State Of U. P.

Vs

Rafiquddin And Others

Sushil Kumar Srivastava And Others

Vs

State of U. P. And others

D. P. Shukla And Others

Vs

State Of U. P. And Others

Chandra Prakash Aggarwal

Vs

State Of U. P. And Others

Sushil Chand Srivastava

Vs

State Of U. P. And Others

R. P. Lavania

Vs

State Of U. P. And Others

P. N. Parashar And Others

Vs

State Of U. P. And Others

Civil Appeals Nos. 4023

(E S. Venkataramiah, K. N. Singh JJ)

04.11.1987

JUDGMENT

SINGH, J. –

1. These three civil appeals directed against the judgment of the High Court of Allahabad and four writ petitions filed under Article 226 of the Constitution raise common questions of law relating to determination of seniority of members appointed as Munsifs in the Uttar Pradesh Nyayik Seva as a result of competitive examinations of 1970, 1972 and 1973 held under the Uttar Pradesh Civil Service (Judicial Branch) Rules, 1951 (hereinafter referred to as the Rules). Since the appeals and the petitions raise common questions of law they have been heard together and are being disposed of by a common judgment.

2. On September 3, 1970 a notification was issued by the Public Service Commission inviting applications for recruitment to 85 posts of Munsifs. In this examination 918 candidates appeared, out of whom 294 candidates on the basis of their marks in written papers, were called for viva voce test. After completion of the written and viva voce tests, the Commission submitted a list of approved candidates to the government on October 25, 1971 recommending the names of 46 candidates for appointment to the service, which shall hereinafter be referred to as the first list of 1970 examination. On receipt of the list of 46 candidates the State Government requested the Commission to recommend some more candidates for appointment to the service as there was shortage of Munsifs, and it further suggested that the minimum of 40 per cent marks in the aggregate may be reduced to 35 per cent. The Commission agreed to the State Government's suggestion and thereafter it forwarded another list of 33 candidates on April 25, 1972 for appointment to the service which shall hereinafter be referred to as the second list. This list included those who had obtained 35 per cent marks in the aggregate, as well as 35 per cent marks in viva voce. All the 79 candidates, as recommenced by the Commission in the aforesaid two lists were appointed to service by different notifications issued between May 1972 to June 12, 1973. On July 17, 1973 a notification was issued determining inter se seniority of all the 79 candidates appointed on the basis of 1970 examination in accordance with their position in the list prepared by the Commission under Rule 19 of the Rules. Meanwhile, the Public Service Commission held another competitive examination for appointment to the 150 posts of Munsifs which shall hereinafter be referred to as the 1972 Examination. The written test was held in November 1973 and the result was declared on June 26, 1974. The Public Service Commission forwarded a list of 150 successful candidates to the government for appointment to the service under Rule 19 of the Rules and all those candidates were appointed to the service on different dates between 1975 to 1977.

3. Some of the unsuccessful candidates of the 1970 Examination made representation to the State Government for considering their case for appointment on the basis of their aggregate marks irrespective of their low marks in the viva voce. The State Government by its letter dated July 24, 1973 requested the Commission that in view of the shortage of Munsifs in the State and since in view of the amendment of Rule 19 it was no longer necessary for a candidate to qualify independently in the viva voce, it may reconsider the result of the examinations of 1967, 1968, 1969 and 1970 and approve all those candidates for appointment to the service who might have obtained 40 per cent of marks or more in the aggregate even if they might have failed to secure the minimum marks in the viva voce test. The Commission refused to consider the proposal of the government, as the minimum marks prescribed by the Commission under the then existing proviso to Rule 19 could not be ignored in judging the suitability of a candidate. In spite of the Commission's refusal the government pursued the matter further, and it convened a meeting of the Chief Minister, Chief Justice of the High Court and the Chairman of the Public Service Commission on May 3, 1974. At that meeting it was decided that in view of the immediate need for Munsifs the Public Service Commission should be requested to recommend such candidates of 1967, 1968, 1969 and 1970 examination who might have secured 40 per cent or more marks in the aggregate, but could not qualify in the viva voce. The committee took the view that after the amendment of Rule 19 it was

not necessary for a candidate to qualify in the viva voce test and therefore he could be appointed to the service if he had got 40 per cent or more marks in the aggregate. In pursuance of the decision taken by the said high level committee the government by its letter dated May 10, 1974 requested the Commission to forward the application forms and the marks obtained by the unsuccessful candidates of the examinations held during the years 1967, 1968, 1969 and 1970 who might have got 40 per cent or more marks in the aggregate but might not have qualified in the viva voce. The letter enclosed a note containing the decision taken by the high level committee. The Commission by its letter dated June 19, 1974 informed the government that the application forms and other particulars of the unsuccessful candidates of 1967, 1968 and 1969 examination had been destroyed, and therefore the Commission was unable to forward the names of candidates of those examinations as desired by the government. But the Commission forwarded with a covering letter dated June 19, 1974 a list of 37 candidates of the 1970 Examination who had obtained 40 per cent or more marks in the aggregate but who had failed to secure 35 per cent qualifying marks in the viva voce which shall hereinafter be referred to as the III list. The Commission's letter contained a note that the candidates mentioned therein had obtained 40 per cent or more marks in the aggregate but they had not been found suitable by the Commission. This III list contained the names of Rafiquddin and 36 others, who were unsuccessful at the 1970 Examination who will be referred to hereafter as the "unplaced candidates" of the 1970 Examination. On receipt of the III list of the "unplaced candidates" the State Government after obtaining approval of the High Court issued a notification dated August 19, 1975 appointing 21 candidates out of the list of 37 candidates as Munsifs with a note that the appointments were being made on the basis of the 1970 Examination conducted by the Commission and the persons appointed were "unplaced candidates" with a further note that their seniority would be determined later on. Out of the list of 37 candidates forwarded by the Commission under its letter dated June 19, 1974 the State Government found that the remaining 16 persons who had been unsuccessful at the 1970 Examination had again appeared in the 1972 Examination and they had been selected and appointed to the service. Therefore, the government requested the Commission to select 16 more candidates from the 1972 Examination. In pursuance of the government's request the Public Service Commission by its letter dated July 14/15, 1976 forwarded another list of 16 candidates who had appeared in the 1972 Examination for appointment to the service.

4. In March 1977 the State Government published a seniority list of successful candidates of the competitive examination of 1970. The "unplaced candidates" belonging to the III list of the 1970 Examination made representation to the High Court for determining their seniority in accordance with Rule 22 of the Rules on the footing that they were recruited to the service in pursuance of 1970 Examination and therefore they were entitled to the seniority as candidates belonging to the examination held in 1970 irrespective of their appointment being made in 1975. They claimed that they were senior to those who had been recruited to service in pursuance of 1972 Examination as well as to those who had been recruited to service earlier to them in pursuance of the 1970 Examination who were appointed in service in pursuance of I and the II lists of 1970 Examination but who had secured lower marks in the aggregate. Their representation was rejected by the High Court as well as by the State Government as in their view the "unplaced candidates" were unsuccessful in the competitive examination of 1970, their appointment was not in accordance with the Rules and as such they were not entitled to seniority of 1970. Rafiquddin and 16 other "unplaced candidates" filed Writ Petition No. 1303 of 1979 under Article 226 of the Constitution before the High Court of Allahabad for quashing the decision of the High Court and the State Government rejecting their representation and also for the issue of a writ of mandamus directing the High Court to confirm the petitioners and to grant them seniority of 1970, and to rearrange the seniority of

Munsifs appointed in service in pursuance of 1970 Examination in order of merit on the basis of the aggregate marks obtained by each of the candidates at the said examination. A Division Bench of the High Court consisting of M. N. Shukla and K. M. Dayal, JJ. by their judgment dated March 31, 1982 allowed the writ petition on the finding that the unplaced candidates were appointed in service on the basis of the result of 1970 Examination. The Bench quashed the seniority list and issued a direction to the State Government and the High Court to prepare the seniority list of candidates of the 1970 Examination afresh in accordance with Rule 22 read with Rule 19 of the Rules and to confirm and promote them in accordance with the seniority list so drawn. The State of Uttar Pradesh has preferred Civil Appeal No. 4023 of 1982 against the judgment of the Division Bench. Civil Appeal No. 4024 of 1982 has been preferred by Sushil Kumar Srivastava and others against the aforesaid judgment of the Division Bench. It should be stated here that D. P. Shukla and three other unsuccessful candidates at the 1970 Examination had filed another writ petition - Writ Petition No. 4261 of 1974 in the High Court of Allahabad under Article 226 of the Constitution raising the grievance that even though they had secured higher marks in the competitive examination than those appointed to the service yet they were discriminated against, as they had not been appointed to the service instead 37 candidates "belonging to the III list" were appointed although they had obtained lower marks. Another Division Bench of the High Court consisting of Satish Chandra, C.J. and A. N. Verma, J. by its judgment dated March 30, 1982 dismissed the said writ petition on the ground that since the petitioners therein had failed to secure minimum qualifying marks in the viva voce they were not entitled to selection. Civil Appeal No. 3736 of 1982 has been preferred by the unsuccessful petitioners against the aforesaid judgment.

5. In addition to the aforesaid three civil appeals four writ petitions have also been filed raising the same controversy. Writ Petition No. 4636 of 1982 has been filed in this Court under Article 32 of the Constitution by Chandra Prakash Agarwal an unsuccessful candidate at the 1970 Examination, challenging the appointment of those who had failed to secure less than 40 per cent marks in the aggregate. Sushil Chand Srivastava a member of the service appointed in pursuance of the 1972 Examination has also filed Writ Petition No. 12818 of 1984 under Article 32 of the Constitution challenging the validity of the appointment of "unplaced candidates" of the 1970 Examination belonging to the III list which include Rafiquddin and others on the ground that their appointment was illegal and for that reason they could not be treated senior to him. R. P. Lavaniya a member of the service who was recruited in pursuance of the 1973 Examination has also filed Writ Petition No. 1347 of 1984 under Article 32 of the Constitution claiming seniority over respondents 3 to 15 to the writ petition who had been recruited in service in pursuance of the 1972 Examination and appointed in service after the petitioner's appointment. P. N. Parashar and 11 others who had been recruited to the service in pursuance of the 1972 Examination filed a writ petition under Article 226 of the Constitution before the High Court of Allahabad being Writ Petition No. 5409 of 1982 challenging the seniority list prepared in pursuance of the judgment of the High Court in Writ Petition No. 1303 of 1979 (Rafiquddin v. State of Uttar Pradesh), on the ground that the "unplaced candidates" of the 1970 Examination were not entitled to seniority over the candidates of the 1972 Examination as they had been appointed to service earlier in time. That writ petition was transferred to this Court. Three civil appeals and four writ petitions including the transferred petition have been heard together at length.

6. The U.P. Civil Service (Judicial Branch) Rules, 1951 that is, the Rules have been framed by the Governor under the proviso to Article 309 read with Article 234 of the Constitution in consultation with the U.P. Public Service Commission and the High Court which provide for recruitment to the service and lay down the conditions of service of personnel appointed to the U.P. Civil Service (Judicial Branch). Rule 3 provides that the Rules shall apply to Munsifs and Civil Judges. "Member

of the service" as defined by Rule 4 means a person appointed in a substantive capacity "under the provisions of these Rules" or of the Rules in force previous to the introduction of these Rules to a post in the cadre of the service. Rule 5 provides that the strength of the service shall be determined by the Governor from time to time in consultation with the High Court of Judicature at Allahabad. It confers power on the Governor to increase the cadre by creation of additional or temporary posts as may be necessary. Rule 6 provides that recruitment to the service shall be made on the result of a competitive examination conducted by the Public Service Commission. Rule 8 lays down that the Governor shall decide the number of recruits to be taken in any particular year. Rule 15 provides for holding of competitive examination for recruitment to the service and it lays down that the examination may be conducted at such time and on such date as may be notified by the Commission and shall consist of written examinations in such legal and allied subjects including procedure as may be included in the syllabus prescribed in Rule 18 and an examination to test the knowledge of the candidate in Hindi, Urdu and also an interview to test the fitness of the candidates for appointment. Rule 18 prescribes syllabus for the competitive examination as contained in Appendix E. Appendix E provides that the examination will include written and viva voce test, it specifies the subjects for written test and the marks allotted to each subject. Clause 5 of Appendix E relates to the viva voce, and the notes appended thereto relevant for the determination of the question raised in these cases, are as under :

> 5. Viva voce : The suitability of the candidate for employment in judicial service will be tested with reference to his record at school, college and in university and his personality, physique. The questions which may be put to him may be of a general nature and will not necessarily be of an academic or legal nature.

Notes

> (I) The marks obtained in viva voce will be added to the marks obtained in the written papers and the candidate's place will depend on the aggregate of both.
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> (II) The Commission reserves the right to refuse to call for viva voce any candidate who has not obtained such marks in the two Law Papers as to justify such refusal or who does not satisfy the requirements of Rule 12(2) of the Rules.

Rule 19 requires the Commission to prepare list of candidates approved by it and to forward the same to the government. Rule 19 as it stood in the year 1970 read thus :

> 19. List of candidatesm approved by the Commission. - The Commission shall prepare a list of candidates who have taken the examination for recruitment to the service in order of their proficiency as disclosed by the aggregate marks finally awarded to each candidate. If two or more candidates obtain equal marks in the aggregate the Commission shall arrange them in order of merit on the basis of their general suitability for the service :

Provided that in making their recommendations the Commission shall satisfy themselves that the candidate -

> (1) has obtained such an aggregate of marks in the written test that he is qualified by his ability for appointment to the service;
>
> (2) has obtained in the viva voce test such sufficiently high marks that he is suitable

for the service.

While preparing the list the Commission had to satisfy itself that a candidate had obtained such aggregate marks in the written test as to qualify him for appointment to the service and further that he had obtained such sufficiently high marks in the viva voce test that he was suitable for the service. The position of the candidates in the list was to be determined on the aggregate marks obtained by a candidate both in written as well a viva voce test. Rule 21 provides that the Governor shall on receipt of the list prepared by the Commission consult the High Court and after into consideration the views of the High Court, select candidates for appointment from amongst those who stand highest in order of merit in the list if they are duly qualified in other respects. Rule 22 provides that the seniority of candidates shall be determined by the year of competitive examination on the results of which a candidate is recruited and his position in the list prepared under Rule 19. The Rules were amended by a notification dated January 31, 1972. After the amendment the Rules are known as the U. P. Nyayayik Seva Niyamavali 1951. Under the amended Rules the service has been designated as the U. P. Nyayayik Seva. It is not necessary to refer to all the amended provisions of the Niyamavali. After the amendment Rule 15 provides that the examination shall consist of written examination and interview to assess all round student career of the candidates and their personality, dress and general suitability. Rule 19 after the amendment reads as under :

> 19. List of candidates approved by the Commission. - The Commission shall prepare a list of candidates who have taken the examination for recruitment to the service in order of their proficiency as disclosed by the aggregate marks finally awarded to each candidate. If two or more candidates obtain equal marks in the aggregate, the Commission shall arrange them in order of merit on the basis of their general suitability for the service :
>
> Provided that in making their recommendation the Commission shall satisfy themselves that the candidate has obtained such an aggregate of marks in the written test that he is qualified by his ability for appointment to the service.

A glance at the amended Rule 19 would show that the two clauses of the proviso have been omitted. Instead the new proviso to Rule 19 has been inserted which lays down that in preparing the list of the approved candidates the Commission shall satisfy itself that the candidate has obtained such aggregate of marks in the written test that he is qualified by his ability for appointment to the service. Now, after the amendment the Commission has no power to prescribe or fix any minimum marks qualifying for viva voce. Now it is not necessary for a candidate to be successful in the viva voce. Prior to the amendment a candidate could not be selected unless he had obtained minimum marks as fixed by the Commission in viva voce. The amended proviso of Rule 19 has dispensed with that requirement though viva voce test has been retained. It is not necessary to refer to other Rules as these are the only Rules which are relevant for the purposes of determining the controversy involved in these cases.

7. The "unplaced candidates" of 1970 Examination claimed seniority of 1970 in terms of Rule 22 even though they were appointed in 1975. The State Government as well as the High Court rejected their claim as in their view the "unplaced candidates" formed a separate class as their recruitment to the service was made in special circumstances, even though they had been unsuccessful at the examination. The High Court on its administrative side rejected their claim for seniority whereupon Rafiquddin and other "unplaced candidates" approached the High Court on the judicial side by filing the writ petition under Article 226 of the Constitution challenging the order rejecting their

representation. The Division Bench of the High Court constituting of M. N. Shukla and K. M. Dayal, JJ. held that the appointment of the "unplaced candidates" had been made in pursuance of the result of the competitive examination of 1970 and as such they were entitled to seniority of 1970 in accordance with Rule 22. The Bench further held that as the seniority in the service is determined on the basis of the year of the competitive examination the "unplaced candidates" belonging to the III list were entitled to be senior to those appointed to service on the basis of the result of the competitive examination of 1972 even though the "unplaced candidates" had been appointed to service later in time. As regards the inter se seniority of the candidates recruited to the service in pursuance of 1970 Examination the High Court held that the Commission had no authority to prescribe any minimum qualifying marks for viva voce and instead it should have prepared the list of successful candidates on the basis of aggregate marks secured by each candidate irrespective of the marks obtained by a candidate in viva voce. Adverting to proviso to Rule 19 the Bench observed : "It is true that the rule authorises the Public Service Commission to lay down such minimum marks but that it was so laid down prior to the holding of the examination of the year 1970 does not appear from the record. If any minimum marks were prescribed the candidate should have had notice of the same and only thereafter they could decide to appear or not to appear at the examination. The Public Service Commission cannot at its whim at any point of time without notice to the candidates fix minimum marks". On these findings the High Court directed that the merit list of 1970 recruits, should be drawn afresh on the basis of the aggregate marks secured by each candidate disregarding the qualifying marks fixed by the Public Service Commission for the viva voce test. The Division Bench directed that the seniority of the "unplaced candidates" include in the third list be re-fixed after rearranging the lists of candidates included in the I and II list on the basis of the aggregate marks. The effect of the judgment of the Bench has been that all those candidates who had been appointed to service in pursuance to the 1972 Examination have been made junior to the "unplaced candidates" of 1970 Examination although they were appointed much later. Further the seniority of regularly selected candidates and appointed to the service out of the I and II lists of the 1970 Examination is adversely affected on account of the rearrangement of the merit list as many of the unsuccessful candidates have become senior to those who had been included in the I and II list. Further the candidates who had passed along with the successful candidates of 1972 Examination also being unplaced candidates would go above all the candidates of the 1972 Examination including the candidates who had stood first in the 1972 Examination.

8. After hearing the learned counsel for the parties at length and having given anxious consideration to the controversy raised in these cases, we are of opinion that the Division Bench completely misconceived the Rules and rendered the judgment in total disregard of the facts available on record. As discussed earlier the Rules entrust the Public Service Commission with the duty of holding competitive examination and recommending the names of suitable candidates as approved by it for appointment to the service on the basis of the proficiency shown by the candidates at the examination adjudged on the basis of the aggregate marks secured by them. The appointment to service is made from the list forwarded by the Commission to the State Government. Seniority in the service is determined on the basis of the year of the competitive examination irrespective of the date of appointment and the intense seniority of candidates recruited to the service is determined on the basis of their ranking in the merit list. To recapitulate Rules 19, 21 and 22 as they stood during the year 1970 i.e. prior to their amendment is January 1972 were as under :

> 19. List of candidates approved by the Commission. - The Commission shall prepare a list of candidates who have taken the examination for recruitment to the service in order of their proficiency as disclosed by the aggregate marks finally awarded to each candidate. If two or more candidates obtain equal marks in the aggregate the

Commission shall arrange them in order of merit on the basis of their general suitability for the service :

Provided that in making their recommendations the Commission shall satisfy themselves that the candidate -

(i) has appointed such an aggregate of marks in the written test that he is qualified by his ability for appointment to the service;

(ii) has obtained in the viva voce test such sufficiently high marks that he is suitable for the service.

21. Appointment. - (1) Subject to the provisions of Rule 20, the Governor shall on receipt of the list prepared by the Commission consult the High Court and shall, after taking into consideration the views of the High Court, select candidates for appointment from amongst those who stand highest in order of merits in such list provided that he is satisfied that they duly qualified in other respects.

(2) The Governor may make appointment in temporary or officiating vacancies from persons possessing necessary qualifications prescribed under these Rules.

(3) All appointments made under this rule shall be notified in the official Gazette.

22. Seniority. - Subject to the provisions of Rule 31 the seniority of candidates already in service at the time when these Rules come into force would be determined according to the Rules in force previously and for those appointed subsequently the seniority shall be determined by the year of competitive examination on the results of which a candidate is recruited and the position in the list prepared under Rule 19.

Note. - A candidate may lose his seniority if without any reasonable cause he does not join his service when a vacancy is offered to him.

The aforesaid rules show that the Commission was required to prepare a list of candidates approved by it for appointment to the service. Rule 19 provided that the list of selected candidates should be arranged in order of merit on the basis of the aggregate marks finally awarded to each candidate in written as well as in viva voce test. Clause (1) of proviso to Rule 19 laid down that in making their recommendation, the Commission should satisfy itself that a candidate had obtained such aggregate of marks in the written test as to indicate that he was qualified by his ability for appointment to the service and further he had obtained in the viva voce test such sufficiently high marks that he was suitable for the service. In pursuance to clause (1) of the proviso, the Commission had power to fix minimum aggregate marks in written test for judging the suitability of a candidate for appointment to service. Similarly clause (ii) of the proviso conferred power on the Commission to fix the minimum marks for viva voce test to judge the suitability of a candidate for the service. One related to the fixation of the minimum in the aggregate marks in the written test while the other related to the fixation of the minimum marks in the viva voce test. The enacting clause of Rule 19 directed the Commission to prepare the list on the basis of the aggregate marks awarded to a candidate. Aggregate marks obtained by a candidate determined his position in the list, but the proviso of the rule

required the Commission to satisfy itself that the candidate had obtained such aggregate marks in the written test as to qualify him for appointment to service and further he had obtained such sufficiency high marks in viva voce which would show his suitability for the service. The scheme underlying Rule 19 and the proviso made it apparent that obtaining of the minimum aggregate marks in the written test and also the minimum in the viva voce was the sine qua non before the Commission could proceed to make its recommendation in favour of a candidate for appointment to the service. The Commission in view of clause (ii) of the proviso had power to fix the minimum marks for viva voce for judging the suitability of a candidate for service. Thus a candidate who had merely secured the minimum of the aggregate marks or above was not entitled to be included in the list of successful candidates unless he had also secured the minimum marks which had been prescribed for the viva voce test. The Commission was required to include the name of candidates in the list prepared by it under Rule 19 on the basis of the aggregate of marks as obtained by each candidate both in written was well as in the viva voce test. Rule 20 provides that no person shall be appointed as member of the service unless he is medically fit. It further provides that a candidate who has passed the competitive examination and is finally approved for appointment to the service shall be required to pass an examination by a Medical Board. Rule 21 provides that the Governor, on receipt of the list prepared by the Commission under Rule 19 shall select candidates for appointment from amongst those who stand highest in order of merit in "such list" after taking into consideration the views of the High Court. The expression "such list" in Rule 21 obviously refers to the list prepared by the Commission under Rule 19. It Is, therefore, manifest that only those candidates can be appointed to the service who are included in the list prepared by the Commission under Rule 19. If the Commission does not approve and include the name of a candidate in the list prepared by it under Rule 19, he cannot be appointed to the service under Rule 21. Rule 22 provides that the seniority in the service shall be determined by the year of competitive examination on the results of which a candidate is recruited and his position in the list prepared under Rule 19. The rule clearly postulates determination of seniority of members of the service recruited to the service through competitive examination with reference to their position in the list of approved candidates prepared by the Commission under Rule 19. The expression "member of the service" as defined by Rule 4(e) means a person appointed in substantive capacity under the provisions of the Rules. Rule 22 read with Rule 4(e) lays down in unmistakable terms that the seniority of members of service is to be determined on the basis of the year of competitive examination and not otherwise. In other words only those persons who are appointed in accordance with the Rules on the result of a competitive examination are entitled to the determination of their seniority in accordance with Rule 22. Seniority of a candidate appointed to the service would depend upon the result of the competitive examination and his position in the list prepared under Rule 19. Claim to seniority under Rule 22 cannot be upheld if a candidate is not approved for appointment under Rule 19 and has not found his way into the service on the recommendation of the Commission. We therefore hold that the claim to seniority on the basis of the year of competitive examination as contemplated by Rule 22 is available only to those candidates who are approved by the Commission on the basis of their marks in the written and viva voce test at the examination.

9. Learned counsel for the respondent (unplaced candidates) urged that clause (2) of the proviso to Rule 19 did not confer power on the Commission to fix any qualifying minimum marks for viva voce. In the alternative he challenged the constitutional validity of the proviso on the ground of excessive delegation of legislative power. Rule 19 as it stood in the year 1970 read with Rule 18 and Appendix E and the Note I of clause (5) of Appendix E required that the aggregate of marks obtained in the written and viva voce test, determined a candidate's rank in the merit list. These provisions conferred power on the Commission to fix qualifying marks in the written test and if a candidate failed to obtain the minimum marks in the written test the Commission might refuse to call him for viva voce test. The enacting clause of Rule 19 provided guidance for the Commission in preparing the list of approved candidates on the basis of the Commission in preparing the list of approved candidates on the basis of the aggregate marks obtained by a candidate in the written as well as in viva voce test. Clause (2) of the proviso to Rule 19 did not no doubt expressly lay down that the minimum marks for the viva voce had to be prescribed but the language used therein clearly showed that the Commission alone had the power to prescribe minimum marks in viva voce test for judging the suitability of a candidate for the service. That is the clear meaning of the words in the proviso to Rule 19 "provided that in making their recommendation the Commission shall satisfy themselves that the candidate (i).... (ii) has obtained in the viva voce test such sufficiently high marks that he is suitable for the service". Commission is required to judge the suitability of a candidate on the basis of sufficiently high marks obtained by a candidate in the viva voce test, it has to fix some percentage of marks which in its opinion may be sufficient to assess the suitability of a candidate. In the absence of a fixed norm, there could be no uniformity in assessing suitability of candidates in the viva voce test. The Commission had therefore power to fix the norm and in the instant case it had fixed 35 per cent minimum marks for viva voce test. The viva voce test is well recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce test are fixed to determine the suitability of a candidate the same has to be respected. Clause (ii) of the proviso to Rule 19 clearly confers power on the Commission to fix minimum marks for viva voce test for judging the suitability of a candidature for the service. We do not find any constitutional legal infirmity in the provision.

10. The learned counsel placed reliance on a Division Bench judgment of the Mysore High Court in K. N. Chandra Sekhara v. State of Mysore [AIR 1963 Mys 292]. In that case A. R. Somnath Iyer, J. speaking for the Bench observed that the power to fix minimum marks in viva voce test for judging the suitability of a candidate for appointment to State Judicial Service was legislative in character and it could not be exercised by the Public Service Commission. He also held that under Article 234 of the Constitution it would be a special duty and responsibility of the Commission alone to make a rule prescribing the minimum marks for viva voce examination and in the absence of such a rule the committee constituted could not prescribe any such minimum standard. No doubt this decision supports the submission raised on behalf of the unplaced candidates but a Full Bench of the Mysore High Court had not approved the view taken in K. N. Chandra Sekhara case [AIR 1963 Mys 292] as can be gathered from T. N. Manjula Devi v. State of Karnataka [1980 Lab IC 759]. In the latter case the court held that the process of selection of suitable candidates and that had to be fixed by the selection committee. Learned counsel for the respondent referred to a decision of this Court in Durgacharan Misra v. State of Orissa [(1987) 4 SCC 646 : 1988 SCC (L&S) 36], for the proposition that the Commission had no power to fix the qualifying marks for the viva voce test. We have carefully considered the decision but we do not find anything therein to support the respondents'

contention. In that case the question for consideration before this Court was whether the minimum marks prescribed by the Commission for the viva voce test for appointment to the State Judicial Service of Orissa was justified. The court on an analysis of the relevant rules of the Orissa Judicial Service Rules, 1964 held that there was no rule prescribing the minimum qualifying marks for the viva voce test. The court found that the Commission had fixed qualifying marks and on that basis it had excluded candidates securing higher marks in written test. The court allowed the petition and quashed the selection made by the Commission and directed the Commission to prepare the select list afresh on the basis of the aggregate marks obtained by the candidates in the written examination and the viva voce test. This decision does not advance the case of respondents in view of clause (ii) of the proviso to Rule 19. So long clause (ii) of proviso to Rule 19 remained in force the Commission had power to fix minimum qualifying marks for the viva voce test. Thus even if a candidate had obtained higher aggregate marks in written and viva voce test but if he had failed to secure the minimum marks in the viva voce test his name could not be included in the list prepared by the Commission under Rule 19. This view was taken by another Bench of the High Court in D. P. Shukla case [Now C.A. No. 3736 of 1982 under appeal herewith], and with which we agree. There is no dispute that none of the unplaced candidates of 1970 examination (those included in the III list) had secured minimum marks of 35 per cent in the viva voce test and for that reason they were not approved by the Commission, although they had obtained more than 40 per cent marks in the aggregate.

11. Learned counsel for the respondents urged that 35 per cent of qualifying marks fixed by the Commission for the viva voce test was unreasonable and excessive. In Lila Dhar v. State of Rajasthan [(1982) 1 SCR 320 : (1981) 4 SCC 159 : 1981 SCC (L&S) 588 : AIR SC 1777], this Court held that while a written examination assessed a candidate's knowledge and intellectual ability an interview test is valuable to assess a candidate's over all intellectual and other qualities. The interview permits an assessment of qualities of character which written papers ignore, it assesses the man himself and not his intellectual abilities. The court observed that there could not be any rule of thumb regarding the precise weight to be given to the viva voce test. It must vary from service to service according to the requirement of service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview is entrusted. There can be no doubt that viva voce test performs a very useful function of assessing personal characteristics and traits of a candidate. The answer to question as to what weight should be attached to viva voce test where both written and viva voce test are held for making the selection, would depend upon the purpose of the selection. Chinnappa Reddy, J. speaking for the Court observed : [SCC pp. 164-65, SCC (L&S) pp. 592-93, para 6]

Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life, greater weight has perforce to be given to performance in the written examination. The importance to be attached to the interview test must be minimal. That was what was decided by this Court in Periakaruppan v. State of Tamil Nadu [(1971) 1 SCC 38 : (1971) 2 SCR 430], Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] and other cases. On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic a professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an

act of cruelty to those persons. There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the thereshold of development and who show signs of great promise, and the discerning may in an interview test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great a weight, to the interview test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union Public Service Commission.

In A. K. Yadav v. State of Haryana [(1985) 4 SCC 417 : 1986 SCC (L&S) 88], a Constitution Bench of this Court approved the view expressed in Lila Dhar Case [(1982) 1 SCR 320 : (1981) 4 SCC 159 : 1981 SCC (L&S) 588 : AIR SC 1777]. The Court observed there cannot be any hard and fast rule regarding the weight to be given as against the written examination. It must vary from service to service; according to the requirement of the service, the minimum qualification, prescribed age group from which the selection is to be made, the body to which the task of holding the interview test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. The court does not possess the necessary equipment and it would not be right for the court to pronounce upon it. In Lila Dhar case [(1982) 1 SCR 320 : (1981) 4 SCC 159 : 1981 SCC (L&S) 588 : AIR SC 1777], 25 per cent of marks fixed for viva voce test was upheld. in A. K. Yadav case [(1985) 4 SCC 417 : 1986 SCC (L&S) 88], selection made by the Haryana Public Service Commission for appointment to the post of Haryana Civil Service (Executive and other allied services) was under challenge. The court held that allocation of 33.3 per cent for viva voce was high as it opened door for arbitrariness and in order to diminish it if not eliminate the same the percentage needs to be reduced. The Constitution Bench made observation that marks for viva voce test should not exceed 12.2 per cent. In spite of these observations the Constitution Bench did not interfere or strike down the selection instead it directed the Commission to give one more opportunity to the aggrieved candidates to appear at the competitive examination. In the instant case there has been no allegation of mala fides or arbitrariness against the Commission which held the viva voice test. In the circumstances we do not consider it necessary to set aside selection or issue any direction to the Public Service Commission or to the State Government as rules relating to via voce test have already been amended. After the amendment of the Rules on January 31, 1972 no minimum qualifying marks can be fixed by the Commission for viva voce test and therefore it is not necessary to issue any direction in the matter.

12. The Division Bench of the High Court observed that the Commission had no authority to fix any minimum marks for the viva voce test and even if it had such a power it could not prescribe the minimum marks without giving notice to the candidates. The Bench further observed that if the Commission had given notice to the candidates before the steps for holding the competitive examination were taken the candidates may or may not have appeared at the examination. In our opinion the High Court committed a serious error in applying the principles of natural justice to a competitive examination. There is a basic difference between an examination held by a college or university or examining body to award degree to candidates appearing at the examination and a competitive examination. The examining body or the authority prescribes minimum pass marks. If a person obtains the minimum marks as prescribed by the authority he is declared successful and

placed in the respective grade according to the number of marks obtained by him. In such a case it would be obligatory on the examining authority to prescribe marks for passing the examination as well as for securing different grades well in advance. A competitive examination on the other hand is of different character. The purpose and object of the competitive examination is to select most suitable candidates for appointment to public services. A person may obtain sufficiently high marks and yet he may not be selected on account of the limited number of posts and availability of persons of higher quality. Having regard to the nature and characteristics of a competitive examination it is not possible nor necessary to give notice to the candidates about the minimum marks which the Commission may determine for purposes of eliminating he unsuitable candidates. The rule of natural justice does not apply to a competitive examination.

13. The question arises as to whether the unplaced candidates "included in the III list" were appointed to the service on the result of the competitive examination of 1970. We have already referred to necessary facts in detail indicating the circumstances under which the unplaced candidates (included in the IIIrd list) of 1970 Examination were appointed. Initially the Public Service Commission had fixed 40 per cent of aggregate marks and 35 per cent as minimum marks in the viva voce test for judging the suitability of candidates and on that basis it had recommended 46 candidates for appointment but subsequently on a suggestion made by the government the Commission forwarded another list of 33 candidates for appointment to service on the basis of 35 per cent marks in the aggregate as well as 35 per cent minimum marks in viva voce. In forwarding the I and the II list, the Commission had applied the criteria of minimum marks of 35 per cent in viva voce test. The Commission had not recommended any candidate in either of the two lists, who had failed to secure minimum marks of 35 per cent in viva voce test. After the amendment of Rule 19 and deletion of the two provisos the State Government on the representation of the unsuccessful candidates of 1970 Examination made suggestion to the Commission for approving more candidates of the examinations held in 1967, 1968, 1969 and 1970 for appointment to the service on the basis of 40 per cent of marks in aggregate disregarding the minimum marks fixed for viva voce. The Commission refused to accept the suggestion but subsequently in pursuance of the decision taken by the high level committee it forwarded the list of 37 unsuccessful candidates of 1970 Examination who had obtained 40 per cent or more marks in the aggregate but had not qualified in the viva voce. The Commission by its letter dated June 19, 1974 forwarded the list of 37 candidates to the State Government. The Commission's letter shows that it had not approved the appointment of those included in the III list as they had failed to secure minimum prescribed marks in the viva voce test. During the course of hearing before us, serious dispute and doubt was raised on the genuineness of the annexure to the letter on behalf of the "unplaced candidates". It was suggested on their behalf that the Commission had approved and recommended the names mentioned in the III list for appointment and that it had nowhere stated that they were unsuccessful candidates or that they had not been found suitable by the Commission. In order to resolve this controversy, on our directive, the State counsel produced the original of the letter before the court and on a perusal of the same we found that the Commission had neither in the body of the letter nor in the annexure appended thereto ever expressed its views that the candidates mentioned therein had been found suitable by it. On the contrary, the note appended to the list which was annexed to the letter clearly stated that the candidates mentioned in the list had not been found suitable by the Commission. This would clearly show that the unplaced candidates (those included in the III list) were unsuccessful at the competitive examination and their names were not included in the list of approved candidates as contemplated by Rule 19 as they failed to obtain the minimum marks in the viva voce test. The Commission had never made any recommendation for their appointment instead under the influence of the government, it had forwarded the list without its recommendation. The appointment of

unplaced candidates made in pursuance of the decision taken by the high level committee, is not countenanced by the Rules. There is no escape from the conclusion that the unplaced candidates were not appointed to the service on the basis of the result of the competitive examination of 1970. Their appointment was made in breach of the Rules, in pursuance to the decision of the high level committee. It is well settled that where recuritment to service is regulated by the statutory rules, recruitment must be made in accordance with those Rules; any appointment made in breach of rules would be illegal. The appointment of 21 "unplaced candidates" made out of the III list was illegal as it was made in violation of the provisions of the Rules. The high level committee which took decision for recruitment of candidates to the service on the basis of the 40 per cent aggregate marks disregarding the minimum marks fixed by the Commission for viva voce test had no authority in law, as the Rules do not contemplate any such committee and any decision take by it could not be implemented.

14. We are surprised that the Chief Justice, Chief Minister as well as the Chairman of the Commission agreed to adopt this procedure which was contrary to the Rules. The high level committee even though constituted by highly placed persons had no authority in law to disregard the Rules and to direct the Commission to make recommendation in favour of unsuccessful candidates disregarding the minimum marks prescribed for the viva voce test. The high level committee's view that after the amendment of Rule 19, the minimum qualifying marks fixed for viva voce could be ignored was wholly wrong. Rule 19 was amended in January 1972, but before that 1970 Examination had already been held. Since the amendment was not retrospective the result of any examination held before January 1972 could not be determined on the basis of amended Rules. The Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. It secures efficiency in the public administration by selecting suitable and efficient persons for appointment to the services. The Commission has to perform its functions and duties in an independent and objective manner uninfluenced by the dictates of any other authority. It is not subservient to the directions of the government unless such directions are permissible by law. Rules vest power in the Commission to hold the competitive examination and to select suitable candidates on the criteria fixed by it. The State Government or the high level committee could not issue any directions to the Commission for making recommendation in favour of those candidates who failed to achieve the minimum prescribed standards as the Rules did not confer any such power on the State Government. In the view even if the Commission had made recommendation in favour of the unplaced candidates under the directions of the government the appointment of the unplaced candidates was illegal as the same was made in violation of the Rules.

15 On behalf of the respondents the "unplaced candidates" it was contended that there was acute shortage of Munsif/Magistrates in the State as a result of which large number of cases were pending in the courts. In order to meet the shortage of Munsifs State Government and the high level committee, keeping in view the amendment of Rule 19 suggested to the Commission to recommend the names of those candidates who may have obtained 40 per cent or more marks in the aggregate disregarding the minimum qualifying marks fixed for the viva voce test in the examination of 1967, 1968, 1969 and 1970. It was urged that the suggestion of the committee was accepted by the Commission and therefore it forwarded the names of 37 candidates for appointment to the service. We have already noticed that the Commission never agreed to the proposal. The Chairman of the Commission was a member of the high level committee but the Commission never took any decision to accept the proposals of the high level committee. No material has been placed before the court to support this contention. On the contrary, the Commission's letter dated June 19, 1974, clearly indicates that the Commission as directed by the State Government merely forwarded the list

of 37 candidates of 1970 examination, without making any recommendation and yet they were appointed in service in breach of the Rules. But even if the Commission had agreed to the government's suggestion, their appointments continued to be illegal, as the same were made in breach of Rules. There was no justification for the appointment of the unsuccessful candidates in 1975, because by that time result of 1972 Examination has been announced and duly selected candidates were available for appointment.

16. In this context, it is necessary to consider as how to long the list of candidates for a particular examination can be utilised for appointment. There is no express provision in the Rules as to for what period the list prepared under Rule 19 can be utilised for making appointment to the service. In the absence of any provision in the Rules a reasonable period must be followed during which the appointment on the basis of the result of a particular examination should be made. The State Government and the Commission had announced 85 vacancies for being filled up through the competitive examination of 1970. In normal course, 85 vacancies could be filled on the basis of the result of the competitive examination of 1970 but if all the vacancies could not be filled up on account of non-availability of suitable candidates, the appointment to the remaining vacancies could be made on the basis of the result of the subsequent competitive examination. The unfilled vacancies of 1970 Examination could not be filled after 5 years as subsequent competitive examinations of the year 1972 and of the year 1973 has taken place and the results had been declared. The list prepared by the Commission on the basis of the competitive examination of a particular year could be utilised by the government for making appointment to the service before the declaration of the result of the subsequent examination. If selected candidates are available for appointment on the basis of the competitive examinations of subsequent years, it would be unreasonable and unjust to revive the list of earlier examination by changing norms to fill up the vacancies as that would adversely affect the right of those selected at the subsequent examination in matters relating to their seniority under Rule 22. The 1970 Examination could not be utilised as a perennial source or inexhaustible reservoir for making appointments indefinitely. The result of a particular examination must come to an end at some point of time, like a "dead ball" in cricket. It could be kept alive for years to come for making appointments. The practice of revising the list prepared by the Commission under Rule 19 at the behest of the government by lowering down the standards and norms fixed by the Commission to enable appointment of unsuccessful candidates is subversive of rule of law. This practice is fraught with dangers of favouritism and nepotism and it would open back door entry to the service. We are, therefore, of the opinion that once the result of the subsequent examination of 1972 was declared, the Commission could not revise the list of approved candidates of 1970 Examination prepared by it under Rule 19 at the behest of the government by lowering down the standard fixed by it.

17. In C. Channabasavaiah v. State of Mysore [(1961) 1 SCR 360 : AIR 1965 SC 1293], the Mysore Public Service Commission made selection and appointment to services in the Mysore State to Class I and II posts of Administrative Services. After the viva voce interviews were held the Commission published a list of 98 successful candidates who were appointed. After the announcement of the results, the State Government sent a list of 24 candidates for the consideration of the government (sic Commission) and the Commission approved it. These 24 candidates also were appointed. Sixteen candidates who had not been selected filed a writ petition before the Mysore High Court. During the pendency of the writ petition a compromise was effected, as a result of an undertaking given by the government before the High Court and the 16 petitioners were also appointed. Thereafter, some other candidates who had not been selected, filed petition under Article 32 of the Constitution before this Court challenging the selection of 24 candidates selected by the government and the 16 persons who has filed the writ petition. This Court set aside the appointments made at the

instance of the government and of the 16 writ petitioners. The Court observed : (SCR p. 365)

It seems surprising that government should have recommended as many as 24 names and the Commission should have approved of all those names without a single exception even though in its own judgment some of them did not rank as high as others they had rejected. Such a dealing with public appointments is likely to create a feeling of distrust in the working of the Public Service Commission, which is intended to be fair and impartial and to do its work free from any influence from any quarter.

The procedure adopted for selection and the appointment practised discrimination in violation of Articles 14 and 16 of the Constitution. While setting aside the selection and appointment the court observed : (SCR p. 366)

It is very unfortunate that these persons should be uprooted after they had been appointed but if equality and equal protection before the law have any meaning and if our public institutions are to inspire that confidence which is expected of them we would be failing in our duty if we did not, even at the cost considerable inconvenience to government and the selected candidates to do the right thing.

In Umesh Chandra Shukla v. Union of India [(1985) 3 SCC 721 : 1985 SCC (L&S) 919], a competitive examination was held for appointment to the posts of Subordinate Judges in Delhi Judicial Service. Out of the candidates who appeared in the written examination only 27 candidates could qualify for viva voce test. The High Court approved the list of 27 qualified candidates but having regard to the fact that some candidates who had otherwise scored very high marks had been kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or the qualifying marks prescribed for the particular paper, the High Court directed that moderation of two marks in each paper to every candidate be done. As a result of moderation of two marks a second list was prepared showing the names of eight more candidates who also qualified for viva voce test. Petitions were filed by the unsuccessful candidates challenging the procedure adopted by the High Court and the selection committee in the preparation of the final list of the successful candidates. This Court struck down the list prepared by the High Court after adding the moderation marks. The court observed that the High Court had no power to include the names of candidates who had not initially secured the minimum qualifying marks by resorting to the device of moderation, particularly when there was no complaint either about the question papers or about the mode of valuation. In striking out the list prepared by the High Court, this Court observed : [SCC p. 735, SCC (L&S) p. 932, para 13]

Exercise of such power of moderation is likely to create a feeling of distrust in the process of selection to public appointments which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness.

18. We are in agreement with the views expressed in the aforesaid decisions. The appointment of the unplaced candidates of 1970 Examination at the behest of the high level committee was unwarranted by law and it was likely to create a feeling of distrust in the process of selection for appointment to public services which is intended to be fair and impartial. The high level committee had no power to lower down the standards fixed by the Commission with a view to accommodate unsuccessful candidates in the judicial services. The procedure adopted in appointing the unplaced candidates of 1970 Examination was unauthorised by law and it practised discrimination in violation of Article 14 and Article 16 of the Constitution.

19. The unplaced candidates were appointed to the service in breach of the Rules and they form a separate class. They cannot be equated with those who were appointed to the service from the first and second list of 1970 Examination as their appointment was made on the recommendation of the Public Service Commission. They remain unchallenged. Similarly, candidates appointed to the service on the basis of the result of the competitive examination of 1972 before the unplaced candidates were appointed, formed separate class as they were also appointed in accordance with the Rules. The "unplaced candidates" of 1970 Examination cannot claim seniority over them on the basis of Rule 22 of their appointment was not made on the basis of the list approved by the Commission under Rule 19. In Shitla Prasad Shukla v. State of U.P. [1986 Supp SCC 185 : 1986 SCC (L&S) 584] this Court held that an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those who may have been regularly and properly appointed.

20. We have recorded findings that 21 unplaced candidates of 1970 Examination were appointed to the service illegally in breach of the Rules. We would, however, like to add that even though their appointment was not in accordance with law but the judgment and orders passed by them are not rendered invalid. The unplaced candidates are not usurpers of office, they were appointed by the competent authority to the posts of Munsifs with the concurrence of the High Court, though they had not been found suitable for appointment according to the norms fixed by the Public Service Commission. They have been working in the judicial service during all these years and some of them have been promoted also and they have performed their functions and duties as de facto judicial officers. "A person who is ineligible to judgeship, but who has nevertheless been duly appointed and who exercises the powers and duties of the office is a de facto judge, he acts validly until he is properly removed." Judgment and orders of a de facto cannot be challenged on the ground of his ineligibility for appointment. This doctrine is founded upon sound principles of public policy and justice. In Achanti Sreenivasa Rao v. State of A.P. [(1981) 3 SCC 132], the de facto doctrine in relation to a judicial officer was considered at length. Chinnappa Reddy, J. speaking for the Court observed : (SCC pp. 140-141, para 17)

A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may latter be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack.

We have adverted to this aspect of the case in order to avoid any challenge to the validity of judgments and orders by the unplaced candidates of the 1970 Examination on the ground of legal infirmity in their appointments. But having regard to the period of 12 years that have elapsed we do

not propose to strike down their appointments.

21. Now the question arises as to what seniority should be assigned to the unplaced candidates. Their claim for assigning them seniority on the basis of the competitive examination of 1970 is not sustainable in law as discussed above. They were appointed to service after five years of the examination and before their appointment competitive examination of 1972 had taken place and candidates selected under that examination had been appointed to service prior to their appointment. The directions issued by the High Court for rearranging the merit list of 1970 examination seriously affect the seniority of those who were regularly selected in accordance with the norms prescribed by the Commission. Having regard to these facts and circumstances of the case we are of the opinion that the view taken by the High Court on its administration side and the State Government that the unplaced candidates of 1970 examination should be assigned seniority below the last candidate of 1972 Examination appointed to the service is just and reasonable. In our opinion it would be just and proper to assign seniority to the unplaced candidates of 1970 Examination at the bottom of the list of 1972 candidates. There were 37 unplaced candidates of 1970 Examination who were included in the III list, out of them 16 candidates appeared in the 1972 examination and they were successful and their names were approved by the Commission in the list prepared under Rule 19. The State Government appointed them in service. Under Rule 22 they are entitled to seniority of 1972 Examination but in view of the judgment of the High Court in Rafiquddin case their seniority has been determined on the basis of their recruitment to service under the 1970 Examination. We have already recorded findings that unplaced candidates of 1970 Examination (as included in the III list) have not been recruited in service according to the Rules and their recruitment to service cannot be treated under 1970 Examination for purposes of determining their seniority under Rule 22. We have further directed that 21 unplaced candidates of 1970 Examination should be placed below the candidates of 1972 Examination. But so far as 16 remaining candidates are concerned, they were appointed to the service on the legal infirmity. They are therefore entitled to seniority of 1972 Examination on the basis of their position in the merit list of that examination. They are however not entitled to the seniority of 1970 on the basis of the examination of that year as held by the High Court.

22. We accordingly set aside the order of the Division Bench dates March 30, 1982 and direct the High Court and the State Government to determine the seniority of the 21 unplaced candidates of 1970 Examination by placing them at the bottom of the candidates appointed on the result of 1972 examination. We accordingly allow Civil Appeal No. 4023 of 1982 and Civil Appeal No. 4024 of 1982.

Civil Appeal No. 3736 of 1982

23. This appeal is directed against the judgment of another Division Bench of the High Court consisting of Satish Chandra and A. N. Verma, JJ. dated March 30, 1982. The appellants appeared at the 1970 Examination but they remained unsuccessful as they failed to secure 35 per cent of minimum marks at the viva voce test, although they had secured higher marks in the aggregate than those selected and appointed. They challenged the selection made in pursuance of 1970 Examination. The Division Bench held that since the minimum marks fixed for viva voce test was integral part of the examination and as the appellants had failed to secure the requisite minimum marks in viva voce test, they were not entitled to selection. The view taken by the Division Bench is consistent with our view. Accordingly, we dismiss the appeal.

Writ Petition 4636 of 1982

24. The petitioner C. P. Agarwal was unsuccessful at the 1970 Examination as he failed to obtain the minimum marks prescribed for vice voce test, although he had obtained more than 40 percent marks in aggregate. For the reasons states earlier he cannot be granted relief of appointment to the service. Further he is disentitled to any relief on the ground of inordinate delay. The validity of the examination of 1970 was challenged before this Court in 1982. There is no plausible explanation for the delay. The petition is liable to dismissed and we accordingly dismiss it.

Writ Petition No. 12818 of 1984

25. The petitioner was recruited to the service on the basis of the competitive examination of 1972. He is aggrieved by the direction issued by the Division Bench of the High Court in Rafiquddin case, as his seniority was affected adversely. We have already taken the view that the unplaced candidates of 1970 Examination cannot be senior to the candidates appointed in the service as a result of the 1972 Examination. The writ petition succeeds to that extent.

Transfer Case No. 15 of 1987

26. The petitioners were recruited to the U. P. Nayayayik Seva on the basis of the result of the competitive examination of 1972. They are aggrieved by the direction issued by the Division Bench in Rafiquddin's case for rearranging the seniority. Since we have already expressed the view that the unplaced candidates of 1970 Examination are not entitled to seniority over the candidates appointed to the service on the result of the 1972 Examination, the petition is to succeed partly.

Writ Petition No. 13047 of 1985

27. The petitioner was appointed to service on November 22, 1976 on the basis of the result of the 1973 Examination. His main grievance is that respondents 3 to 15 to the petition have been shown senior to him although they were appointed in service between May 1976 to November 1977 on the basis of the result of competitive examination of 1972. Since the respondents were treated senior by the High Court, they were promoted to the post of Chief Judicial Magistrate/Civil Judge ignoring the petitioner's claim. On behalf of the petitioners, two submissions were made : (i) respondents 3 to 15 were appointed later in time, consequently they cannot be treated senior to the petitioner; (ii) the selection and the appointment of respondents 3 to 15 was against rules and as such they are not entitled to seniority over the petitioner who is regularly selected candidate.

28. We do not find any merit in either of the two submissions. Rule 22 lays down criteria for determination of the seniority of members of service. It directs that the seniority shall be determined on the basis of the year of examination which means that a person recruited to the service in pursuance of the result of a particular year of examinations would rank senior to the candidate who is recruited to service in pursuance of result of subsequent year of examination although he may have actually been appointed earlier in time. After the selection of candidates, several formalities are followed before appointment is made under Rule 21. The selected candidates are required to undergo medical examination, their character and antecedents are verified and the approval of High Court is obtained and only thereafter the Governor appoints them by issuing notification. Many a time, this process causes delay in making the actual appointment and in that process sometimes persons selected on the basis of subsequent examination are appointed before the successful candidates of earlier examination are appointed. But in view of Rule 22 the latter shall be senior to the former irrespective of the date of appointment. Since there has been challenge to Rule 22 and the appointment is not shown to be illegal for the reasons which we presently give, it must be

applied in its plain terms in determining the seniority of those recruited to service in accordance with Rules. The petitioner was appointed in service on the basis of the result of the 1973 Examintion while respondents 3 to 15 were recruited to service on the basis of the result of the 1972 Examination. Therefore, according to Rule 22, respondents 3 to 15 are entitled to be senior to the petitioner. The mere fact that the petitioner was appointed few months before respondents 3 to 15 were appointed, cannot override the express provision of Rule 22.

29. As regards the second submission raised on behalf of the petitioner, we do not find any illegality in the appointment of respondent 3 to 15. The competitive examination in 1972 was held for recruiting 150 candidates, the examination was held in 1973 and 1974. Sixteen successful candidates of 1972 Examination were included in the list of 37 unplaced candidates of 1970 Examination and the Government has appointed them in service treating them as unplaced candidates of 1970 Examination. On the request of the State Government, the Public Service Commission made recommendation in favour of 16 more candidates on the basis of result of 1972 Examination which included the names of respondents 3 to 15 and they were appointed to the service between May 1976 to November 1977. Their appointment in service was made by the State Government on the recommendation of Public Service Commission made in accordance with Rule 19 as they has obtained the requisite aggregate marks in the written and vice voce test. Unlike the 21 unplaced candidates of 1970 Examination respondents 3 to 15 were appointed in accordance with the Rules; they are therefore entitled to their seniority in terms of Rule 22. We find no merit in the petition.

30. Before we close we would like to refer certain aspects which came to our notice during the hearing of the case relating to the functioning of the Public Service Commission, selection of candidates and their appointment to the Judicial Service. We were distressed to find that the Public Service Commission has been changing the norms fixed by it for considering the suitability of candidates at the behest of the State Government after the declaration of results. We have noticed that while making selection for appointment to the U.P. Judicial Service the Commission had initially fixed 40 per cent aggregate marks and minimum 35 per cent marks for viva voce test and on that basis it had recommended list of 46 candidates only. Later on at the instance of the State Government it reduced the standard of 40 per cent marks in aggregate to 35 per cent and on that basis it forwarded a list of 33 candidates to the government for appointment to the service. Again at the behest of the State Government and with a view to implement the decision of the high level committee consisting of Chief Justice, Chief Minister and the Chairman of the Commission forwarded name of 37 candidates in 1974 ignoring the norms fixed by it for judging the suitability of candidates. The Commission is an independent expert body. It has to act in an independent manner in making the selection on the prescribed norms. It may consult the State Government and the High Court in prescribing the norms for judging the suitability of candidates if no norms are prescribed in the Rules. Once the Commission determines the norms and makes selection on the conclusion of the competitive examination and submits list of the suitable candidates to the government it should not reopen the selection by lowering down the norms at the instance of the Government. If the practice of revising the result of competitive examination by changing norms is followed there will be confusion and the people will lose faith in the institution of Public Service Commission and the authenticity of selection. The State Government had made a preposterous suggestion to the Commission that unsuccessful candidates of 1967, 1968, 1969 should be selected and recommended for appointment by ignoring the marks obtained by them in viva voce test. If the Commission had accepted the government's suggestion and forwarded the list and appointments had been made in 1975 as was done in the case of unplaced candidates of 1970 Examination, it would have made a mockery of the entire system. We are of opinion that the Commission should take firm stand in these matters in making the selection in accordance with the norms fixed by law or fixed by

it in accordance with law uninfluenced by the directions of the State Government unsupported by the Rules.

31. We have noticed that a retired judge of the High Court is appointed as an expert to assist the Commission in making the selection for appointment to the Judicial Service. This practice is not desirable. In A. K. Yadav case [(1985) 4 SCC 417 : 1986 SCC (L&S) 88] service of the State is made it is necessary to exercise the utmost care to see that competent and able persons possessing a high degree are selected because if we do not have good, competent and honest judicial officers the democratic quality of the State itself will be in serious peril. It is therefore essential that when selections to the judicial service are being made a sitting judge of the High Court should be nominated by the Chief Justice of the State to participate in the interview as an expert. The Constitution Bench further observed that a sitting High Court judge would be in a better position to give advice to the Commission in the matter relating to selection of suitable candidates and his advice would be binding on the Commission unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Commission. The Constitution Bench had issued directions to the Public Service Commission of every State to follow this direction but it appears that in the State of U.P. this direction is not being not followed. We therefore direct that in future selection for appointment to the Judicial Service shall be made by the Commission on the expert advice of a sitting judge of the High Court nominated by the Chief Justice.

32. There is another aspect which requires consideration. Seniority of officers recruited to the service is determined on the basis of the year of the competitive examination under which they are recruited. We have noticed that generally there is a considerable interregnum between holding of the examination and the appointment of the selected candidates. Those selected under 1970 Examination were appointed in 1973, 1974 and 1975 while those selected under the 1972 Examination were appointed in 1975 and 1976 and also in 1977. Similarly the successful candidates of 1973 Examination were appointed in 1976 and 1977. No system was followed in making appointments as some of the candidates selected in subsequent examination were appointed earlier to those selected under the earlier examination, with the result those appointed to the service later in time are made senior to those appointed in service earlier in time in accordance with Rule 22. This causes heart burning and other complications. In order to avoid these complications it is necessary that every effort should be made to appoint the successful candidates of a particular examination before any candidate of subsequent examination is appointed. If for some reason this is not possible the State Government and the High Court both should consider the desirability of amending Rule 22 to ensure that the length of service rendered by an offer is respected.

33. In the result, Civil Appeal No. 4023 of 1982 and Civil Appeal No. 4024 of 1982 are allowed. Civil Appeal No. 3736 of 1982 is dismissed. Writ petition No. 4636 of 1982 and Writ petition No. 13047 of 1985 are dismissed. Writ petition No. 12818 of 1985 and Transfer Case No. 15 of 1987 (transferred petition) are allowed partly. There will be no order as to costs in these cases.

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