

SUPREME COURT OF INDIA

G.C. Gupta

Vs.

N. K. Pandey

C.A.No.1717 of 1981

(A. P. Sen and B. C. Ray, JJ.)

30.04.1987

JUDGEMENT

RAY, J.:-

1. This appeal by special leave arises out of the judgment and order passed in Civil Miscellaneous Writ Petition No. 1080 of 1973 by the High Court of Allahabad delivered on 6th May, 1981. While the writ petition was allowed in part a writ in the nature of certiorari quashing the gradation or seniority list annexures 1, 2 and 28 to the writ petition was directed to be issued. There was a further direction for the issue of a writ of mandamus commanding the opposite party No. 1, the State Government to prepare a fresh seniority list in accordance with law in the light of the observations made in the said judgment, within a period of three months and thereafter to take other consequential steps.

2. The crucial question of controversy in this appeal relates to the determination of seniority between the respondents i.e. in writ petition who are all appointed as temporary Assistant Engineers in the United Provinces Service of Engineers (Buildings and Roads Branch) and subsequently made

permanent therein and the appellants appointed on probation in the permanent posts of Assistant Engineers reserved for toppers of the Thomson College of Civil Engineering later incorporated in Roorkee University and made permanent after expiry of period of probation. The respondents 2 and 3 who passed the final Civil Engineering Examination of Thomson College, Roorkee in 1946 were appointed as temporary and officiating Assistant Engineers by the Chief Engineer subject to final approval of the Government vide CE-P/W/D/C.M. No. 2736 E/8E-1947 dt. 2-6-1947. This provisional appointment as temporary Assistant Engineers was approved by the Government vide G.O. No. 89-EBR/2-1947 dt. 20-2-1948. Thereafter on the advice of the Public Service Commission the Government confirmed their provisional appointment as temporary Assistant Engineers vide G.O. No. 1427/EBR 2 EBR- 1947 dt. 16-10-1948.

3. The petitioners 1 and 4 to 12 passed the final Civil Engineering Examination of the Thomson College, Roorkee in the year 1948. They were appointed by Chief Engineer as temporary Assistant Engineers subject to the final approval of the Government vide Chief Engineer, P.W.D. O. M. dt. 10-8-1949. These appointments were made subject to the final approval of the Government and on their being declared medically fit by the Medical Board. The appointment of these temporary Assistant Engineers was sanctioned by the Government by its order dt. 15-10-1949. These appointments were made in accordance with R. 5(i) of the United Provinces Service of Engineers (Buildings and Roads Branch), Class II Rules, 1936. Thereafter on 20th, Jan., 1950, vide G.O. No. 3968 EBR/2-1949 the Government on the advice of the Public Service Commission confirmed the provisional appointments of the said petitioners as temporary Assistant Engineers in the Buildings and Roads Branch of United Provinces Service of Engineers. The petitioners were examined by the State Medical Board and all of them were declared fit. By Gazette Notification dt. 7-11-1956 the Government was pleased to issue orders of confirmation of the appointment of petitioners 1, 2, 3, 4, 7 and 8 as permanent Assistant Engineers in permanent posts, in the cadre of United Provinces Service of Engineers (Buildings and Roads Branch), Class II. By this Notification the Government reserved the right to determine the seniority subsequently. Similarly, the petitioners 5, 6, 9 and 10 were confirmed as permanent Assistant Engineers in permanent posts by Gazette Notification dt. 9-4-1957. The petitioners 11 and 12 were also confirmed as permanent Assistant Engineers in permanent posts in the cadre of United Provinces Service of Engineers (Buildings and Roads Branch) Class II by Notification dt. 14-5-1958. It is specifically mentioned therein that the Government reserved the right to determine the seniority subsequently. Thus the date of confirmation of the petitioners 1 to 12 as permanent Assistant Engineers in the permanent posts of Assistant Engineers in United Provinces Service of Engineers (Buildings and Roads Branch), Class II was fixed at 1-4-1956. Vide G.O. dt. 29-5-1961 the orders for inter se seniority exclusively of petitioners I to 12 vis-a-vis 39 others including opposite parties 8 to 13 who were all confirmed as permanent Assistant Engineers, were issued by the Government.

4. Rule 6 of the said Rules i.e. United Provinces Service of Engineers (Buildings and Roads Branch), Class II Rules, 1936 empowers the Government to decide in each case the source from which the vacancy in the cadre has to be filled up. Under these powers the Government by G.O. dt. 31-8-1942 provided that with effect from 1942-43, two vacancies in the Provincial Service of Engineers shall be reserved for the two students of Thomson College of Civil Engineering, Roorkee who passed out highest in the order of merit in the final examination of the Civil Engineering. This quota was increased by G.O. dt. 1-7-1944 from two to four posts each year (two for the P.W.D.

(Buildings and Roads Branch) and two for the Irrigation Branch). This reservation was also guaranteed each year to the top students. The Government however by G.O. dt. 22-6-1950 abolished the system of guaranteed posts with effect from the batch which was to enter the civil engineering class of the Roorkee University in October, 1950. It was specifically mentioned therein that no reservations were to be made in the cadre of the U.P.S.E. (Junior Scale) B and R and Irrigation Branches for students who passed out highest in the final examination of the Civil Engineering Class in 1953 and subsequent years. It was also mentioned therein that the guaranteed Civil Engineer students who passed from Thomson College of Engineering, Roorkee/Roorkee University and who had been working in the Buildings and Roads Branch should be absorbed in the existing permanent vacancies which might arise in future. In accordance with the Government orders the opposite parties 2 and 3 who passed out from the Roorkee University in the year 1949 securing top positions were appointed in January, 1951 as Temporary Assistant Engineers. The opposite parties 4 and 5 namely Shri G. C. Gupta and Shri S. P. Goel who passed out from the Roorkee University in 1950 were appointed in 1951 as temporary Assistant Engineers in two temporary posts. The opposite party 6 namely Shri S. K. Ojha who was one of the toppers passing out from Roorkee University in 1952 was appointed in October, 1953 as a temporary Assistant Engineer. The opposite party 7 namely Shri Brijendra Singh who passed out from Roorkee University Civil Engineering Examination in 1952 was first appointed as a temporary Assistant Engineer on a provisional basis but subsequently as he secured Fourth position in Civil Engineering final examination in 1952 from the Roorkee University he was appointed to the guaranteed post of temporary Assistant Engineer in 1954. The opposite party 8 who passed the departmental qualifying examination for promotion to the Service was appointed to a temporary post of Assistant Engineer on 16-4-1949. Similarly, the opposite parties 9, 10, 11, 12 and 13 who passed the qualifying departmental examination were appointed under Rr. 5(iv) and 6(a) to the temporary post of Assistant Engineers in 1955.

5. In accordance with the provisions of Regulation 3(i) of the United Provinces Public Service Commission (Limitation of Function) Regulations, 1941 made by the Provisional Government, the appointment of opposite parties 3 to 5 and 7 (appellants in this appeal) who had been appointed to the guaranteed posts reserved for toppers of Thomson Engineering College, Roorkee did not require consultation with the Public Service Commission. The Government by Gazette Notification- No. 2205-EBR/XXIII-PWD-16EB-53 dt. 11-10-1955 confirmed the appointment of the opposite parties 3 to 5 and 7 in the permanent post of Assistant Engineers with effect from April 1, 1955. By Office Memorandum No. 1933 EBR/XXIII-PWB/55dt.20-7-1956, the Government fixed the inter se seniority of opposite parties 2 to 7 along with 18 other officers who were confirmed as Assistant Engineers.

6. Aggrieved by the order of confirmation of the respondents 2 to 7, the petitioner 4 made representation to the Government for re-determination of the confirmation as well as consequential determination of seniority of the petitioners vis-a-vis the respondents. This representation was made on 15-7-1959 and a reminder was also given on 9-8-1960. Similarly, petitioners 6, 7 and 11 also made representations on 19-8-1959, 5-8-1959 and 23-7-1959 respectively. The petitioner 6 gave reminder in June, 1965 and April, 1970. The petitioner 7 also sent reminders on 2-3-1960 and 3-7-1960. The petitioner 1 also sent a representation on 12-9-1963. As no steps were taken to consider the representations and to re-determine the date of confirmation of the petitioners, the petitioners 6, 7 and 11 filed writ petition No. 2254 of 1970 in the Allahabad High Court challenging the order of

confirmation of the respondents and also the consequential fixation of seniority on its basis. The said petition was dismissed by order dt. 16-4-1971 on the sole ground that the petition was highly belated and the petitioners were guilty of laches and delay in challenging the impugned notification dt. 11-10-1955 and 20-7-1956 regarding confirmation and fixation of seniority. Against the said order Special Appeal No. 287 of 1971 was filed before the Division Bench of Allahabad High Court. The said appeal was also dismissed. It was observed that though the petitioners could not be permitted to question the propriety of confirmation orders yet they were entitled to claim seniority over the respondents as per rules regulating the service of engineers. The claim of the petitioners was that they being appointed as Assistant Engineers though temporarily became members of the Service earlier than the respondents and as such they were entitled to claim seniority over the respondents. The representations made by the petitioners as far back as in 1959 were still pending and as such the relief regarding determination of seniority in accordance with rules was not barred by delay. It was observed further that the Government would consider and dispose of the representations fairly and in accordance with law.

7. The Government by their order dt. 29-6-1973 rejected all the representations against fixation of seniority as permanent Assistant Engineers. Hence the writ petition was filed by the petitioners claiming the relief of re-determination of their seniority in accordance with the rules governing the services of United Provinces Service of Engineers Class II (Buildings and Roads Branch) as there had been no determination of inter se seniority of the petitioners and the respondents according to R. 23 of the said Rules.

8. It is pertinent to note in this connection that in spite of the observations of the Division Bench of the Allahabad High Court in special appeal No. 287 of 1971 that so far as the claim of the appellants for consideration of their representations regarding determination of seniority in accordance with the Service Rules was not barred by the rejection of the writ petition on the ground of delay and observations were made for consideration of those representations, by the opposite party 1, i.e. the Government instead of considering and disposing of the said representations in accordance with law dismissed the same merely on the ground of delay and laches.

9. Before proceeding to consider the merits of the controversy raised in this case, it is pertinent to refer to the relevant rules i.e. United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 which regulate the appointment and conditions of service of United Provinces Service of Engineers (Buildings and Roads Branch). The relevant Rules are quoted herein below:

Rule 3(b). "Members of the Service" means a Government servant appointed in a substantive capacity, under the provision of these rules or of rules in force previous to the introduction of these rules, to a post in the cadre of the service.

Rule 4. The sanctioned strength of the cadre is 24 Assistant Engineers, provided that subject to the

provisions of R. 40 of the Civil Services (Classification, Control and Appeal) Rules, 1930, the Government may

.....

.....

(ii) increase the cadre by creating permanent or temporary posts from time to time as may be found necessary.

Rule 5. Recruitment to the services shall be made by the Government -

(i) by direct appointing from amongst engineer students who have passed out of the Thomson Civil Engineering College, Roorkee, and who have completed a course of training in the Buildings and Roads Branch as Engineer Students after consulting the Public Service Commission, U. P.

(ii) by direct appointment after advertisement and after consulting the Public Service Commission, U. P.

(iii) by the appointment of officers in the temporary service of the. United Provinces Public Works Department (Buildings and Roads Branch), after consulting the Public Service Commission, U. P. :

provided that it will not be necessary to consult the Commission in the case of appointment of a temporary officer to a permanent vacancy if he has already been appointed to a temporary post in the cadre of the service after consultation with the Commission.

(iv) by promotion of members of the United Provinces Subordinate Engineering Service or of Upper Subordinates in the Pbulic Works Department, Buildings and Roads Branch, who have shown exceptional merit.

(v) by promotion of computers in the Public Works Department, Buildings and Roads Branch, who have shown exceptional merit and who are technically qualified.

Rule 16. TRAINING AND PROBATION

Engineer students who pass from the Thomson College shall be required to undergo a course of training for one year. This period may be extended by the Government for one more year in the case of candidates who are not selected for appointment at the end of their first year of training, but who are considered to have justified their retention in training for one more year.

Rule 17. All persons appointed to the Service, who are not already in the permanent employ of the Buildings and Roads Branch of the United Provinces Government, shall be placed on probation for four years, provided that such of them as have undergone training as Engineer students, or have served as temporary engineer in the Buildings and Roads Branch of the United Provinces Government, may be permitted to count the period of such training and service respectively towards this period of probation. The Government may extend the period of probation fixed in any case. At any time during the probationary period the Government may dispense with the services of an officer at one month's notice.

Rule 19. (i) A probationer shall be confirmed in his appointment when -

(a) he has completed the prescribed period of probation;

(b) he has passed all the tests prescribed in the last preceding rule; and

(c) the Government are satisfied that he is fit for confirmation.

(ii) All confirmations under the rule shall be notified in the United Provinces Gazette.

Rule 23. Seniority in the service shall be determined according to the date of the order of appointment to it, provided that if the order of appointment of two or more candidates bears the same date, their seniority inter se shall be determined according to the order in which their appointment has been notified.

10. Two preliminary objections were raised on behalf of the petitioners about the maintainability of the writ petition before the High Court. The first objection was regarding the delay in making the application challenging the determination of seniority of the petitioners vis-a-vis the respondents which were determined as early as in 1956, in 1973 i.e. after 17 years. This objection was duly

considered by the Court below and it was overruled. In 1959 representations had been made against the determination of seniority in contravention of the provisions of R. 23 of the United Provinces Service of Engineers (Buildings and Roads Branch), Class II Rules, 1936. These representations were kept pending by the Government and they were not disposed of. Secondly, in 1970 a challenge was thrown in writ petition No. 2254 of 1970 by Shri R. C. Mangal and two others i.e. respondents 6, 7 and 11 challenging the order of confirmation of the petitioners 1 to 4 who were appointed long after the appointment of the petitioners and the consequent determination of seniority. This writ petition, however, was unsuccessful as the writ petition as well as the Special Appeal were dismissed on the ground of inordinate delay and laches in moving the Court for redress against the order of confirmation of the petitioners 1 to 4 which was made by the Government vide notification dt. 11-10-1955. But in that case the question of determination of seniority in derogation of the provisions of Rules did not arise nor it was considered and determined. It was further observed that the Government would decide these representations fairly and in accordance with law. These observations were made in the Special Appeal No. 287 of 1971 decided in October, 1971. The High Court while disposing of the Civil Writ Petition No. 1080 of 1973 observed that the petition did not suffer from delay and laches and the question of determination of seniority was required to be considered by the Court. It was further observed that the plea of wrong fixation in the cadre was not raised in the earlier writ petition. As such there was no determination on the question of seniority in the cadre itself in the said writ petition and the principles of res judicata were not attracted.

11. The other preliminary objection raised was that if the question of seniority was considered it might seriously prejudice the rights of the opposite parties. On this point it was observed by the High Court that the matter of seniority of the opposite parties vis-a-vis the petitioners was never settled and as such no question arises as to the accrual of any right legal or equitable in favour of the opposite parties because of lapse of time.

12. It is a well established principle that where there are no specific rules for determination of seniority in service the length of continuous service is the yardstick for determining the seniority of the members of service. The vital question that requires to be considered in this appeal is what is the yardstick or standard or norm for determination of seniority of the respondents who have been appointed as temporary or officiating Assistant Engineers against temporary posts of United Provinces Service of Engineers (Buildings and Roads Branch) Class II, as well as the toppers from Thomson College of Civil Engineering who were directly appointed sometime in 1950 and 1951 on probation against reserved temporary posts and confirmed immediately after the expiry of the period of probation against permanent posts before the confirmation of the temporary Assistant Engineers recruited from the Thomson College of Engineering sometime between 1948 to 1950. To decide this question it is very relevant to consider the Service Rules as in the instant case there are admittedly the Service Rules namely United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 which regulate the appointments and conditions of service of United Province Service of Engineers (Buildings and Roads Branch). Rule 23 of the said Rules which is said to be the mariners' compass in determining the seniority of the members of the service provides that seniority in service shall be determined according to the date of order of appointment to it provided that if the order of appointment of two or more candidates bears the same date their seniority inter se shall be determined according to the order in which their appointment has been notified. Therefore, it is evident from this Rule that the touchstone of determination of seniority in service is

the date of order of appointment to the service or in other words the date when an appointee becomes a member of the service after fulfilling all the necessary requirements provided in the various provisions of the said Rules. Rule 3(b) defines further that "Member of the Service" means a Government servant appointed in a substantive capacity under the provisions of these rules or of rules in force prior to the introduction of these rules to a post in the cadre of this service. In other words, it states categorically that an appointee to be a member of the service has to be appointed in a substantive capacity in the cadre of the service. The cadre of the service in R. 4(ii) clearly provides that it consists of both permanent and temporary posts and the strength of the cadre may be increased by the Government by creating permanent and temporary posts from time to time as may be found necessary. The sanctioned strength of the cadre of Assistant Engineers though originally was 24 yet the said strength of the cadre could be increased by creation of both permanent and temporary posts. Rule 5 specifically lays down the sources of recruitment to the service. There are five sources for recruitment to the service. These sources have been stated hereinbefore and as such it is not necessary to reiterate them once again here. Rule 16 enjoins that engineer students who pass from the Thomson College are to undergo a course of training for one year. This period of training may be extended by the Government by one more year in the case of candidates who are not selected for appointment at the end of their first year of training but who are considered to have justified their retention in training for one or more years. Rule 17 provides that all persons appointed to the service who are already in the permanent employment of Buildings and Roads Branch of the United Provinces Government shall be placed on probation for four years provided that such of them as have undergone training as engineer students, or have served as temporary engineer in the Buildings and Roads Branch of United Provinces Government, may be permitted to count the period of such training and service respectively towards the period of probation. Rule 19 deals with confirmation of a probationer when the requirements provided therein have been fulfilled or completed namely the completion of the prescribed probation period, the passing of all the tests prescribed in R. 18 and the Government is satisfied that the probationer is fit for confirmation. It has also been provided therein that all confirmations under the Rules shall be notified in the United Provinces Gazette.

13. The petitioners in the writ petition who are respondents in this appeal were initially appointed as temporary Assistant Engineers subject to the final approval of the Government by the Chief Engineer, P.W.D. between 1947 and 1948. Undoubtedly, these appointments were subsequently approved by the Government between 1948 and 1949 in accordance with the provisions of R. 5(i) of the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936. Thereafter on Jan. 20, 1950 the Government in consultation with the Public Service Commission confirmed the provisional appointments of the petitioners as temporary Assistant Engineers and these petitioners have also passed the requisite tests held by the Government. They were confirmed vide Gazette Notifications dt. 7-11-1956, 19-4-1957 and 14-5-1958. The date of confirmation of all these petitioners was fixed as 1-4-1956 (vide G. O. dt. 24-5-1961). The respondents 3 to 5 and 7 who are appellants in this appeal were appointed between 1951 and 1952 as temporary Assistant Engineers against guaranteed post on probation and after completion of the probationary period they were confirmed in 1955 vide Gazette Notification dt. 11-10-1955. Seniority of these appellants 1 to 4 was fixed earlier from 1-4-1955 whereas the seniority of the respondents 1 to 12 of this appeal was fixed below them from 1956 treating the date of confirmation in the service as the date of their becoming member of the service.

14. It has been urged on behalf of the appellants as well as by the State that unless a person is appointed as temporary Assistant Engineer against a permanent post on probation and thereafter unless he becomes confirmed after successful completion of the period of probation and passing of all the tests mentioned in R. 19(b) of the said rules and he is considered to be fit for confirmation by government he cannot be considered to be appointed to the service and he does not become a member of the service. The seniority of an Assistant Engineer will be reckoned only from the date when an Assistant Engineer is substantively appointed against a permanent post and duly confirmed in the post in accordance with provisions of R. 19 and thereby becomes a member of the service. In other words, it was tried to be contended before this Court that the provisional, fortuitous, temporary or officiating appointment of the respondents as Assistant Engineers will not be taken into consideration in determining their seniority in service unless and until they are duly appointed against permanent posts on probation and are confirmed after the successful completion of the probation period and on passing of the requisite tests and after their confirmation is notified by the Government in the United Provinces Gazette. Relying on these contentions it has been urged that the services of the respondents 1 to 12 were confirmed and duly notified in the Gazette in 1961 and accordingly by office memo dt. May 29, 1961 their inter se seniority was fixed. As they were confirmed much later than the appellants so their seniority was fixed below that of the appellants.

15. It was, on the other hand, urged on behalf of the respondents who passed civil engineering examination from Thomson College of Engineering between 1947 and 1948 that the appellants did not enter into the Thomson College of Engineering when they were appointed as officiating temporary Assistant Engineers subject to final approval of the Government by the Chief Engineer, P.W.D. between 1947 and 1948. Thereafter the Government duly sanctioned their appointment by order made between 1948 and 1949, subject to the final approval of the United Provinces Public Service Commission. These provisional appointments were ultimately made final by the Government after the receipt of the approval of the U. P. Public Service Commission in 1950. It has been urged on behalf of the respondents that from 1950 at least these respondents should be deemed or treated to be substantively appointed in accordance with the provisions of R. 3(b) of the said Service Rules. As they have become members of the service inasmuch as their appointments have been duly approved by the Government and the Public Service Commission and on their passing the medical test and other tests the Government has confirmed their provisional appointments and the period of service these temporary Assistant Engineers rendered previously was counted towards their probation in accordance with the provisions of R. 17 of these Rules, they are entitled to have their seniority reckoned at least from the date of their confirmation in the service by the Government in 1950 i.e. from the date of their substantive appointment in the service. The seniority list that has been published is wholly arbitrary, illegal and in utter contravention of the provisions of R. 23 of the Rules.

16. On a consideration of the letters of provisional appointment issued by the Chief Engineer, P.W.D. (Buildings and Roads Branch) as well as the sanctions accorded to such appointments by the Government thereafter and the confirmation of the service of the temporary Assistant Engineers in 1950 after obtaining the approval of the Public Service Commission and also after passing of the tests by the respondents as provided in R. 18 of the said Rules, I cannot but hold that they have become appointed in a substantive capacity against temporary posts of the cadre of Assistant Engineers and as such they have become members of the service since that date in accordance with

the provisions of R. 3(b) of the said Rules. The argument that their appointment being made against temporary posts and not against permanent posts and not on probation as well as they being not confirmed and their confirmation being not notified in the United Provinces Gazette before 1956, they are not entitled to be treated as members of the service being appointed in the substantive capacity, cannot be sustained under any circumstances. Rule 4 of the Service Rules clearly states that the cadre of Assistant Engineers will comprise of both permanent and temporary posts and as such the argument that unless and until the respondents are appointed on probation against permanent posts and unless they are confirmed they cannot be treated as members of the service is wholly untenable. One can be a member of service if he is appointed in a substantive capacity as distinguished from a fortuitous appointment or an appointment for a fixed tenure or on a purely temporary basis against a temporary post of Assistant Engineer in the cadre. This Court in the case of Parshotam Lal Dhingra v. Union of India, 1958 SCR 828 at p. 842: (AIR 1958 SC 36 at p. 42) has held that an appointment to a temporary post in Government service may be substantive or on probation or on an officiating basis. Similar observation has been made by this Court in the case of Baleshwar Dass v. State of U. P., (1981) 1 SCR 449 : (AIR 1981 SC 41) wherein this very rule came to be considered in the case of a similar dispute regarding the seniority amongst the engineers in the Irrigation Department of the Uttar Pradesh Government. It has been observed as follows:-

"It is not correct to say that when Engineers are appointed to temporary posts but after fulfilling all the tests for regular appointment they are not appointed in a substantive capacity.....That is to say although they are temporary appointees, if their probation was completed and other formalities fulfilled, they become members of the service. Merely because the person is a temporary appointee it cannot be said that he is not substantively appointed if he fulfils the necessary conditions or regular appointment such as probation and consultation with the Public Service Commission."

It has been further observed :

"Rule 23 is the relevant rule when a question of seniority arises. The order of appointment in a substantive capacity is the significant starting point for reckoning seniority. The appointment in a substantive capacity need not necessarily be to a permanent post. It is significant even if it is to a temporary post of long duration."

17. Rule 4 prescribes the sanctioned strength of a cadre. It provides that the Government may subject to the provisions of R. 40 of the Civil Services (Classification, Control and Appeal) Rules, 1930 increase the strength of the cadre by creating permanent or temporary posts from time to time as may be found necessary. So a cadre post may be either permanent or temporary and if an engineer is appointed substantively to a temporary post or permanent post he becomes a member of the service. Therefore merely because a Government servant has been appointed to a temporary post after fulfilment of all the requirements of the rules for regular appointment including consultation with the Public Service Commission, he cannot be said to be appointed substantively in the temporary post of the cadre and he cannot be said to be treated to be not a member of the service under R. 3(b) of the Rules for the purpose of determination of seniority under R. 23 of the Rules on the mere plea that he has not been appointed against a permanent post on probation. Such a

contention is not tenable. This point has been very clearly settled by this Court in the case of Baleshwar Dass v. State of U. P. (AIR 1981 SC 41 at p. 50) (supra). It has been observed in this case as follows :-

"We see no reason to hold that when engineers are appointed to temporary posts but after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, they are not appointments in a substantive capacity."

In the instant case as I have stated hereinbefore that though initially the appointments of these respondents were not appointments in accordance with the Rules as they were appointed not by the Government but by the Chief Engineer, P.W.D. but after approval of their appointments by the Government and also confirmation of their provisional appointments by the Government in consultation with the Public Service Commission and after the respondents had passed all the requisite tests for confirmation, it cannot be questioned that these respondents have not been appointed in a substantive capacity as they were not confirmed by the Government prior to 1961 and their confirmations were not published in the U. P. Gazette. It is pertinent to mention that for an appointment in order to be an appointment in a substantive capacity it is not necessary that the appointment should be made to a permanent post. If the appointment is made to a temporary post of long duration in a department having both permanent and temporary posts of a quasi permanent nature, there is nothing to distinguish the quality of service as between the two.

18. It is pertinent to refer in this connection the observations of this Court in S. B. Patwardhan v. State of Maharashtra, AIR 1977 SC 2051: (1977) 3 SCR 775 where it has been observed (at p. 2062 of AIR) :

"There is no universal rule either that a cadre cannot consist of both permanent and temporary employees or that it must consist of both. That is primarily a matter of rules and regulations governing the particular service in relation to which the question regarding the composition of the cadre arises."

19. It has been further observed that confirmation cannot be the sole touchstone of seniority as that will be indefensible. "Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of the substantive vacancies."

20. It does not show that confirmation has to conform to any set of rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government. I do not find any rational or legal justification for preventing the respondents to have their services rendered from the date they are appointed in the cadre of Assistant Engineers' in a substantive capacity reckoned for determination of their seniority in service on the mere ground that no order of confirmation has

been issued by the Government as required under R. 19 of the Rules even though all the essential requirements for being confirmed have been clearly fulfilled by the respondents. The respondents, as has been stated hereinbefore, have been duly appointed in a substantive capacity in the cadre of the Service by the Government in consultation with the United Provinces Public Service Commission as required under R. 5(iii) of the said Rules as well as after fulfilling the other requirements as provided in R. 19 of the said Rules in 1950. It will be relevant to mention in this connection that this Court in the case of *Baleshwar Dass v. State of U. P.* (AIR 1981 SC 41) (supra) while considering the identical rules so far as the determination of seniority of the U. P. Engineers in the Irrigation Department has observed that substantive capacity referred to the capacity in which a person holds the post and not necessarily to the nature and character of the post. A person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration, in contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation. It has also been observed, that an official in service even before confirmation in service has a relevancy to seniority if eventually no infirmities in the way of confirmation exist. There is nothing in the scheme of Rules contrary to that principle. Therefore the point from which service is to be counted is the commencement of the service by the Assistant Engineer which might not have been permanent appointment in the beginning and in that sense may still be temporary but for all other purposes has been regularised and is fit to be absorbed into permanent post as and when it is vacant.

21. The decision in the case of *A. K. Subraman v. Union of India*, AIR 1975 SC 483 which was cited before us is not relevant inasmuch as in that case there was no statutory rule for determination of seniority unlike the instant case where there are specific rules for the determination of seniority. The method of filling up of the post of Executive Engineers Class I was by promotion of Assistant Executive "Engineers Class I as well as by promotion on selection by Departmental Promotion Committee of Assistant Engineers in Central Engineering Service Class II according to prescribed quota. In the seniority list published in 1971 the petitioners were shown junior to respondents who were appointed to the service of Central Engineers long after the petitioners were appointed in the grade of Executive Engineer, Class I. The petitioners were promoted to officiate as Executive Engineer Class I by the Departmental Promotion Committee between Dec. 1956 and Sept. 1959 whereas respondents were promoted to the posts of Executive Engineers Class I between Mar. 1957 and Feb. 1966. It was held that once the Assistant Engineers are regularly appointed to officiate as Executive Engineers within their quota they will be entitled to consideration in their own rights as Class I Officers to further promotion. It was also held therein that Assistant Engineers (Class II) who are initially appointed in a regular manner in accordance with the rules to officiate as Assistant Engineers, their seniority in service in Grade I will count from the date of their initial officiating appointment in Class I provided their initial appointment as Assistant Engineer was within their quota. Their seniority will not count from the date of their future confirmation in the service.

22. In *G. P. Doval v. Chief Secy., Govt. of U. P.*, AIR 1984 SC 1527 this court has observed that it is well settled that if there was no binding rule of seniority, the length of continuous officiation prescribed a valid principle of seniority.

23. Where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list. This decision which runs contrary to the decision cited herein is distinguishable as this decision was rendered on the peculiar facts of that case.

24. Due to exigencies of service the Khandsari Inspectors were recruited to that post pending regular selection through Public Service Commission. A provisional seniority list of the Khandsari Inspectors was drawn on the principle of length of continuous officiation reckoned from the date of selection/approval by Public Service Commission in respect of each employee belonging to the cadre. All officiating service rendered by the Inspectors prior to their confirmation by Public Service Commission was totally ignored while determining seniority. It was held that seniority list prepared of Khandsari Inspectors without considering their officiating service prior to confirmation by the Public Service Commission was violative of Article 16 and the list drawn upon this basis must be quashed. In that case there was no specific statutory rule laying down the conditions of service governing the cadre as well as for the determination of seniority of the members of the service.

25. I have already held hereinbefore after due consideration of the said Rules governing the appointment and conditions of service of United Provinces Service of Engineers (Buildings and Roads Branch) Class II that the cadre of the service of Engineers consists of both temporary and permanent posts and as such there can be substantive appointment against a temporary post of the cadre in accordance with the provisions of the Service Rules. Once a Government servant is appointed in a substantive capacity against a temporary post of the cadre after due observance of the requirements as provided in the Rules he will be deemed to be a member of the service in accordance with the provisions of R. 3(b) and his seniority in service shall be determined from the date of order of appointment to the service notwithstanding that no order of confirmation has been made and there has been no publication of order of confirmation in the Official Gazette. The respondents were appointed temporarily in an officiating capacity as Assistant Engineers against temporary posts and these temporary appointments were continued for years together and the Government duly sanctioned their appointment after consultation with the Public Service Commission. The respondents thus have become members of the United Provinces Service of Engineers (Buildings and Roads Branch) Class II at least from the date when they have been confirmed in the Service by the Government order issued in May 1950 after complying with all the tests prescribed and they are entitled to have their seniority reckoned from that date when they have become regular Members of the Service after fulfilling all the requirements provided in Rr. 18 and 19 of the said Rules. The decisions in *Baleshwar Dass v. State of U. P.* (AIR 1981 SC 41)(supra) as well as in *Ashok Gulati v. B. S. Jain*, AIR 1987 SC 424 clearly go to establish that as soon as a Government servant becomes a member of the service fulfilling all the requirements specified under the Rules governing the terms and conditions of service as well as of seniority in service, the seniority of the Government servant has to be computed and reckoned from the date when he becomes a member of the Service. As I have held already that confirmation has nothing to do with the Government servant's becoming a member of the Service eligible to have his service reckoned for the purpose of determination of his seniority in service in accordance with R. 3(b) read with R. 23 of the said Rules. In *Ashok Gulati's* case (in which one of us - Justice A. P. Sen - was a party) the

following five yardsticks have been laid down for reckoning seniority :

"The date from which seniority is to be reckoned may be laid down by rules or instructions

(i) on the basis of the date of appointment;

(ii) on the basis of confirmation;

(iii) on the basis of regularisation of service;

(iv) on the basis of length of service; or

(v) on any other reasonable basis.

26. Apropos to mention in this connection that the decision rendered by this court in the case of N. K. Chauhan v. State of Gujarat, (1977) 1 SCR 1037: (AIR 1977 SC 251) is not applicable as the facts of that case are different from the facts of this case. In that case the dispute arose regarding the claim of the direct recruits to the posts of Deputy Collectors to be declared senior to the appellants who were promotees from Mamlatdars to the post of Deputy Collectors. In the State of Bombay prior to bifarcation the source of recruitment to the post of Deputy Collector was two - fold i.e.(1) by promotion from Mamlatdar and (2) by direct recruitment to the post of Deputy Collector. A resolution was adopted by the Bombay Government on 30-7-1959 laying down the method of recruitment to the post of Deputy Collectors. It is in the following terms :-

"Appointment to the post of Deputy Collector shall be made either by nomination or by promotion of suitable Mamlatdars:

Provided that the ratio of appointment by nomination and by promotion shall, as far as practicable, be 50 : 50".

The question arose whether the direct recruits who were recruited subsequent to the promotees can

claim seniority over the promotees as the quota of direct recruits was not fulfilled. It was held that since the rule was that as far as possible the quota system must be kept and if not practicable, promotees in the place of direct recruits or direct recruits in the place of promotees may be inducted by applying the regular procedure without suffering the seats to lie indefinitely vacant. It was further held that the quota rule does not, inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and these deficient vacancies have been filled up by promotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier. It was also held that normally seniority is measured by length of continuous officiating service - actually is easily acceptable as the legal. It does not preclude a different prescription constitutional tests being satisfied. It has also been observed that the decision in the case of *S. G. Jaisinghani v. Union of India*, (1967) 2 SCR 703 at p. 718: (AIR 1967 SC 1427 at p. 1434) as well as the decision in the case of *B. S. Gupta v. Union of India*, (1975) 1 SCR 104 : (AIR 1974 SC 1618) cannot be considered to hold the field in as much as in case where recruitment is from two independent sources subject to prescribed quota and power is conferred on the Government to make recruitment in relaxation of the rules any recruitment made contrary to the quota rule could not be held to be invalid unless it is shown that the power of relaxation was exercised mala fide. Similar observation has been made in the case of *A. Janardhana v. Union of India*, (1983) 2 SCR 936 at p. 956 : (AIR 1983 SC 769 at p. 778), where it has been observed that in a system governed by rule of law discretion when conferred upon executive authority must be confined within clearly defined limits. In this case R. 3 of the Military Engineering Service (RTS) Rule provides method of recruitment indicating the source from which the recruitment can be made. There were two sources of recruitment to the service one by direct recruitment another by promotion, according to quota prescribed by the said rule. The question arises whether promotees in excess of quota provided for promotion on the basis of power of relaxation rule can be pushed down as such filling up of the quota by promotion would be illegal and the excess recruits unless they find their place by adjustment in subsequent years in the quota would not be members of the service. It was held that even though the rule prescribed the method of recruitment and quota and if the very rule simultaneously confers power on the government to recruit in relaxation of the rules unless mala fide are alleged and attributed such excess recruitments by promotion could not be illegal and the said promotees cannot be pushed down where the rule confers a discretion on the Government to relax rules to meet exigencies of service. Any recruitment made contrary to quota rule would not be invalid unless it is shown that the power of relaxation was exercised mala fide. This decision thus followed the observation made in the Chauhan's case referred to earlier. These two decisions, of course, have no application to the instant case inasmuch as no such question does arise for decision in this case.

27. In the instant case there is a specific rule i.e. Rule 23 providing for determination of seniority from the date a person has been substantively appointed and has become a member of the cadre of service of Assistant Engineer in the United Provinces Engineering Service (Buildings and Roads Branch) Class II. Therefore in this case there is no quota for recruitment to the service and as such the decision in Chauhan's case is not applicable.

28. I have already decided hereinbefore that when an employee has been appointed substantively to a temporary post in the cadre of service and has become a member of service of Assistant Engineers in the United Provinces Engineers Service under the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, his seniority in service will be counted from the date of his becoming member of the service. It does not matter whether he has been appointed against the permanent post and has been duly confirmed in that post. I have come to this finding on a due consideration of the provisions of the aforesaid rules more particularly Rr. 3 (b) and 23 of the said rules which lay down the mode of determination of seniority in service.

29. In the instant case, however, I am not inclined to give any relief to the respondents (petitioners in the writ petition) by directing re-determination of the seniority of the respondents as well as the appellants on the ground of unusual laches and delay. The appellants 1 to 4 were confirmed in 1955 and their seniority was determined by Government Order of 20th July, 1956. Out of the petitioners, of the writ petition, the petitioners 4 and 5 made representations in 1959 against the aforesaid seniority list. Subsequently, petitioner No. 6 filed another representation. Petitioners 6, 7 and 4 made their representation in 1959 and petitioner 6 gave a reminder in June 1965 and April 1970. The other petitioners 2, 3, 9 and 10 did not make any representation in the matter of seniority. It is only in 1970 that the Writ Petition No. 2254 of 1970 was moved challenging the confirmation of the petitioners 1 to 4 (appellants in the instant appeal). This challenge was negatived on the ground of laches and delay. An appeal being Special Appeal No. 287 of 1971 was also dismissed on the ground of laches and delay as regards the confirmation of the appellants was concerned. Of course, it had been observed that the seniority in service of these appellants was not questioned in the said writ petition and the Government would consider the representation made by the petitioners of the writ petition (appellants in the instant appeal) as far back as in 1959, which were pending before the Government. The Writ Petition No. 1080 of 1973 which gave rise to the Civil Appeal was moved in 1973 challenging the determination or seniority of the appellants in the instant appeal. It appears from the affidavit-in-opposition sworn by one of the appellants Shri G. C. Gupta that at the time when the writ petition was moved the appellants 1 to 4 were officiating as Superintending Engineers and the respondents 2 and 3 were officiating as Superintending Engineers but junior to all the four appellants and the respondents 1 and 4 to 12 were then Executive Engineers. At present the appellants 1, 2 and 3 are permanent Superintending Engineers and officiating as Additional Chief Engineers. The appellant 4 is also a permanent Superintending Engineer. At this juncture if the seniority of these appellants vis-a-vis the respondents of this appeal is directed to be determined it will create much administrative difficulties and would amount to deprive the appellants of their valuable rights which have accrued to them. It is pertinent to refer in this connection to the observation made by this court in the case of *Rabindra Nath Bose v. Union of India*. (191/0) 2 SCR 697 : (AIR 1970 SC 470). It has been observed that the attack to the seniority list prepared on the basis of 1952 rules 15 years after the rules were promulgated and effect given to the seniority list prepared on Aug. 1, 1953 should not be allowed because of the inordinate delay and laches in challenging the said rule.

30. Similar observations have been made by this Court in the case of *State of Orissa v. Pyarimohan Samantaray*, (1977) 3 SCC 396 : (AIR 1976 SC 2617); *State of M. P. v. Nandial Jaiswal*, AIR 1987 SC 251, *Ramanna Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCR 1014 : (AIR 1979 SC 1628), *Ashok Kumar v. Collector, Raipur*. AIR 1980 SC 112 : (1980) 1 SCR 491, K.

R. Mudgal v. R. P. Singh, (1986) 4 SCC 531 (AIR 1986 SC 2086) and R. S. Makashi v. I. M. Menon, (1982) 1 SCC 379 : (AIR 1982 SC 101) where relief was refused on the ground of laches in moving the Court for redress of the grievances after lapse of a period of years after the cause of action arose. It has been observed in State of M. P. v. Nandlal Jaiswal (AIR 1987 SC 251 at p. 272) (supra) :-

"Now, it is well settled that the power of the High Court to issue an appropriate writ under Art. 226 of the Constitution' is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. 'The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction."

31. In this case the challenge to the seniority of the appellants which was determined by order dt. 20th July, 1956 was made in 197 i.e. after nearly 17 years and they have sought relief for re-determination of the seniority in accordance with the provisions of the aforesaid Service Rules. This cannot be permitted as it would amount to unjust deprivation of the rights of the appellants which had accrued to them in the meantime. The observation that 'Every person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years as made in the above case (Rabindra Nath Bose v. Union of India (AIR 1970 SC 470)) will be applicable to this case. Considering all these aspects it would be just and proper not to give any relief to the respondents on the round of inordinate laches and delay in challenging the seniority list made in July, 1956. I have already mentioned hereinbefore that at the time of moving the writ petition in 1973 all the appellants had been confirmed as Superintending Engineers in the United Provinces Service of Engineers and the appellants 1 to 3 had been officiating as Additional Chief Engineers. The appellant 4 who was also a permanent Superintending Engineer we were told by the parties at the time of hearing of this appeal had been promoted and appointed as Additional Chief Engineer. Whereas out of the 12 respondents 10 have already retired from services as it appears from the affidavit sworn by appellant 1 Mr. G. C. Gupta in accordance with the directions of this court. We are also told that out of the remaining 2 respondents, 1 has already retired from service. So, only 1 respondent is at present in service. In these circumstances I think that the cause of justice will be served if the authorities concerned consider the case of the said respondent for Promotion in accordance with law.

32. For the reasons aforesaid the appeal is allowed and the judgment and order of the High Court is

set aside. There will be no order as to costs.

33. I also make it clear that henceforth seniority of the employees in service in question will be determined from the date when an employee has become a member of the service being appointed substantively to a post in the cadre of service, no matter whether the said post is permanent or temporary as I have held hereinbefore.

ORDER

34. **SEN, J :-**

I have had the benefit of going through the draft judgment prepared by my learned brother Ray, J. and I agree with the order proposed to be made. In view of the importance of the question involved, I would like to say a few words of my own. The reasons therefor would follow.

Appeal allowed.