

P. D. Aggarwal and Others

Vs

State of U.P. and Others

Civil Appeals Nos. 622-625 of 1982

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

08.06.1987

JUDGMENT

B. C. RAY, J. -

1. These appeals by special leave are against the common judgment and order dated January 14, 1982 quashing the seniority list in the cadre of Assistant Engineers in the United Provinces (Buildings and Roads Branch) Class II prepared on July 29, 1980 and December 18, 1980 with December 19, 1980. A writ of mandamus was also issued to the State Government for preparation of fresh seniority list in respect of Assistant Engineers in the Civil Engineering Wing and Electrical and Mechanical Wing respectively in accordance with guidelines mentioned in the said judgment. The facts giving rise to these writ petitions are in brief as follows :

2. Previously Public Health Department as well as the Irrigation Department of the Government of Uttar Pradesh were integrated into Public Works Department comprising both these two branches. In 1992 Irrigation branch was separated into a different independent department. Similarly, in 1927 Public Health Department was separated. In 1936 U.P. Service of Engineers Class II Rules (Buildings and Roads Branch) pertaining to PWD were framed in exercise of powers conferred under the Government of India Act. Identical rules also governed the Irrigation Department. Before entering into the controversy that has been raised in the instant appeal it is appropriate to refer to the relevant provisions of the said Rules. Rule 3(b) defines 'Member of the Service' as a government servant appointed in substantive capacity, under the provisions of these rules or of rules in force previous to the introduction in the cadres of the service. Clause (c) defines 'Direct recruitment' or 'Direct appointment' as recruitment or appointment in the manner prescribed in Rule 5 (i), (ii) and (iii) of these rules. In Rule 4 which is captioned as 'Strength of Cadre' it is mentioned in clause (ii) of the said rule that the government may increase the cadre by creating permanent or temporary posts from time to time as may be found necessary. Rule 5 lays down five sources of recruitment :

(i) by direct appointment from amongst engineer students who have passed out of 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;

(ii) by the appointment after (sic) advertisement and after consulting the Public Service Commission;

(iii) by the appointment of officers in the temporary service of United Provinces Public Works Department, Buildings and Roads Branch, after consulting the Public

Service Commission :

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 service after consultation with the Commission;

(iv) by promotion of members of the United Provinces Subordinate Engineering Service in the Public Works Department, Buildings and Roads Branch, who have shown exceptional merits;

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

3. It has been specifically provided in Rule 6 that the government will decide in each case the source from which a vacancy shall be filled up provided that 25 per cent of the vacancies shall be reserved for selected qualified members of the subordinate Engineering Service and computers. It thus provides that barring 25 per cent of the vacancies to be filled by promotion from Engineering subordinate services and computers, the remaining 75 per cent of the vacancies are to be filled up by direct recruitment as provided in sub-clause (ii) and (iii) of Rule 5.

4. Rule 17 which is termed as "Probation" specifically provides that 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 engineers 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.

5. Rule 19 deals with confirmation of probationers. It mentions that a probationer shall be confirmed in his appointment after he has completed the prescribed period of probation, has passed all the tests prescribed in the rules and the government is satisfied that he is fit for confirmation. It also provides therein that all confirmations under this rule shall be notified in the United Provinces Gazette.

6. Rule 23 states that seniority in the 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.

7. On December 7, 1961 an office memorandum No. 4162 EBR/XXIII-PWD-90 EBR/1954 was issued by the government laying down the principles for recruitment to the permanent and temporary posts. It is stated therein that in future direct recruitment to both permanent and temporary vacancies of Assistant Engineers (Civil, Electrical and Mechanical) in the Public Works, Irrigation and Local Self Government Engineering Departments, will be made on the results of competitive examination to be conducted by the Public Service Commission. Candidates possessing technical and other qualifications prescribed in the rules for the Uttar Pradesh Service of Engineers in the departments concerned will be eligible to appear at the examination for that particular service. It has been further provided therein that successful candidates in order of merit will be appointed on probation against vacant permanent posts and those following will be appointed against temporary posts. It also lays

down the manner of filling up the vacancies in the permanent cadre of the service of Assistant Engineers in the Irrigation Department as well as in the PWD. In PWD 50 per cent of the vacancies in the permanent cadre will be filling up through competitive examination, 25 per cent by promotion from amongst overseers and computers and 25 per cent by selection from amongst temporary Assistant Engineers recruited through the Commission. It has been further provided that as a measure of concession to the existing temporary Assistant Engineers who were recruited as temporary Assistant Engineers on the advice of the Public Service Commission prior to the introduction of this scheme, the distribution of vacancies in the permanent cadre of Assistant Engineers will be 25 per cent by direct recruitment through competitive examination; 25 per cent by promotion from subordinate service and 50 per cent by selection amongst existing temporary Assistant Engineers. It has also been provided that the government may in consultation with the Public Service Commission increase or decrease the percentage fixed for recruitment by selection and competitive examination in any particular year. In para 7 of the said memorandum it has been provided that temporary and officiating Assistant Engineers possessing the requisite technical qualifications will be eligible to appear in the competitive examinations and the maximum age limit in the case of those working in the department with the approval of the Commission, or after having been recruited by the Commission will be 40 years.

8. Thereafter on July 28, 1969 an amendment to the rule was made by the government in exercise of power under proviso to Article 309 of the Constitution. This is known as the United Provinces Service of Engineers (Buildings and Roads Branch), Class II (Amendment) Rules, 1969. These Rules shall be deemed to have been in force since March 1962. The relevant provisions of these Rules are quoted hereinbelow :

3. In these rules unless there is anything repugnant in the subject or context -

(a) The 'Service' means the U.P. Service of Engineers (Buildings and Roads Branch), Class II,

(b) 'Member of the Service' means a government servant appointed in a substantive capacity, under the provisions of these rules or of rules in force previous to the introduction of these rules to a post in the cadre of the service,

(c) 'Direct recruitment' or 'Direct appointment' means recruitment or appointment in the manner prescribed in Rule 5 (a)(i) and 5 (b)(1),

(d) 'Commission' means the Uttar Pradesh Public Service Commission,

(e) 'Department' means the Public Works Department, Uttar Pradesh,

(f) 'Governor' means the Governor of Uttar Pradesh,

(g) 'Secretary' means the Secretary to Government Public Works Department, Uttar Pradesh,

(h) 'Chief Engineer' means the Chief Engineer, Public Works Department, Uttar Pradesh,

(i) 'Period of recruitment' means the period up to the end of December in the calendar year succeeding year in which the recruitment or selection is made.

(j) 'Citizen of India' means a person who is or is deemed to be a citizen of India under Part II of the Constitution of India,

(k) 'Government' means the Government of Uttar Pradesh.

5. Source of recruitment - Recruitment to the post of Assistant Engineer shall be made from the following sources -

(a) in permanent vacancies -

(i) by direct recruitment on the result of a competitive examination conducted by the Commission;

(ii) by selection from amongst the officers appointed as Assistant Engineer by direct recruitment through the Commission and working in temporary or officiating vacancies in the department;

(iii) by promotion of members of the Public Works Department, Subordinate Engineering Service and the Public Works Department 'Computers' Service.

(b) in officiating or temporary vacancies -

(i) by direct recruitment on the result of a competitive examination conducted by the Commission;

(ii) by promotion of members of the Public Works Department, Subordinate Engineering Service, and Public Works Department Computers Service.

6. Number to be recruited from each source. - The Governor shall decide the number of appointments to be made at each selection in each kind of post from the sources specified in Rule 5 :

Provided that recruitment in substantive vacancies during a period of recruitment in the post of Assistant shall, so far as may be possible, be made from the in Rule 5(a) in the following proportion :

(a) Fifty per cent of the vacancies shall be filled by direct recruitment on the results of a competitive examination under Rule 5(a)(i);

(B) Twenty-five per cent of the vacancies shall be filled from the source specified in Rule 5(a)(ii);

(c) Twenty-five per cent of the vacancies shall be filled from the source specified in Rule 5(a)(iii) which shall be shared by members of the Public Works Department Subordinate Engineering Service and the Public Works Department Computers' Service in approximate proportion of permanent strength of their respective cadres at the time of selection :

Provided further that with a view to giving facility to temporary Assistant Engineers recruited in the Department in consultation with the Commission up to the date of commencement of the first competitive examination in accordance with these rules,

the proportion of vacancies to be filled from the three sources mentioned in the first proviso shall be 25 per cent, 50 per cent and 25 per cent respectively subject to review at the discretion of the Governor in consultation with the Commission.

Explanation. - The vacancies from the source mentioned in Rule 5(a)(ii) will, until further orders, be filled from amongst those temporary Assistant Engineers only who were recruited in the Department in consultation with the Commission and were working in this capacity on the date of commencement of first competitive examination :

Provided also that recruitment to temporary or officiating vacancies in the posts of Assistant Engineers by promotion from the source mentioned in Rule 5(b)(ii) shall be made up to 25 per cent of the vacancies, occurring during any one period of recruitment in the same proportion as in clause (c) of the first proviso and the remaining vacancies shall be filled by direct recruitment under Rule 5(b)(i).

Note. - The distribution of vacancies in the permanent cadre in the above manner will be subject to the condition that the Governor, in consultation with the Commission may, for special reasons, increase or decrease the percentage fixed for recruitment by selection and competitive examination in any particular period of recruitment.

9. On November 26, 1971 a further amendment to the U.P. Service of Engineers (Buildings and Roads Branch), Class II Rules has been brought in and these rules are called U.P. Service of Engineers (Buildings and Roads Branch) Class II (Amendment) Rules, 1971. Rule 23 which deals with seniority has been substituted. The relevant portion of Rule 23 is quoted hereunder :

Except as provided for hereunder seniority in the service will be determined by the date of order of appointment in a substantive vacancy

10. On the basis of these amended rules of 1969 and 1971 examinations were held and the successful candidates in the said examinations were appointed to the permanent posts and they were placed on probation. These appointees were called direct recruits in short 'D' category. The petitioners 1, 2 and 4 who are appellants here in these appeals are those direct recruits. The appellants 1 and 2 who were working in the PWD as temporary Assistant Engineers after selection by the Commission were successful in 1962 competition for appointment against permanent posts. Appellant 3 who was also working as temporary Assistant Engineer in the PWD after selection by the Public Service Commission in 1962 also competed in the examination held in 1964 for appointment against a permanent post. Appellant 4 who was working in the Irrigation Department after selection by the Commission in 1962 was successful for appointment against one of the permanent posts in PWD through 1964 competitive examination. It may be mentioned in this connection that the first competitive examination was held in 1962 on the basis of the memorandum dated December 7, 1961. The next examination was held in 1964. Similar examinations were held thereafter till 1971 in accordance with the amended Rules. The Shukla Committee in para 36 of its report observed that "the system had done more harm than good to the Service" and ultimately recommended that in future such direct recruitment for permanent posts should be discontinued. No examinations were held in 1963. After 1971 the recruitment by this method was discontinued by executive instructions issued in 1972 vide Office Memorandum dated 23, 1972 (Annexure C-2 to the counter-affidavit of S. C. Gupta dated January 23, 1981 in Writ Petition No. 3327 of 1980, Syed Masood Tagi Zaidi v. State of U. P.). This was followed by another order dated June 8, 1973 (Annexure C-3 *ibid*) stopping direct promotion against permanent vacancies. These decisions were

taken on the basis of the recommendations of Shukla Committee's Report.

11. The respondents are the directly recruited Assistant Civil Engineers in the Buildings and Roads Branch pursuant to the provisions of Rule 5(a)(ii) in the temporary posts of the cadre up to 1961 after consultation with the Public Service Commission. These temporary Assistant Engineers who are working continuously since the date of their appointment in the cadre of Assistant Engineers have questioned the seniority list of Assistant Engineers made by the government in 1980 pursuant to the Office Memorandum dated December 7, 1961 and U.P. Engineering Service (Amendment) Rules of 1969 and 1971 on the grounds that they are arbitrary and discriminatory being violative of Articles 14 and 16 of the Constitution. These amended rules have been challenged further on the ground that these rules adversely affect their service conditions and as such prayed for quashing of the seniority list and for determination of their seniority on the basis of the decision rendered by this Court in *Baleswar Dass v. State of U. P.* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1980 Lab IC 1155) on the basis of the length of their continuous service since the date of their becoming member of the service in accordance with the provisions of the 1936 rules. The High Court of Allahabad allowed these writ petitions and quashed the 1980 seniority list directing to prepare a seniority list after taking the appointments of officers to the service after selection by Public Service Commission to be substantive appointments to the cadre.

12. Against this judgment and order the above appeals on special leave have been preferred to this Court. The only question that falls for consideration is the determination of seniority of Assistant Engineers in the cadre of the service within the meaning of Rule 3(b) of U.P. Service of Engineers (Buildings and Roads Branch) Class II (Amendment) Rules. It appears that a similar question about the yardstick for determination of seniority between the Assistant Engineers appointed substantively to temporary posts of the cadre and those Assistant Engineers appointed against the permanent posts on probation and confirmed in the said post, came up for consideration before this Court in Civil Appeal No. 1717 of 1981. In that appeal we have already considered this aspect of the case and relying on the decision in *Baleswar Dass v. State of U. P.* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1980 Lab IC 1155), *N. K. Chauhan v. State of Gujarat* (((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127 : 1977 Lab IC 38) we have held that since the cadre of the service of engineers consists of both temporary and permanent posts and as such there can be substantive appointments against temporary posts of the cadre in accordance with the provisions of the Service Rules. When a temporary Assistant Engineer is selected and appointed by the Government with the approval of the Public Service Commission after fulfillment of all the tests prescribed in the said Rules, he shall be deemed to be member of the service and as such the entire length of service from the date of his becoming member of the service has to be reckoned in computing the seniority of the Assistant Engineers appointed substantively to temporary posts in the service in accordance with the provisions of Rule 23 as it was prior to its amendment by 1971 Rules. We have also held that on the plea of not being confirmed, the long years of service rendered by an Assistant Engineer though appointed to a temporary post substantively cannot be arbitrarily cut off and excluded in determining seniority.

13. Before proceeding to consider the merits of the controversy raised in this appeal it is pertinent to deal with the preliminary objections raised on behalf of the appellants that the validity of rules of 1969 and 1971 was not challenged by 'T' category officers or by the ad hoc officers at any time prior to the filing of the present writ petitions out of which the instant appeals on special leave have arisen and as such the writ petitions should be dismissed on the ground of undue delay and laches. This objection was elaborately dealt with by the High Court in its judgment and it was held that there was no such undue delay and laches which can be considered to be a bar for considering the

writ petitions. It appears that the seniority list of 1971 that was prepared following 1969 and 1971 Rules was challenged by some 'D' category officers in Civil Writ Petition No. 3734 of 1965. (V. C. Aggarwal v. State of U. P.). That petition was allowed and the seniority list of 1971 was quashed. The government was directed to prepare a fresh seniority list in accordance with law after adjusting the recruitment for the period of 1962 to 1966 in accordance with the quota rule. Against that judgment two special appeals were filed being Nos. 634 and 629 of 1972. These appeals were allowed in part. Against that judgment the government alone came to this Court in SLP(C) No. 951 of 1975. This special leave petition was dismissed on September 8, 1975. Thereafter the impugned list was published in 1980 and it was supplemented on December 18 and 19, 1980. In these circumstances we are unable to hold that there has been undue delay and laches on the part of temporary Assistant Engineers to challenge the aforesaid amended Rules and as such there is no merit in this contention.

14. In the instant appeal there is no controversy that all the temporary Assistant Engineers who were appointed in consultation with the Public Service Commission by the government and had been tendering their service for long years since 1956 till 1961 when the said notification has been made by the government have become members of the service in accordance with the provisions of the Rules. Therefore on the basis of the provisions of Rule 23 as it was before the amendment made in 1971 these temporary Assistant Engineers are legally entitled to have their seniority reckoned from the date of their being member of the service no matter whether they are holding posts which remain as temporary for years together. It is quite clear that there are about 200 Assistant Engineers who have been appointed substantively by the government with the approval of the Public Service Commission and as such the direct recruits appointed on the basis of the examination held under the 1969 Rules cannot in any manner whatsoever encroach upon the rights of these substantively appointed Assistant Engineers to temporary posts in the matter of determination of their seniority in the said cadre of Assistant Engineers.

15. The Office Memorandum dated December 7, 1961 introduces quotas for filling up vacancies in the cadre of Assistant Engineers in the Public Works Department as well as Irrigation and Local Self Government Engineering Departments by providing direct recruitment through competitive examination to both permanent and temporary vacancies of Assistant Engineers (Civil, Electrical and Mechanical). It has been provided therein that the quota of 50 per cent of the vacancies in the cadre of Assistant Engineers in a year will be filled by direct recruits through competitive examination as well as it provides 25 per cent of the permanent posts to be filled up by selection from amongst temporary Assistant Engineers recruited through the Commission. As a concession however, it has provided that the quota of direct recruits through competitive examination will be 25 per cent instead of 50 per cent as there are large number of temporary Assistant Engineers from whom the selection can be made to the vacancies in the permanent posts of Assistant Engineers by selection. This memorandum has subsequently been incorporated in the amended rules of U.P. Service of Engineers 1969. In Rule 5 of the said Rules provision has been made for direct recruitment both in permanent vacancies as well as in officiating or temporary vacancies on the basis of competitive examination conducted by the Public Service Commission and the criteria laid down is that those who are more meritorious judged by the result of the examination and occupy higher place will be recruited to the permanent vacancies whereas others less meritorious judged by their performance in the competitive examination will be recruited to the post of officiating or temporary vacancies of Assistant Engineers. It has also been provided therein that the temporary Assistant Engineers already recruited in the department in consultation with the Commission will be permitted to compete in the examination and if they can do well in the competitive examination then they may be appointed in the permanent posts of Assistant Engineers. This rule if considered

properly will clearly show that direct recruits permanent vacancies on the basis of the competitive examination will score a march over the Assistant Engineers who have been appointed substantively in temporary posts of the cadre and have become member of the service. They will be deprived of having their services reckoned from the date of their substantive appointment to temporary posts for the purpose of determination of seniority. In accordance with the provisions of Rule 23 of the amended rules of 1971 which has been substituted for the old rules of 1936 seniority in the service has to be determined by the date of order of appointment in a substantive vacancy. As a result this rule expressly debar Assistant Engineers who have been appointed long before the appointment of the direct recruits under the amended rules of 1969 to have their long years of service as Assistant Engineers after being appointed substantively and after being members of the service fulfilling all the tests prescribed within the meaning of Rule 3 of the rules of 1936 and also under Rule 3(b) as amended by the 1969 amendment to be left out in fixation of seniority. In other words these temporary Assistant Engineers will ever remain temporary though they have been rendering identical service for long years and having same educational qualification and long experience in the service.

16. This memorandum dated December 7, 1961 was considered in Baleshwar Dass case ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1980 Lab IC 1155) by this Court and it was held that "this GO was not arbitrary insofar as it fixes the proportion of permanent vacancies to be filled from various sources, and it has statutory force being under Rule 6. It has also been observed that : [SCC p. 238, SCC (L&S) p. 544, para 22]

The office memorandum makes it clear that direct recruitment will be made to "both permanent and temporary vacancies of Assistant Engineers". But this scheme of 1961 cannot stand in isolation and has to be read as subordinate to the 1936 Rules. After all, the 1961 Memorandum cannot override the Rules which are valid under Article 313, and so must be treated as filling the gaps, not flouting the provisions.

Hence the said OM does not affect the petitioners who have become members of the Service and are entitled to have their seniority reckoned from the date of their being member of the Service according to Rule 23 of the 1936 Rules. The 1969 Rules and 1971 Rules have however, affected the rights of the respondents who have become members of the Service being substantively appointed in temporary posts as Assistant Engineers inasmuch as there has been an amendment effected in Rule 3(b) by providing that a member of the Service meant a government servant appointed in a substantive capacity to a post in the cadre of the Service. Rule 3(c) also amends the earlier provisions by meaning direct recruitment as in the manner prescribed in Rules 5(a)(i) and 5(b)(i). Similar amendments have been made in Rules 5 and 6. The effect of these amendments is that Assistant Engineers who have become members of the Service being appointed substantively in temporary posts will no longer be members of the Service and will have to wait till they are selected and appointed as Assistant Engineers under Rule 5(a)(ii) against quota fixed by Rule 6 for this purpose. This creates serious prejudice to them and it also creates uncertainty as to when they will be selected and appointed against the quota set up for such selection under Rule 5(a)(ii). The amended Rule 23 lays down that a seniority will be determined from the date of order of appointment in substantive vacancy. These amended Rule 23 lays down that seniority will be determined from March 1, 1962 to the existing officers i.e. the respondents appointed substantively against temporary vacancies. It has been urged that government has the power to amend rules retrospectively and such rules are quite valid. Several decisions have been cited of this Court at the bar. Undoubtedly the government has got the power under proviso to Article 309 of the Constitution to make rules and amend the rules giving retrospective effect. Nevertheless, such retrospective

amendments cannot take away the vested rights and the amendments must be reasonable, not arbitrary or discriminatory violating Articles 14 and 16 of the Constitution.

17. In the case *T. R. Kapur v. State of Haryana* (1986 Supp SCC 584) (in which one of us was a party) this Court observed : (SCC p. 595, para 16)

It is well settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect : *B. S. Vadhera v. Union of India* ((1968) 3 SCR 575 : 1969 Lab IC 100 : (1970) 1 LLJ 449), *Raj Kumar v. Union of India* ((1975) 3 SCR 963 : (1975) 4 SCC 13 : 1975 SCC (L&S) 198), *K. Nagaraj v. State of A. P.* ((1985) 1 SCC 523 : 1985 SCC (L&S) 280) and *State of J & K v. Triloki Nath Khosa* ((1974) 1 SCR 771 : (1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 LLJ 121). It is equally well settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules, cannot be reverted and their promotion cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the tests of Articles 14 and 16(1) of the Constitution.

18. It has been held by this Court in *E. P. Royappa v. State of Tamil Nadu* (AIR 1974 SC 555, 583 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165), *Maneka Gandhi v. Union of India* (AIR 1978 SC 597, 624 : (1978) 1 SCC 248) that there should not be arbitrariness in State action and the State action must ensure fairness and equality of treatment. It is open to judicial review whether any rule or provision of any Act has violated the principles of equality and non-arbitrariness and thereby invaded the rights of citizens guaranteed under Articles 14 and 16 of the Constitution. As has been stated hereinbefore the Assistant Engineers who have already become members of the Service on being appointed substantively against temporary posts have already acquired the benefit of 1936 Rules for having their seniority computed from the date of their becoming member of the Service. 1969 and 1971 Amended Rules take away this right of these temporary Assistant Engineers by expressly providing that those Assistant Engineers who are selected and appointed in permanent vacancies against 50 per cent quota provided by Rule 6 of the amended 1969 Rules will only be considered for the purpose of computation of seniority from the date of their appointment against permanent vacancies. Therefore the temporary Assistant Engineers are not only deprived of the right that accrued to them in the matter of determination of their seniority but they are driven to a very peculiar position inasmuch as they are to wait until they are selected and appointed against permanent vacancies in the quota set up for this purpose by the amended Rule 6. The direct recruits on the basis of the competitive examination conducted by the Commission and appointed against permanent vacancies on probation will supersede the rights that accrued under the unamended rules to the temporary Assistant Engineers having precedence in the matter of determination of their seniority from the date of their appointment against permanent vacancies. In other words, the Assistant Engineers appointed substantively against temporary posts several years before the direct recruits and working in the posts of Assistant Engineers will be pushed down to the direct recruits against permanent vacancies. It is also evident that there are about 200 Assistant Engineers who

have been appointed substantively by the government with the approval of the Public Service Commission before the enforcement of 1969 Rules. The direct recruits appointed on the basis of the examination against permanent vacancies will get precedent over Assistant Engineers appointed in the matter of determination of their seniority in the cadre of Assistant Engineers on the basis of changed rules, particularly new Rule 23 which takes into account only appointments in substantive vacancies. Thus appointments made under Rule 5(b)(i) are to be treated as temporary i.e. 'T' category officers and their such services will not be taken into consideration in determining seniority until they are selected and appointed to permanent posts under Rule 5(a)(ii). Note I to Rule 23 made it clear that an appointment made substantively on probation against a clear vacancy in a permanent post will be treated as substantive appointment. Thus the 1969 and 1971 amendments in effect take away from the officers appointed to the temporary posts in the cadre through Public Service Commission, i.e. after selection by Public Service Commission, the substantive character of their appointment. These amendments are not only disadvantageous to the future recruits against temporary vacancies but they were made applicable retrospectively from March 1, 1962 even to existing officers recruited against temporary vacancies through Public Service Commission. As has been stated hereinbefore that the government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution.

19. In the case of *S. B. Patwardhan v. State of Maharashtra* ((1977) 3 SCR 775, 778 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391) Rule 8(iii) of 1960 Rules of Bombay Service of Engineers Grade II which provided that direct recruits on probation in any year will be in a bunch senior to promotees confirmed in that year was declared ultra vires Article 14 of the Constitution as it purported to take away from the promotees their right of seniority being determined from date of their promotion from subordinate service to the posts of Deputy Engineers before confirmation. It was held that : [SCC p. 420, SCC (L&S) p. 412, para 39]

Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. Yet clause (iii) of Rule 8 provides that probationers recruited during any year shall in a bunch be treated as senior to promotees confirmed in that year. The plain arithmetic of this formula is that a direct recruit appointed on probation, say in 1966, is to be regarded as senior to a promotee who was appointed as an officiating Deputy Engineer, say in 1956, but was confirmed in 1966 after continuous officiation till then. This formula gives to the direct recruit even the benefit of his one year's period of training and another year's period of probation for the purposes of seniority and denies to promotees the benefit of their long and valuable experience. If there was some intelligible ground for this differentiation bearing nexus with efficiency in public services, it might perhaps have been possible to sustain such a classification Instead of adopting an intelligible differential, Rule 8(iii) leaves seniority to be determined on the sole touchstone of confirmation Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies.

20. The office memorandum dated December 7, 1961 which purports to amend the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 in our opinion cannot override, amend or supersede statutory rules. This memorandum is nothing but an administrative order or instruction and as such it cannot amend or supersede the statutory rules by

adding something therein as has been observed by this Court in *Sant Ram Sharma v. State of Rajasthan* ((1968) 1 SCR 111 : AIR 1967 SC 1910 : (1968) 2 LLJ 830). Moreover the benefits that have been conferred on the temporary Assistant Engineers who have become members of the service after being selected by the Public Service Commission in accordance with the service rules are entitled to have their seniority reckoned in accordance with the provisions of Rule 23 as it was then, from the date of their becoming member of the service, and this cannot be taken away by giving retrospective effect to the rules of 1969 and 1971 as it is arbitrary, irrational and not reasonable.

21. We have already mentioned hereinbefore that the amended rules of 1969 read with the amended rules of 1971 adversely affect the rights of the Assistant Engineers appointed to substantive posts prior to the introduction of these amended rules and create fetters for the long years of service being ever considered for reckoning of seniority in the cadre of Assistant Engineer. It is pertinent to refer in this connection to the decision of this Court in the case of *Mohammad Shujat Ali v. Union of India* ((1975) 1 SCR 449 : (1975) 3 SCC 76 : 1974 SCC (L&S) 454 : 1974 Lab IC 1103) wherein it has been observed that : [SCC p. 95, SCC (L&S) p. 473, para 15]

It is true that a rule which confers a right of actual promotion or a right to be considered for promotion is a rule prescribing a condition of service.

For promotion from Assistant Engineer to the post of Executive Engineer seniority-cum-merit is the criterion in accordance with the service rules in question. These temporary Assistant Engineers unless they are selected to the 50 per cent quota in permanent vacancies reserved for promotion from the Assistant Engineers appointed to temporary posts, will never their service reckoned for determination of seniority in the cadre. It is pertinent to mention in this connection that 'T' category and 'D' category engineers have got some technical qualification i.e. both are graduates in Civil Engineering and both worked as Assistant Engineers in permanent vacancies. The appointment of respondents have been made in consultation with the Public Service Commission and according to the decision in *Baleshwar Dass case* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1980 Lab IC 1155) the respondents having become member of the Service they are deemed to be appointed substantively in temporary posts. Therefore the amended rules more particularly Rules 3(c), 5 and 6 of 1969 rules as well as Rule 23 of 1971 amended rules are wholly arbitrary and discriminatory and so they are violative of Articles 14 and 16 of the constitution. It has been tried to be urged in this connection on behalf of the direct recruits that the method of selection to the cadre of Assistant Engineers by providing quota for direct recruits in permanent vacancies was introduced by the authorities concerned in order to attract meritorious and talented engineers in the U.P. Service of Engineers (Buildings and Roads Branch) as there were very little prospects of promotion for such Assistant Engineers to be promoted to the higher posts owing to the large number of Assistant Engineers appointed to temporary posts. It has thus been urged that these new rules have been introduced in order to give an incentive to meritorious and talented engineers to get themselves recruited directly to permanent posts in the cadre on the basis of the competitive examination in order to have a fair promotional prospect in the service. This submission cannot be sustained in view of the fact that firstly it seriously prejudices the rights of the Assistant Engineers appointed substantively to the temporary posts and working as Assistant Engineers for a number of years and discriminates them from having their long years of service after being appointed substantively in temporary posts and being members of the service though the 'D' category engineers appointed much later in permanent posts will steal a march over them by having their seniority reckoned from the date of their appointment on probation. Secondly, this process of direct recruitment against permanent vacancies was discontinued after 1971 and these amended rules were not thereafter taken

recourse to in filling up the vacancies in the cadre of Assistant Civil Engineers as it worked injustice and had led to patent discrimination violating Articles 14 and 16 of the Constitution. This is perhaps the reason and rationale which impelled the Shukla Committee to recommend the discontinuance of this practice of giving promotion to direct recruits. Quota and rota are introduced where recruitments to a cadre of Service are made from two or more sources. But in the instant case the Quota has been introduced for the first time after their recruitment of determining seniority in service 'T' category having become members of the Service already and also there are no different sources of recruitment as both 'D' and 'T' category employees are recruited by examination conducted by Commission. Moreover no quota for filling up permanent vacancies has been provided at the initial stage of recruitment but a quota has been made after recruitment at the stage of confirmation.

22. In this connection it is relevant to mention that the quota and rota which was introduced by the 1971 amendment of Rule 23 cannot be questioned to be arbitrary inasmuch as when recruitments to a particular service are made from more than one source quota and rota may be introduced consistent with the equality clause envisaged in Articles 14 and 16 of the Constitution. This decision is now well settled by several decisions of this Court, the last of these decisions is in the case of *Narender Chhada v. Union of India* ((1986) 2 SCC 157 : 1986 SCC (L&S) 226). In the instant case the question is whether by the substitution of Rule 23 by the amendment Act of 1971 the long years of service already rendered by the temporary Assistant Engineers who have become members of the cadre of the service of Assistant Engineers all the conditions can be arbitrarily and unreasonably excluded while fixing a seniority and 'T' category officers can be of their long years of services being reckoned for determination of seniority.

23. It has been urged on behalf of the appellants that the classification made between temporary Assistant Engineers though working for a considerable period of time but not appointed against permanent against permanent vacancies on probation is based on merits. In support of this submission the decision in *State of J & K v. Triloki Nath Khosa* ((1974) 1 SCR 771 : (1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 LLJ 121) has been cited at the bar. This decision in our considered opinion is not applicable to the instant case inasmuch as in that case recruitment to the cadre of Assistant Engineers in Jammu and Kashmir Engineering Service was made by direct recruitment of degree holders in civil engineering as well as by transfer of degree or diploma holders having served as Supervisor for a period of not less than five years. The recruitment rules also further provided for promotion to the cadre of Executive Engineer on the basis of merit, ability and previous service record of the candidates. In 1970 the Jammu and Kashmir Engineering (Gazetted) Service Recruitment Rule, 1970 were made providing that recruitment to the post of Executive Engineers was to be made only by promotion of Assistant Engineers possessing degree in civil engineering. It was held by this Court that the classification made had a reasonable nexus for classification namely to achieve administrative efficiency in the engineering service by introducing higher qualification for promotion to the post of Executive Engineer. In the instant case, all the Assistant Engineers whether appointed in a temporary post of the cadre or in the permanent post of the cadre are recruited directly from graduates in Civil Engineering. The only difference is that due to exigencies of service a large number of Assistant Engineers were recruited by the government in consultation with the Public Service Commission in accordance with Rule 5(a)(ii) of 1936 Rules as it was prior to its amendment, against temporary vacancies and those Engineers have been working as Assistant Engineers since their appointment from 1956 onwards till the end of 1961 when the impugned 1961 Memorandum was promulgated by the government and thereafter the amended Rules of 1969 and 1971 were made. It was for the first time that the amendment in the rules was made retrospective by introducing the process of selecting Assistant Engineers to be appointed

directly against permanent posts on probation through examination to be conducted by the Public Service Commission in 1962. Necessary amendments were also made in Rules 3(c), 5 and 6 of the 1969 Rules as well as Rule 23 of the 1971 Rules in order to provide better prospects of promotion to these direct recruits by laying down that their seniority will be reckoned from the date of their appointment on probation whereas in the case of Assistant Engineers who were working for years together but appointed against temporary posts, their seniority from the date of their appointment after consultation with the Public Service Commission cannot be counted for the purposes of determination of seniority unless they are appointed against permanent posts and confirmed. Therefore it cannot be said that higher educational qualification has been prescribed as in the case of State of J & K v. Triloki Nath Khosa ((1974) 1 SCR 771 : (1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 LLJ 121) for the purpose of appointing Assistant Engineers directly against permanent post on promotion. In the instant case undoubtedly, both 'T' and 'D' category Assistant Engineers are graduates in engineering and both are performing the same nature of work. It is also significant to note in this connection that the appellants were previously appointed as Assistant Engineers against temporary vacancies of the cadre but subsequently on the basis of this examination they have been appointed directly on probation against permanent vacancies. There is nothing to show that these Assistant Engineers has shown any extraordinary or brilliant performance as Assistant Engineers. It is also to be noted that the temporary Assistant Engineers have acquired much experience in their work having been appointed much before the direct recruits against permanent vacancies. As stated hereinbefore that under the 1936 Rules the Assistant Engineers appointed against temporary vacancies became members of the Service under the then Rule 3 and they were eligible for their seniority being reckoned from the date of their becoming members of the Service. In these circumstances it is evident that the impugned Rules of 1969 and 1971 purport to take away or to cruelly cut off the long years of valuable service rendered by these respondents i.e. Assistant Engineers appointed in temporary vacancies of the cadre only on the pretext of appointment against permanent post and confirmation. The effect of the 1969 and 1971 amendments was thus to take away from the officers appointed to the temporary cadre through Public Service Commission i.e. after the selection by the Commission the long years of service after becoming members of the Service. It is also pertinent to mention here that though these temporary posts of the cadre have been continuing for over years together yet these temporary posts have not been made permanent before 1961 and thereby depriving the Assistant Engineers from being appointed against permanent vacancies even though they have become members of the Service being appointed in a substantive capacity. These temporary Assistant Engineers after introduction of the amended Rules have been relegated to a very uncertain position as to when they will be selected against permanent vacancies by the Commission in the 50 per cent quota provided under Rule 6 of the amended Rules to become members of Service and to have their seniority reckoned. Moreover the fate of those Assistant Engineers who are selected and appointed in temporary posts on the basis of the results of the examination is also very uncertain inasmuch as they will be considered for selection by the Commission against the quota for temporary Assistant Engineers after the Assistant Engineers appointed before them are all considered for selection in the said quota set up for the temporary Assistant Engineers in permanent vacancies even though they have been appointed through the same process of examination. Considering all these circumstances we are constrained to hold that the impugned provisions of Rules 3(c), 5 and 6 of the 1969 Rules and Rule 23 of the 1971 Rules are arbitrary, irrational and unreasonable infringing Articles 14 and 16 of the Constitution insofar as they affect the question of determining the inter se seniority of temporary Assistant Engineers appointed by the Government i.e. 'T' category officers under Rule 5(2) of the Rules against that of 'D' category officers i.e. officers directly recruited by the Government against permanent vacancies and placed on probation.

24. An argument has been advanced on behalf of the direct recruits i.e. the appellants that they having duly succeeded in the competitive examination on the basis of the amended rules cannot be deprived of their right to be promoted on the basis of the fixation of their seniority in the cadre of Assistant Engineers as provided in the amended Rule 23 of 1971 Rules. This argument in our considered opinion cannot hold good inasmuch as the cadre of Assistant Engineers comprises of both permanent and temporary posts. Rule 3(b) specifically lays down that an Assistant Engineer becomes member of the Service as soon as he is appointed in the substantive capacity even in a temporary posts in the cadre. It is inconceivable how a member of the Service can be prevented from having his service reckoned for determination of seniority in the Service from the date he became member of the Service. The substituted Rule 23 introduced in 1971 is on the face of it unreasonable and arbitrary inasmuch as it purports to deprive a member of the Service from having his seniority reckoned on the ipse dixit of the rules that he has not been appointed in a substantive vacancy. Rules 3(c), 5 and 6 of 1969 Rules are arbitrary, irrational and not reasonable infringing Article 14 of the Constitution. While considering this we of course agree with the finding arrived at by the High Court that so far as the selections made on the basis of the competitive examination on the basis of the amended Rules of 1969 and 1971 read with Go dated December 7, 1961 more than two decades before, should not be disturbed inasmuch as these selections were not challenged during all these years and these direct recruits have worked there since their appointment. We also make it clear that our decision will not affect any confirmations or substantive promotions and prior to the filing of the writ petitions.

25. It appears that an interim order was made by this Court on May 5, 1982 to the effect that "if any appointments pursuant to the fresh rules which are framed, are made these will be subject to the results of the appeals". It also appears that in Civil Appeal Nos. 2616-19 of 1981 this Court while disposing of those appeals by order dated April 15, 1981 directed that in regard to promotions already made in accordance with the impugned seniority list there shall be status quo as on the date on which the writ petitions were filed in the court. It was also directed that such promotions and any future promotions made in accordance with the impugned seniority list will abide by the result of these appeals. We make it clear that since we are dismissing these appeals all those ad hoc promotions given during the pendency of these writ petitions as well as civil appeals will not confer any right of the promotees.

26. We further hold that so far as the temporary Assistant Engineers who have been appointed substantively to temporary posts and have been working for years together after being duly recruited and selected by the Public Service Commission as required under the service rules have become members of the service but so far as purely ad hoc employees or employees on purely officiating basis or employees purely for a temporary period in the cadre of Assistant Engineer in Public Works Department being not members of the Service in accordance with the service rules, are not entitled to have the benefit of their such adventitious, purely ad hoc and temporary service being of their such adventitious, purely ad hoc and temporary service being not appointment substantively even to a temporary post will not be reckoned for determination of seniority unless and until they become members of the Service in accordance with the provisions of service rules. Only those ad hoc appointees whose service have been regularized by the regularisation rules framed under proviso to Article 309 of the Constitution after being duly selected by the Selection Committee and becoming member of the Service, will be entitled to seniority only from the date of order of appointment after selection in accordance with those regulations as provided in Rule 7 of the regulations.

27. We mention in this connection the observations of this Court in the case of Ashok Gulati v. B. S. Jain (AIR 1987 SC 424 : 1986 Supp SCC 597 : (1987) 2 ATC 608) (to which one of us was a party).

It has been observed as followed : (SCC p. 612, ATC p. 623, para 22)

According to the accepted canons of service jurisprudence, seniority of a person appointed must be reckoned from the date he becomes a member of the service It is well settled that an ad hoc or fortuitous appointment on a temporary or stopgap basis cannot be taken into account for the purpose of seniority even if the appointee was qualified to hold the post on a regular basis; as such temporary tenure hardly counts for seniority in any system of service jurisprudence.

28. Similar observation was also made by this Court in the case of State of Gujarat v. C. G. Desai ((1974) 2 SCR 255 : (1974) 1 SCC 188 : 1974 SCC (L&S) 116 : (1974) 1 LLJ 252). Therefore we make it clear that the period of service rendered by the ad hoc appointees before their service has been duly regularised in accordance with the regularisation rules, cannot be taken into account in reckoning their seniority in service. Their seniority in service will be counted only from the date when such ad hoc appointees after regularisation in accordance with concerned rules have become members of the Service.

29. We direct the authorities concerned to prepare a fresh seniority list of all the members of the Service in the cadre of Assistant Engineer in the PWD on the basis of their length of service from the date they have become members of the Service fulfilling all the requirements laid down in the service rules. We cannot but observe in this connection that though the temporary Assistant Engineers have been duly selected by the Public Service Commission after they are appointed as temporary Assistant Engineers yet in spite of several directions given by this Court, the authorities concerned did not think it fit and proper to prepare the seniority list in accordance with the directions given by this Court and as a result no seniority list in the cadre of Assistant Engineer has yet been prepared following the directions made even by this Court as embodied in the decision in Baleshwar Dass v. State of U. P. ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1980 Lab IC 1155) On the other hand amendments have been made to the existing 1936 service rules which per se seem to be arbitrary and this led to a spate of litigations. We do hope and expect that considering all these, the government will take effective steps for preparation of seniority list as early as possible in order to create incentive for the members of the Service by holding out prospects of future promotions in the interests of the Service.

30. In the premises aforesaid we dismiss these appeals and affirm the judgment and order of the High Court of Allahabad quashing the said seniority list dated July 29, 1980 together with supplementary seniority list dated December 18, 1980 and December 19, 1980 relating to Civil Engineering Wing. Rules 3(c), 5 and 6 of 1969 Rules as well as Rule 23 of 1971 Rules are also quashed. The condition in Office Memorandum dated January 21, 1980, Annexure 2 of Writ Petition No. 2447 of 1980 providing that for the selection for the post of Superintending Engineer the officer must be a confirmed Executive Engineer is quashed. A writ of mandamus be issued directing the government to prepare a fresh seniority list of Engineers in the Civil Engineering and EM Wing respectively in the light of the observations made hereinbefore. This order, however, will not affect any confirmation or promotions (other than ad hoc promotions) made before November 29, 1979. In the facts and circumstances of the case, there will be no order as to costs.

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