

G. C. Gupta And Others

Vs

N. K. Pandey and Others

Civil Appeal No. 1717 of 1981

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

08.12.1987

JUDGMENT

A. P. SEN, J.

(concurring) - I have had the benefit of going through the judgment prepared by my learned brother Ray, J. and I agree with the order proposed to be made. In view of the importance of the questions involved, I would however like to add a few words.

2. I have no doubt in my mind that temporary Assistant Engineers were entitled to the benefit of their seniority reckoned according to the date of the order of appointment to the Service in terms of Rule 23 of the United Provinces Service of Engineers (Buildings and Roads Branch) Rules, 1936, w.e.f. the date of their absorption into the Service by the Government in consultation with the Public Service Commission i.e. from the date from which they became 'Members of the Service' within the meaning of Rule 3(b) of the Rules. I had expressed the same view in *Ashok Gulati v. B. S. Jain* (1986 Supp SCC 597 : (1987) 2 ATC 608) and I still adhere to it.

3. As a matter of policy, the then Provincial Government by a notification dated August 31, 1942 directed under Rule 6 of the Rules that from the year 1942-43, two vacancies in the United Provinces Service of Engineers, both in the Buildings and Roads as well as in the Irrigation Departments, shall be reserved for two students of Thomson College of Civil Engineering, Roorkee who stood first and second in order of merit in the final examination of the degree course of engineering i.e. to the guaranteed posts. The reserved quota of guaranteed posts was later increased by the Government from two to four posts each year in each of the two branches. The system of direct recruitment of such engineer students to the two guaranteed posts was however discontinued by its notification dated June 22, 1950, w.e.f. the year 1953 i.e. the system of direct recruitment of merit scholars to the guaranteed posts was abolished in respect of the batch of students who joined the Thomson College of Civil Engineering, Roorkee/University of Roorkee from the month of October 1950, i.e. after the inauguration of the Constitution.

4. Again, as a matter of policy, the State Government by an office memorandum dated December 7, 1961 brought about a change in the method of recruitment of Assistant Engineers in the U.P. Service of Engineers, Buildings and Roads Branch. It provided for direct recruitment of such Assistant Engineers by competitive examination through the Public Service Commission from the year 1961. Paragraphs 1 and 2 of the said memorandum read as follows :

(1) The principles regulating selection for recruitment to permanent and temporary posts of Assistant Engineer in the various State Engineering Services have been under the consideration of Government for some time past and after thorough consideration, the Governor is pleased to order 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 United Provinces Service of Engineers in the Department concerned will be eligible to appear at the examination for that particular service.

(2) Successful candidates in order of merit will subject to the relevant rules regarding physical fitness and other matters, be appointed directly on probation against vacant permanent posts and those following will be appointed against temporary posts.

5. By a G.O. dated April 19, 1950, the State Government settled the principle that persons appointed to the guaranteed posts every year as engineer students would take their seniority over persons appointed as temporary Assistant Engineers in that year. A person appointed to a guaranteed post in a particular year however was made junior to all those who were appointed as Assistant Engineers in earlier years, irrespective of whether they were appointed to guaranteed or to non-guaranteed posts. By a subsequent G.O. dated June 22, 1950 the Government intimated the Chief Engineer, Buildings and Roads that engineer students who were appointed to the guaranteed posts of temporary Assistant Engineers and working in the Buildings and Roads Branch be absorbed in the existing permanent vacancies or those which might arise in future.

6. Thus, the appellants who were appointed to the guaranteed posts of temporary Assistant Engineers, as reserved for the top students of Thomson College of Civil Engineering, Roorkee/University of Roorkee, constituted a class apart. One D. K. Laroia who had been appointed as a temporary Assistant Engineer to one of the guaranteed posts in 1945 and confirmed in the year 1949 made a representation dated April 15, 1955 claiming seniority over all the Assistant Engineers appointed to guaranteed or non-guaranteed posts, irrespective of the order of appointment. While this representation was pending, the State Government passed an order dated October 11, 1955 confirming the appellants i.e. holders of guaranteed posts w.e.f. April 1, 1955 in the permanent posts of Assistant Engineers, and later on by order dated July 20, 1956 determined their order of seniority. Subsequently, the Government by orders dated November 7, 1956, April 9, 1957 and May 14, 1958 confirmed the temporary Assistant Engineers i.e. persons appointed to non-guaranteed posts as permanent Assistant Engineers, all w.e.f. April 1, 1956. By order dated May 29, 1961 the Government determined the seniority of respondents 1-12 and 39 others referable to the date of their substantive appointment. On a combined reading of the impugned orders dated July 20, 1956 and the subsequent order dated May 29, 1961, the appellants i.e. the directly recruited engineer students who had passed out from the Thomson College of Civil Engineering, Roorkee/University of Roorkee in order of merit i.e. to the guaranteed posts, were placed above respondents 1-12 and 39 others i.e. the temporary Assistant Engineers. On the basis of their seniority and in view of their record of service, the appellants had in the mean while been promoted as Offg. Executive Engineers in the years 1960 and 1961. Admittedly, respondents 1-12 who later on were promoted as Offg. Executive Engineers never filed any representation qua Executive Engineers and the seniority of the appellants as

Executive Engineers remained unchallenged throughout the period of 14 years.

7. It was not till May 4, 1970 i.e. after a lapse of 15 years that respondents 6, 7 and 11 viz. I. P. Gupta, R. C. Mangal and R. K. Mathur filed a petition under Article 226 of the Constitution in the High Court challenging the impugned order dated October 11, 1955 by which the appellants were confirmed w.e.f. April 1, 1955 and the consequential determination of the inter se seniority between direct recruits and promotees vide orders dated July 20, 1956 and May 29, 1961 assigning them higher seniority. The writ petition came to be heard by Broome, J. and the learned Judge by his judgment and order dated April 16, 1971 dismissed the writ petition holding that the petitioners were guilty of laches. That judgment of his was upheld in appeal by a Division Bench consisting of R. S. Pathak and H. N. Seth, JJ. by its judgment dated October 26, 1971. The Division Bench following the decision of this Court in *Rabindra Nath Bose v. Union of India* ((1970) 2 SCR 697 : (1970) 1 SCC 84 : AIR 1970 SC 470) held that the learned Single Judge was fully justified without any reasonable explanation approached the High Court under Article 226 of the Constitution after inordinate delay. It was also observed relying upon the decision of this Court in *S. G. Jaisinghani v. Union of India* ((1967) 2 SCR 703 : AIR 1967 SC 1427 : 65 ITR 34) that it would be highly unjust to deprive the appellants of the rights which had accrued to them as such. The learned Judges firmly repelled the contention that even if the petitioners could not be permitted to question the legality and propriety of the impugned order of confirmation, they were still entitled to claim seniority over the directly recruited engineer students as per rules regulating seniority, observing that :

Since the petitioners cannot be allowed to re-agitate and question the propriety of the confirmation order passed long time back, it would not be desirable to go into the question of consequential determination of seniority either.

In the concluding part of the judgment, there is a direction in the following terms :

Moreover, representations made by the petitioners, as admitted in the counter-affidavit filed on behalf of the State Government, are still pending. The State Government has taken up the stand that these representations have not been decided as writ petitions had been filed by Sri K. C. Agarwal and the petitioners before this Court and the matter became subjudice. We have no reason to think that after disposal of the petitions the State Government will not decide the representations fairly and in accordance with law. In the circumstances, we are not inclined to examine the correctness of this submission made by the petitioners in this petition.

If the sentence was read in the context, it meant 'Left to themselves, they would not have interfered'. Misconstruing this direction, the State Government afforded an opportunity to the temporary Assistant Engineers to make their representations, if any. Factually, there were no representations pending except the one filed by Laroiya. Eventually, the State Government realised the mistake and by its order dated June 29, 1973 rejected the representation stating that the question of inter se seniority of Assistant Engineers had been finally settled and could not be reopened.

8. It is somewhat strange that the Division Bench (T. S. Misra and U. S. Srivastava, JJ.) by its judgment dated May 6, 1981 should have, after a lapse of nearly 26 years, thought that merely because of the fact that the State Government erroneously invited representation

afresh, "the matter of inter se seniority was still alive and not a closed chapter". Upon that wrongful assumption, the High Court has fallen into an error in directing the issuance of a writ in the nature of certiorari quashing the impugned seniority list and a writ in the nature of mandamus directing the State Government to re-determine the inter se seniority of Assistant Engineers in the U.P. Service of Engineers, Buildings, and Roads Branch, Class II.

9. There can be no doubt whatever that it was not a proper exercise of jurisdiction on the part of the High Court to have interfered with the impugned seniority list after nearly three decades. When way back in the year 1971 Broome, J. had declined to interfere with the inter se seniority between the appellants i.e. the direct recruits and respondents 1-12 and 39 others i.e. the promotees on a similar petition under Article 226 of the Constitution on the ground of inordinate delay and laches and that judgment of his was upheld by a Division Bench which observed that it would be unjust to deprive the appellants of the rights which had accrued to them as they were entitled to consider that their appointments to the promotional posts would not be set aside after a lapse of so many years, there was no occasion for the later Division Bench to have interfered with the impugned orders and given a direction to the State Government to re-determine the inter se seniority between the appellants and respondents 1-12 and 39 others under Rule 23 of the Rules afresh, with advertence to the observations made by it.

10. My learned brother Ray, J. has taken immense pain in discerning the principles emerging from all the relevant authorities on the subject, including those of N. K. Chauhan v. State of Gujarat ((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127 : AIR 1977 SC 251), S. B. Patwardhan v. State of Maharashtra ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391 : AIR 1977 SC 2051) and the subsequent decision in Baleshwar Dass v. State of U. P. ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) and I do not wish to traverse the ground over again except to touch upon certain aspects. The principle deducible from the two well-known decisions of N. K. Chauhan ((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127 : AIR 1977 SC 251) and S. B. Patwardhan ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391 : AIR 1977 SC 2051) is that in the absence of a seniority rule, the promotees within the quota are entitled to the benefit of the period of continuous officiation in reckoning their seniority vis-a-vis direct recruits.

11. The question must turn on a proper construction of the unamended Rule 23 of the Rules which provided :

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

It is plain upon the language of Rule 23 that it does not in terms use the words 'substantive capacity' but speaks of 'the date of order of appointment to it' i.e. the Service which brings in the concept of 'substantive capacity' as those words are used in the definition of the expression 'Members of the Service' as contained in Rule 3(b) of the Rules.

12. In Baleshwar Dass case ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41), the seniority list challenged before the High Court was the one relating to

Assistant Engineers belonging to the Irrigation Department prepared in December 1965 under Rule 23 of the Rules prior to the amendment, but after the issuance of the aforesaid memorandum dated December 7, 1961 by which a new method of recruitment was introduced. The Court referred to Rules for recruitment in particular to Rules 5, 6, 17 and 19 as well as the aforesaid office memorandum dated December 7, 1961. The Court in Baleshwar Dass case ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) firmly repelled the contention that the aforesaid office memorandum incorporating a change in the method of recruitment had no statutory force, nor being expressed in the name of the Governor, on the ground that it had been published under government authority, acted upon for two decades when recruitments were made by the Public Service Commission and universally accepted as binding. It held that the office memorandum was relatable to a statutory source, namely, Rules 5 and 6 of the Rules as "filling up the gaps and not flouting the provisions". It was observed : [SCC p. 234, SCC (L&S) pp. 539-40, para 13]

Two vital factors must guide us in this interpretative exercise. If a dated rule of colonial times is to be applied today, that meaning which sustains it as constitutionally valid must be preferred to another which may be appealing, going by officialese or literal sense. We have to regard it as a case of 'new wine in old bottle'. We must re-interpret the rules to comport with Articles 14 and 16 by constitutionally acceptable construction, not rigid connotation given to expressions in the vintage vocabulary of British-Indian days.

Acting upon the basis that the aforesaid office memorandum dated December 7, 1961 was constitutionally valid, the Court went into the intent and effect of Rules 23, 3, 4, 5, 6, 17 and 18 and their impact on Rule 23 read in the context of the memorandum of 1961 with a view to rationalise the scheme of recruitment, classification, seniority and promotion and held that there was nothing arbitrary in the 1961 memorandum bringing about a change in the method of recruitment by competitive examination through Public Service Commission, and observed : [SCC pp. 235-36, SCC (L&S) p. 541, para 19]

... although in its application, we have to remember the prior rules and when the two are woven into each other or, rather, when the later 1961 Memorandum is dovetailed to the 1936 Rules the results that may follow will have to be ascertained with care and consistently with the ration of the decision of this Court in cognate situations.

Further that : [SCC p. 236, SCC (L&S) p. 541, para 20]

... Government decided in 1961 to resort to direct recruitment of Assistant Engineers through competitive examinations held by the Public Service Commission. It was, however, alive to the fact that massive appointments had already been made, in the years gone by, to the posts of Assistant Engineers from among graduates in engineering by direct selection and later approval by the Public Service Commission

13. The importance of the decision in Baleshwar Dass case ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) lies in the meaningful interpretation of the words 'substantive capacity'. Krishna Iyer, J. affirming the principle in his own charismatic and picturesque language, observed : [SCC pp. 237-38, SCC (L&S) p. 543, para 20]

We must emphasise that while temporary and permanent posts have great relevancy in regard to the career of government servants, keeping posts temporary for long, sometimes by annual renewals for several years, and denying the claims of the incumbents on the score that their posts are temporary makes no sense and strikes us as arbitrary, especially when both temporary and permanent appointees are functionally identified. If, in the normal course, a post is temporary in the real sense and the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricious in clothing him with no rights. Not so, if the post is, for certain departmental or like purposes, declared temporary, but it is within the ken of both the government and the appointee that the temporary posts are virtually long-lived. It is irrational to reject the claim of the 'temporary' appointee on the nominal score of the terminology of the post. We must also express emphatically that the principle which has received the sanction of this Court's pronouncements is that officiating service in a post is for all practical purposes of seniority as good as service on a regular basis. It may be permissible, within limits, for government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categoric and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the service rendered in the two types of posts. While rules regulating conditions of service are within the executive power of the State or its legislative power under proviso to Article 309, even so, such rules have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16.

Adverting to the oft-quoted observations of Chandrachud, C. J. in S. B. Patwardhan case ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391 : AIR 1977 SC 2051) that "seniority cannot depend on the inglorious uncertainties of confirmation" and to his own in N. K. Chauhan case ((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127 : AIR 1977 SC 251) that "seniority, normally, is measured by length of continuous officiating service" the learned Judge observed that although an appointee to a permanent post acquires certain rights which one who fills a temporary post cannot claim, nevertheless, when the post is not purely temporary or ad hoc or of short duration or of an adventitious nature, the holder of such temporary post cannot be degraded to the position of one who by accident of circumstances, or for a fugitive tenure occupies the temporary post for a fleeting term. The learned Judge while accepting that there was a distinction between permanent and temporary posts inasmuch as permanency carries with it other rights than mere seniority and promotion, brought out the 'propinquity in status' of permanent and temporary Assistant Engineers in the special conspectus of the facts before him and found no justification to hold that when Engineers were appointed to temporary posts but after fulfilment of the tests for regular appointment, including consultation with the Public Service Commission, they were not appointed in a substantive capacity.

14. The ultimate ratio of the decision in Baleshwar Dass case ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) is best brought out in the words of Krishna Iyer, J. in the following passage : [SCC p. 243, SCC (L&S) p. 548, paras 31 and 32]

Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post ... a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation.

Once we understand 'substantive capacity' in the above sense, we may be able to rationalise the situation. If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity.

It is to be emphasised that the Court in Baleshwar Dass case ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) did not take upon itself the task of determining whether the temporary Assistant Engineers were entitled to have the benefit of their entire period of service in reckoning seniority under Rule 23 of the Rules, but left it to the Government to ascertain the facts and determine the question in the light of the principles laid down whether the capacity in which the posts had been held was substantive or temporary. The emerging principle is that the temporary Assistant Engineers were entitled to the benefit of their seniority reckoned according to the date of order of appointment to the Service in terms of Rule 23 of the Rules w.e.f. the date of their absorption into the Service by the Government in consultation with the Public Service Commission i.e. from the date from which they became 'Members of the Service' within the meaning of Rule 3(b) of the Rules.

15. In legal matters, some degree of certainty is as valuable a part of justice as perfection. One reason for consistency is that people often regulate their conduct with reference to existing rules, which makes it important for Judges to abide by them. Innovations can be unsettling and lead to a loss of confidence : Dias' Jurisprudence, 4th edn., p. 286. In the present case, the High Court was obviously wrong in proceeding upon the basis that the matter was still *res integra*. The decision of the earlier Division Bench was arrived at keeping in view all the aspects and it was held that the claim for re-determination of inter se seniority between direct recruits and promotees could not be agitated after a lapse of 16 years. It is sufficient for invoking the rule of *stare decisis* that a certain decision was arrived at on a question or was argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, an earlier decision may be overruled if the court comes to the conclusion that it is manifestly wrong and not upon a mere suggestion that if the matter was *res integra*, the Court on a later occasion could come to a different conclusion. It cannot be doubted that an unlimited and perpetual threat of litigation leads to disorder, sense of insecurity and uncertainty. May be, there may have been isolated cases of hardship but there must be some reservation about limitation on the court's power in the public interest. Obvious considerations of public policy make it a first importance that the person aggrieved must take action requisite effectively to assert his right to that end so that if the contention can be justified, the government service may be disturbed as little as possible.

16. Inordinate delay is not merely a factor for the court to refuse appropriate relief but also a relevant consideration it be so minded not to unsettle settled things. As observed by Khanna, J. in delivering the judgment of the Court in *Malcom Lawrence Cecil D'Souza v. Union of India* (1975 Supp SCR 409 : (1976) 1 SCC 599 : 1976 SCC (L&S) 115 : AIR 1975 SC 1269) : [SCC p. 602, SCC (L&S) p. 118, para 9]

... by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the

seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time.

So also in *R. S. Makashi v. I. M. Menon* ((1982) 2 SCR 69 : (1982) 1 SCC 379 : 1982 SCC (L&S) 77 : AIR 1982 SC 101), Eradi, J. speaking for a three-Judge Bench stated that belated petitions cannot be entertained under Article 32 of the Constitution. See also : *K. R. Mudgal v. R. P. Singh* ((1986) 4 SCC 531). It would clearly be unjust, as observed by Sikri, J. in *Rabindra Nath Bose case* ((1970) 2 SCR 697 : (1970) 1 SCC 84 : AIR 1970 SC 470) to deprive the appellants of the rights which have accrued to them. As a result of the G.O. of April 19, 1950, although initially the guarantee to the merit scholars who had passed out from the Thomson College of Civil Engineering, Roorkee in order of merit was in regard to appointment to the guaranteed post, but later it was amplified into assuring to the holders of such guaranteed posts like the appellants preference in the matter of permanency and seniority. This necessarily perpetuated some amount of injustice, as brought out in the Report of Lal Committee, to the holders of non-guaranteed posts i.e. the temporary Assistant Engineers, due to permanent appointments having been given to the holders of guaranteed posts i.e. directly recruited engineer students in preference to them, though they joined service earlier. There is, however, nothing that can be done for the Court is faced with a *fait accompli*. At times, the Court is overtaken by the events. As a matter of policy, the Government of the day thought that it would bring greater efficiency and merit scholars graduating from the Thomson College of Civil Engineering, Roorkee, which in those days was the most prestigious institution of its kind in the country and was later incorporated into the University of Roorkee, which in those days was the most prestigious institution of its kind in the country and was later incorporated into the University of Roorkee. The evidence about relevant consideration which prompted the then Government into taking such a policy decision a long time back may have been lost by passage of time but there is always a presumption that every official act is done in good faith. Although Krishna Iyer, J. in *Baleswar Dass case* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) calls the directly recruited engineer students to be a "relic of the Imperial days", nevertheless the system of reservation of posts for the engineer students served its own purpose in attracting persons of undoubted talent and outstanding merit to the Service and thereby promoted efficiency, and it has also withstood the test of time.

17. In view of these considerations, I agree with my learned brother Ray, J. that respondents 1-12 were disentitled to any relief under Article 226 of the Constitution due to inordinate delay and laches. If the judgment of the High Court were to be sustained after a lapse of nearly 32 years, it cannot be gainsaid that the entire structure of the administrative set-up of the U.P. Service of Engineers, Buildings and Roads Branch would be upset. We are informed that the four appellants before us by reason of their seniority and record of service, have reached the higher echelons of service. One of them has been the Offg. Engineer-in-Chief i.e. Head of the Public Works Department, Buildings and Roads Branch, and the remaining three are Offg. Chief Engineers. As against this, eleven of the 12 respondents have since retired, leaving only one of them. It is always open to the State Government to reconsider the case of the remaining respondent in the light of the principles settled by this judgment that the temporary Assistant Engineers on absorption were entitled to the benefit of their

seniority from the date from which their services were regularised i.e. the date from which they became 'Members of the Service' within the meaning of Rule 3(b) of the Rules. It is still open to the Government to grant him the necessary relief, if he is found suitable for promotion to a higher post, without disturbing the appointment, promotion and confirmation of the appellants, by the creation of a supernumerary post.

18. I would, for these reasons, allow the appeal and set aside the judgment and order passed by the High Court quashing the seniority list, without any order as to costs.

B. C. RAY, J.

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

20. The crucial question in controversy in this appeal relates to the determination of seniority between the respondents i.e. petitioners in writ petition who are all appointed as temporary Assistant Engineers in the United Provinces Service of Engineers (Buildings and Roads Branch) and subsequently made permanent therein and the appellants appointed on probation in the permanent posts of Assistant Engineers reserved for toppers of the Thomson College of Civil Engineering later incorporated in Roorkee University and made permanent after expiry of period of probation. Respondents 2 and 3 who passed the final Civil Engineering Examination of Thomson College, Roorkee in 1946 were appointed as temporary and officiating Assistant Engineers by the Chief Engineer subject to final approval of the Government vide CE-PWD/C.M. No. 2736-E/8-E-1947 dated June 2, 1947. This by provisional appointment as temporary Assistant Engineers was approved by the Government vide G.O. No. 89-EBR/2-1947 dated February 20, 1948. Thereafter on the advice of the Public Service Commission the Government confirmed their provisional appointment as temporary Assistant Engineers vide G.O. No. 1427/EBR/2-EBR-1947 dated October 16, 1948.

21. Petitioners 1 and 4 to 12 passed the final Civil Engineering Examination of the Thomson College, Roorkee in the year 1948. They were appointed by Chief Engineer as temporary Assistant Engineers subject to the final approval of the Government vide Chief Engineer, P.W.D.O.M. dated August 10, 1949. These appointments were made subject to the final approval of the Government and on their being declared medically fit by the Medical Board. The appointment of these temporary Assistant Engineers was sanctioned by the Government by its order dated October 15, 1949. These appointments were made in accordance with Rule 5(i) of the United Provinces Service of Engineers (Buildings and Roads Branch), Class II Rules, 1936. Thereafter on January 20, 1950, vide G.O. No. 3968-EBR/2-1949 the Government on the advice of the Public Service Commission confirmed the provisional appointments of the said petitioners as temporary Assistant Engineers in the Buildings and Roads Branch of United Provinces Service of Engineers. The petitioners were examined by the State Medical Board and all of them were declared fit. By Gazette notification dated November 7, 1956 the Government was pleased to issue orders of confirmation of the appointment of petitioners 1, 2, 3, 4, 7 and 8 as permanent Assistant Engineers in permanent posts, in the cadre of United

Provinces Service of Engineers (Buildings and Roads Branch) Class II. By this notification the Government reserved the right to determine the seniority subsequently. Similarly, petitioners 5, 6, 9 and 10 were confirmed as permanent Assistant Engineers in permanent posts by Gazette notification dated April 9, 1957. Petitioners 11 and 12 were also confirmed as permanent Assistant Engineers in permanent posts in the cadre of United Provinces Service of Engineers (Buildings and Roads Branch) Class II by notification dated May 14, 1958. It is specifically mentioned therein that the Government reserved the right to determine the seniority subsequently. Thus the date of confirmation of petitioners 1 to 12 as permanent Assistant Engineers in the permanent posts of Assistant Engineers in United Provinces Service of Engineers (Buildings and Roads Branch), Class II was fixed at April 1, 1956. Vide G.O. dated May 29, 1961 the orders for inter se seniority exclusively of petitioners 1 to 12 vis-a-vis 39 others including opposite parties Nos. 8 to 13 who were all confirmed as permanent Assistant Engineers, were issued by the Government.

22. Rule 6 of the said Rules i.e. United Provinces Service of Engineers (Buildings and Roads Branch), Class II Rules, 1936 empowers the Government to decide in each case the source from which the vacancy in the cadre has to be filled up. Under these powers the Government by G.O. dated August 31, 1942 provided that with effect from 1942-43, two vacancies in the Provincial Service of Engineers shall be reserved for the two students of Thomson College of Civil Engineering, Roorkee who passed out highest in the order of merit in the final examination of Civil Engineering. This quota was increased by G.O. dated July 1, 1944 from two to four posts each year [two for the P.W.D. (Buildings and Roads Branch) and two for the Irrigation Branch]. This reservation was also guaranteed each year to the top students. The Government however by G.O. dated June 22, 1950 abolished the system of guaranteed posts with effect from the batch which was to enter the Civil Engineering Class of the Roorkee University in October 1950. It was specifically mentioned therein that no reservations were to be made in the cadre of the U.P.S.E. (Junior Scale) B & R and Irrigation Branches for students who passed out highest in the final examination of the Civil Engineering Class in 1953 and subsequent years. It was also mentioned therein that the guaranteed Civil Engineering students who passed from Thomson College of Engineering, Roorkee/Roorkee University and who had been working in the Buildings and Roads Branch should be absorbed in the existing permanent vacancies which might arise in future. In accordance with the government orders the opposite parties Nos. 2 and 3 who passed out from the Roorkee University in the year 1949 securing top positions were appointed in January 1951 as temporary Assistant Engineers. The opposite parties Nos. 4 and 5 namely Shri G. C. Gupta and Shri S. P. Goel who passed out from the Roorkee University in 1950 were appointed in 1951 as temporary Assistant Engineers in two temporary posts. The opposite party No. 6 namely Shri S. K. Ojha who was one of the toppers passing out from Roorkee University in 1952 was appointed in October 1953 as a temporary Assistant Engineer. The opposite party No. 7 namely Shri Brijendra Singh who passed out from Roorkee University Civil Engineering Examination in 1952 was first appointed as a temporary Assistant Engineer on a provisional basis but subsequently as he secured fourth position in Civil Engineering final examination in 1952 from the Roorkee University he was appointed to the guaranteed post of temporary Assistant Engineer in 1954. The opposite party No. 8 who passed the departmental qualifying examination for promotion to the Service was appointed to a temporary post of Assistant Engineer on April 16, 1949. Similarly, the opposite parties Nos. 9, 10, 11, 12 and 13 who passed the qualifying departmental examination were appointed under Rules 5(iv) and 6(a) to the temporary post of Assistant Engineers in 1955.

23. In accordance with the provisions of Regulation 3(i) of the United Provinces Public Service Commission (Limitation of Function) Regulations, 1941 made by the Provisional Government, the appointment of opposite parties Nos. 3 to 5 and 7 (appellants in this appeal) who had been

appointed to the guaranteed posts reserved for toppers of Thomson Engineering College, Roorkee did not require consultation with the Public Service Commission. The Government by Gazette Notification No. 2205-EBR/XXIII-PWD-16-EB-53 dated October 11, 1955 confirmed the appointment of the opposite parties Nos. 3 to 5 and 7 in the permanent post of Assistant Engineers with effect from April 1, 1955. By Office Memorandum No. 1933 EBR/XXIII-PWD/55 dated July 20, 1956, the Government fixed the inter se seniority of opposite parties Nos. 2 to 7 along with 18 other officers who were confirmed as Assistant Engineers.

24. Aggrieved by the order of confirmation of respondents 2 to 7, petitioner 4 made representation to the Government for re-determination of the confirmation as well as consequential determination of seniority of the petitioners vis-a-vis the respondents. This representation was made on July 15, 1959 and a reminder was also given on August 9, 1960. Similarly, petitioner Nos. 6, 7 and 11 also made representations on August 19, 1959, August 5, 1959 and July 23, 1959 respectively. Petitioner 6 gave reminder in June 1965 and April 1970. Petitioner 7 also sent reminders on March 2, 1960 and July 3, 1960. Petitioner 1 also sent a representation on September 12, 1963. As no steps were taken to consider the representations and to re-determine the date of confirmation of the petitioners, petitioners 6, 7 and 11 filed Writ Petition No. 2254 of 1970 in the Allahabad High Court challenging the order of confirmation of the respondents and also the consequential fixation of seniority on its basis. The said petition was dismissed by order dated April 16, 1971 on the sole ground that the petition was highly belated and the petitioners were guilty of laches and delay in challenging the impugned notification dated October 11, 1955 and July 20, 1956 regarding confirmation and fixation of seniority. Against the said order Special Appeal No. 287 of 1971 was filed before the Division Bench of Allahabad High Court. The said appeal was also dismissed. It was conceded that though the petitioners could not be permitted to question the propriety of confirmation orders yet they were entitled to claim seniority over the respondents as per rules regulating the service of engineers. The claim of the petitioners was that they being appointed as Assistant Engineers though temporarily became members of the Service earlier than the respondents and as such they were entitled to claim seniority over the respondents. The representation made by one of the petitioner as far back as in 1959 was still pending and as such the relief regarding determination of seniority in accordance with rules was not barred by delay. It was observed further that the Government would consider and dispose of the representation fairly and in accordance with law. In compliance therewith, the Government invited representations from all the persons aggrieved. The petitioners accordingly made representations in the matter of re-fixation of their inter se seniority.

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

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

laches.

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

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

Rule 4 : The sanctioned strength of the cadres is 24 Assistant Engineers, provided that subject to the provisions of Rule 40 of the Civil Services (Classification, Control and Appeal) Rules, 1930, the Government may

* * *##

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

Rule 5 : Recruitment to the Services shall be made by the Government -

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

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

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

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

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

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

Training and Probation

Rule 16 : Engineer students who pass from the Thomson College shall be required to undergo a course of training for one year. This period may be extended by the Government for one more year

in the case of candidates who are not selected for appointment at the end of their first year of training, but who are considered to have justified their retention in training for one more year.

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

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

- (a) he has completed the prescribed period of probation;
- (b) he has passed all the tests prescribed in the last preceding rule; and
- (c) the Government are satisfied that he is fit for confirmation.

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

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

28. Two preliminary objections were raised on behalf of the petitioners about the maintainability of the writ petition before the High Court. The first objection was regarding the delay in making the application challenging the determination of seniority of the petitioners vis-a-vis the respondents which were determined as early as in 1956, in 1973 i.e. after 17 years. This objection was duly considered by the Court below and it was overruled. In 1959 representations had been made against the determination of seniority in contravention of the provisions of Rules 23 of the United Provinces Service of Engineers (Buildings and Roads Branch), Class II Rules, 1936. These representations were kept pending by the Government and they were not disposed of. Secondly, in 1970 a challenge was thrown in Writ Petition No. 2254 of 1970 by Shri R. C. Mangal and two others i.e. respondents 6, 7 and 11 challenging the order of confirmation of petitioners 1 to 4 who were appointed long after the appointment of the petitioners and the consequent determination of seniority. This writ petition, however, was unsuccessful as the writ petition as well as the special appeal were dismissed on the ground of inordinate delay and laches in moving the Court for redress against the order of confirmation of the petitioners 1 to 4 which was made by the Government vide notification dated October 11, 1955. But in that case the question of determination of seniority in derogation of the provisions of Rules did not arise nor was it considered and determined. It was further observed that the Government would decide these representations fairly and in accordance with law. These observations were made in the Special Appeal No. 287 of 1971 decided in October 1971. The High Court while disposing of the Civil Writ Petition No. 1080 of 1973 observed that the petition did not suffer from delay and laches and the question of determination of seniority was required to be considered by the Court. It was further observed that the plea of wrong fixation in the cadre was not

raised in the earlier writ petition. As such there was no determination on the question of seniority in the cadre itself in the said writ petition and the principles of res judicata were not attracted.

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

30. It is a well established principle that where there are no specific rules for determination of seniority in service the length of continuous service is the yardstick for determining the seniority of the members of service. The vital question that requires to be considered in this appeal is what is the yardstick or standard or norm for determination of seniority of the respondents who have been appointed as temporary or officiating Assistant Engineers against temporary posts of United Provinces Service of Engineers (Buildings and Roads Branch) Class II, as well as the toppers from Thomson College of Civil Engineering who were directly appointed sometime in 1950 and 1951 on probation against reserved temporary posts and confirmed immediately after the expiry of the period of probation against permanent posts before the confirmation of the temporary Assistant Engineers recruited from the Thomson College of Engineering sometime between 1948 to 1950. To decide this question it is very relevant to consider the Service Rules as in the instant case there are admittedly the Service Rules namely United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 which regulate the appointments and conditions of service of United Provinces Service of Engineers (Buildings and Roads Branch). Rule 23 of the said Rules which is said to be the mariner's compass in determining the seniority of the members of the service provides that seniority in service shall be determined "according to the date of order of appointment to it provided that if the order of appointment of two or more candidates bears the same date, their seniority inter se shall be determined according to the order in which their appointment has been notified". Therefore, it is evident from this rule that the touchstone of determination of seniority in service is the date of order of appointment to the service or in other words the date when an appointee becomes a member of the service after fulfilling all the necessary requirements provided in the various provisions of the said Rules. Rule 3(b) defines further that "Member of the Service" means a government servant appointed in a substantive capacity under the provisions of these rules or of rules in force prior to the introduction of these rules to a post in the cadre of this service. In other words, it states categorically that an appointee to be a member of the service has to be appointed in a substantive capacity in the cadre of the service. The cadre of the service in Rule 4(ii) clearly provides that it consists of both permanent and temporary posts and the strength of the cadre may be increased by the Government by creating permanent and temporary posts from time to time as may be found necessary. The sanctioned strength of the cadre of Assistant Engineers though originally was 24 yet the said strength of the cadre could be increased by creation of both permanent and temporary posts. Rule 5 specifically lays down the sources of recruitment to the service. There are five sources for recruitment to the service. These sources have been stated hereinbefore and as such it is not necessary to reiterate them here. Rule 16 enjoins that engineering students who pass from the Thomson College are to undergo a course of training for one year. This period of training may be extended by the Government by one more year in the case of candidates who are not selected for appointment at the end of their first year of training but who are considered to have justified their retention in training for one more year. Rule 17 provides that all persons appointed to the service who are already in the permanent employment of Buildings and Roads Branch of the United Provinces Government shall be placed on probation for four years provided that such of them as have undergone training as engineering students, or have served as temporary engineer in the

Buildings and Roads Branch of United Provinces Government, may be permitted to count the period of such training and service respectively towards the period of probation. Rule 19 deals with confirmation of a probationer when the requirements provided therein have been fulfilled or completed namely the completion of the prescribed probation period, the passing of all the tests prescribed in Rule 18 and the Government is satisfied that the probationer is fit for confirmation. It has also been provided therein that all confirmations under the Rules shall be notified in the United Provinces Gazette.

31. The petitioners in the writ petition who are respondents in this appeal were initially appointed as temporary Assistant Engineers subject to the final approval of the Government by the Chief Engineer, P.W.D. between 1947 and 1948. Undoubtedly, these appointments were subsequently approved by the Government between 1948 and 1949 in accordance with the provisions of Rule 5(i) of the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936. Thereafter on January 20, 1950 the Government in consultation with the Public Service Commission confirmed the provisional appointments of the petitioners as temporary Assistant Engineers and these petitioners have also passed the requisite tests held by the Government. They were confirmed vide Gazette Notifications dated November 7, 1956, April 19, 1957 and May 14, 1958. The date of confirmation of all these petitioners was fixed as April 1, 1956 (vide G. O. dated May 29, 1961). Respondents 3 to 5 and 7 who are appellants in this appeal were appointed between 1951 and 1952 as temporary Assistant Engineers against guaranteed posts on probation and after completion of the probationary period they were confirmed in 1955 vide Gazette Notification dated October 11, 1955. Seniority of these appellants 1 to 4 was fixed earlier from April 1, 1955 whereas the seniority of respondents 1 to 12 of this appeal was fixed below them from 1956 treating the date of confirmation in the service as the date of their becoming members of the service.

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

33. It was, on the other hand, urged on behalf of the respondents who passed Civil Engineering Examination from Thomson College of Engineering between 1947 and 1948 that the appellants did not enter into the Thomson College of Engineering when they were appointed as officiating temporary Assistant Engineers subject to final approval of the Government by the Chief Engineer, P.W.D. between 1947 and 1948. Thereafter the Government duly sanctioned their appointment by

order made between 1948 and 1949, subject to the final approval of the United Provinces Public Service Commission. These provisional appointments were ultimately made final by the Government after the receipt of the approval of the U.P. Public Service Commission in 1950. It has been urged on behalf of the respondents that from 1950 at least these respondents should be deemed or treated to be substantively appointed in accordance with the provisions of Rule 3(b) of the said Service Rules. As they have become members of the service inasmuch as their appointments have been duly approved by the Government and the Public Service Commission and on their passing the medical test and other tests the Government has confirmed their provisional appointments and the period of service these temporary Assistant Engineers rendered previously was counted towards their probation in accordance with the provisions of Rule 17 of these Rules, they are entitled to have their seniority reckoned at least from the date of their confirmation in the service by the Government in 1950 i.e. from the date of their substantive appointment in the service. The seniority list that has been published is wholly arbitrary, illegal and in utter contravention of the provisions of Rule 23 of the Rules.

34. On a consideration of the letters of provisional appointment issued by the Chief Engineer, P.W.D. (Buildings and Roads Branch) as well as the sanctions accorded to such appointments by the Government thereafter and the confirmation of the service of the temporary Assistant Engineers in 1950 after obtaining the approval of the Public Service Commission and also after passing of the tests by the respondents as provided in Rule 18 of the said Rules, I cannot but hold that they have become appointed in a substantive capacity against temporary posts of the cadre of Assistant Engineers and as such they became members of the service since that date in accordance with the provisions of Rule 3(b) of the said Rules. The argument that their appointment being made against temporary posts and not against permanent posts and not on probation as well as they being not confirmed and their confirmation being not notified in the United Provinces Gazette before 1956, they are not entitled to be treated as members of the service being appointed in the substantive capacity, cannot be sustained under any circumstances. Rule 4 of the Service Rules clearly states that the cadre of Assistant Engineers will comprise of both permanent and temporary posts and as such the argument that unless and until the respondents are appointed on probation against permanent posts and unless they are confirmed they cannot be treated as members of the service is wholly untenable. One can be a member of service if he is appointed in a substantive capacity as distinguished from a fortuitous appointment or an appointment for a fixed tenure or on a purely temporary basis against a temporary post of Assistant Engineer in the cadre. This Court in the case of Parshotam Lal Dhingra v. Union of India (1958 SCR 828, 842 : AIR 1958 SC 36 : (1958) 1 Lab LJ 544), has held that an appointment to a temporary post in government service may be substantive or on probation or on an officiating basis. Similar observations has been made by this Court in the case of Baleshwar Dass v. State of U. P. ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) wherein this very rule came to be considered in the case of a similar dispute regarding the seniority amongst the engineers in the Irrigation Department of the Uttar Pradesh Government. It has been observed as follows :

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

35. It has been further observed :

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

36. Rule 4 prescribes the sanctioned strength of a cadre. It provides that the Government may subject to the provisions of Rule 40 of the Civil Services (Classification, Control and Appeal) Rules, 1930 increase the strength of the cadre by creating permanent or temporary posts from time to time as may be found necessary. So a cadre post may be either permanent or temporary and if an engineer is appointed substantively to a temporary post or permanent post he becomes a member of the service. Therefore a government servant who has been appointed to a temporary post in the cadre after fulfilment of all the requirements of the rules for regular appointment including consultation with the Public Service Commission, cannot be said to be (sic have not been) appointed substantively in the temporary post of the cadre. He cannot be said to be not a member of the service under Rule 3(b) of the Rules for the purpose of determination of seniority under Rule 23 of the Rules on the mere plea that he has not been appointed against a permanent post on probation. Such a contention is not tenable. This point has been very clearly settled by this Court in the case of *Baleswar Dass v. State of U. P.* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41). It has been observed in this case as follows : [SCC p. 240, SCC (L&S) p. 545, para 26]

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

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

37. It is pertinent to refer in this connection the observations of this Court in *S. B. Patwardhan v. State of Maharashtra* ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391 : AIR 1977 SC 2051) where it has been observed : [SCC p. 417, SCC (L&S) p. 409, para 33]

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

38. It has been further observed that confirmation cannot be the sole touchstone of seniority as that will be indefensible :

Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. [SCC p. 420, SCC (L&S) p. 412, para 39]

39. It does not show that confirmation has to conform to any set of rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the Government. I do not find any rational or legal justification for preventing the respondents to have their services rendered from the date they are appointed in the cadre of Assistant Engineers in a substantive capacity reckoned for determination of their seniority in service on the mere ground that no order of confirmation has been issued by the Government as required under Rule 19 of the Rules even though all the essential requirements for being confirmed have been clearly fulfilled by the respondents. The respondents, as has been stated hereinbefore, have been duly appointed in a substantive capacity in the cadre of the service by the Government in consultation with the United Provinces Public Service Commission as required under Rule 5(iii) of the said Rules as well as after fulfilling the other requirements as provided in Rule 19 of the said Rules in 1950. It will be relevant to mention in this connection that this Court in the case of *Baleshwar Dass v. State of U. P.* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) while considering the identical rules so far as the determination of seniority of the U.P. engineers in the Irrigation Department (sic is concerned) has observed that substantive capacity referred to the capacity in which a person holds the post and not necessarily to the nature and character of the post. A person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration, in contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation. It has also been observed that an official in service even before confirmation in service has a relevancy to seniority if eventually no infirmities in the way of confirmation exist. There is nothing in the scheme of Rules contrary to that principle. Therefore the point from which service is to be counted is the commencement of the service by the Assistant Engineer which might not have been permanent appointment in the beginning and in that sense may still be temporary but for all other purposes has been regularised and is fit to be absorbed into permanent post as and when it is vacant.

40. The decision in the case of *A. K. Subraman v. Union of India* (AIR 1975 SC 483 : (1975) 1 SCC 319 : 1975 SCC (L&S) 36) which was cited before us is not relevant inasmuch as in that case there was no statutory rule for determination of seniority unlike the instant case where there are specific rules for the determination of seniority. The method of filling up of the post of Executive Engineers Class I was by promotion of Assistant Executive Engineers Class I as well as by promotion on selection by Departmental promotion Committee of Assistant Engineers in Central Engineering Service Class II according to prescribed quota. In the seniority list published in 1971 the petitioners were shown junior to respondents who were appointed to the service of Central Engineers long after the petitioners were appointed in the grade of Executive Engineers Class I. The petitioners were promoted to officiate as Executive Engineer Class I by the Departmental Promotion Committee between December 1956 and September 1959 whereas respondents were promoted to the posts of Executive Engineers Class I between March 1957 and February 1966. It was held that once the Assistant Engineers are regularly appointed to officiate as Executive Engineers within their quota they will be entitled to consideration in their own rights as Class I officers to further promotion. It was also held therein that Assistant Engineers (Class II) who are initially appointed in a regular manner in accordance with the rules to officiate as Assistant Engineers, their seniority in service in

Grade I will count from the date of their initial officiating appointment in Class I provided their initial appointment as Assistant Engineer was within their quota. Their seniority will not count from the date of their future confirmation in the service.

41. In *G. P. Doval v. Chief Secretary, Govt. of U. P.* (AIR 1984 SC 1527 : (1984) 4 SCC 329 : 1984 SCC (L&S) 767) this Court has observed that it is well settled that if there was no binding rule of seniority, the length of continuous officiation prescribed a valid principle of seniority.

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

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

44. I have already held hereinbefore after due consideration of the said Rules governing the appointment and conditions of service of United Provinces Service of Engineers (Buildings and Roads Branch) Class II that the cadre of the Service of Engineers consists of both temporary and permanent posts and as such there can be substantive appointment against a temporary post of the cadre in accordance with the provisions of the Service Rules. Once a Government servant is appointed in a substantive capacity against a temporary post of the cadre after due observance of the requirements as provided in the Rules he will be deemed to be a member of the service in accordance with the provision of Rule 3(b) and his seniority in service shall be determined from the date of order of appointment to the service notwithstanding that no order of confirmation has been made and there has been no publication of order of confirmation in the Official Gazette. The respondents were appointed temporarily in an officiating capacity as Assistant Engineers against temporary posts and these temporary appointments were continued for years together and the Government duly sanctioned their appointment after consultation with the Public Service Commission. The respondents thus have become members of the United Provinces Service of Engineers (Buildings and Roads Branch) Class II at least from the date when they have been confirmed in the service by the Government Order issued in May 1950 after complying with all the tests prescribed and they are entitled to have their seniority reckoned from that date when they have become regular members of the service after fulfilling all the requirements provided in Rules 18 and 19 of the said Rules. The decisions in *Baleshwar Dass v. State of U. P.* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : AIR 1981 SC 41) as well as in *Ashok Gulati v. B. S. Jain* (1986 Supp SCC 597 : (1987) 2 ATC 608) clearly go to establish that as soon as a government servant becomes a member of the service fulfilling all the requirements specified under the Rules governing the terms and conditions of service as well as of seniority in service, the seniority of the government

servant has to be computed and reckoned from the date when he becomes a member of the service. As I have held already confirmation has nothing to do with the government servant's becoming a member of the service eligible to have his service reckoned for the purpose of determination of his seniority in service in accordance with Rule 3(b) read with Rule 23 of the said Rules. In Ashok Gulati case (1986 Supp SCC 597 : (1987) 2 ATC 608) (in which one of us - Justice A. P. Sen - was a party) the following five yardsticks have been laid down for reckoning seniority : (SCC p. 612, ATC p. 623, para 22)

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

- (i) on the basis of the date of appointment;
- (ii) on the basis of confirmation;
- (iii) on the basis of regularisation of service;
- (iv) on the basis of length of service; or
- (v) on any other reasonable basis.

45. Apropos to mention in this connection that the decision rendered by this Court in the case of N. K. Chauhan v. State of Gujarat ((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127 : AIR 1977 SC 251) is not applicable as the facts of that case are different from the facts of this case. In that case the dispute arose regarding the declared senior to the appellants who were promotees from Mamlatdars to the post of Deputy Collectors. In the State of Bombay prior to bifurcation the source of recruitment to the post of Deputy Collector was two fold i.e. (1) by promotion from Mamlatdar and (2) by direct recruitment to the post of Deputy Collector. A resolution was adopted by the Bombay Government on July 30, 1959 laying down the method of recruitment to the post of Deputy Collector. A resolution was adopted by the Bombay Government on July 30, 1959 laying down the method of recruitment to the post of Deputy Collectors. It is in the following terms :

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

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

The question arose whether the direct recruits who were recruited subsequent to the promotees can claim seniority over the promotees as the quota of direct recruits was not fulfilled. It was held that the rule was that as far as possible the quota system must be kept and if not practicable, promotees in the place of direct recruits or direct recruits in the place of promotees may be inducted by applying the regular procedure without suffering the seats to lie indefinitely vacant. It was further held that the quota rule does not, inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier. It was also held that normally seniority is measured by length of

continuous officiating service - actually is easily acceptable as the legal (sic). It does not preclude a different prescription constitutional tests being satisfied. It has also been observed that the decision in the case of S. G. Jaisinghani v. Union of India ((1967) 2 SCR 703 : AIR 1967 SC 1427 : 65 ITR 34) as well as the decision in the case of B. S. Gupta v. Union of India ((1975) 1 SCR 104 : (1975) 3 SCC 116 : 1974 SCC (L&S) 506 : AIR 1974 SC 1618) cannot be considered to hold the field inasmuch as in case where recruitment is from two independent sources subject to prescribed quota and power is conferred on the Government to make recruitment in relaxation of the rules any recruitment made contrary to the quota rule could not be held to be invalid unless it is shown that the power of relaxation was exercised mala fide. Similar observation has been made in the case of A. Janardhana v. Union of India ((1983) 2 SCR 936, 956 : (1983) 3 SCC 601 : 1983 SCC (L&S) 467 : AIR 1983 SC 769), where it has been observed that in a system governed by rule of law discretion when conferred upon executive authority must be confined within clearly defined limits. In this case Rule 3 of the Military Engineering Service (RTS) Rules provides method of recruitment indicating the source from which the recruitment can be made. There were two sources of recruitment to the service one by direct recruitment, another by promotion, according to quota prescribed by the said rule. The question arises whether promotees in excess of quota provided for promotion on the basis of power of relaxation rule can be pushed down as such filling up of the quota by promotion would be illegal and the excess recruits unless they find their place by adjustment in subsequent years in the quota would not be members of the service. It was held that even though the rule prescribed the method of recruitment and quota and if the very rule simultaneously confers power on the Government to recruit in relaxation of the rules unless mala fide are alleged and attributed such excess recruitments by promotion could not be illegal and the said promotees cannot be pushed down where the rule confers a discretion on the Government to relax rules to meet exigencies of service. Any recruitment made contrary to quota rule would not be invalid unless it is shown that the power of relaxation was exercised mala fide. This decision thus followed the observation made in Chauhan case ((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127 : AIR 1977 SC 251) referred to earlier. These two decisions, of course, have no application to the instant case inasmuch as no such question does arise for decision in this case.

46. In the instant case there is a specific rule i.e. Rule 23 providing for determination of seniority from the date a person has been substantively appointed and has become a member of the cadre of Service of Assistant Engineers in the United Provinces Engineering Service (Buildings and Roads Branch) Class II. Therefore in this case there is not quota for recruitment to the Service and as such the decision in Chauhan Case ((1977) 1 SCR 1037 : (1977) 1 SCC 308 : 1977 SCC (L&S) 127 : AIR 1977 SC 251) is not applicable.

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

48. In the instant case, however, I am not inclined to give any relief to the respondents (petitioners in the writ petition) by directing re-determination of the seniority of the respondents as well as the appellants on the ground of unusual laches and delay. Appellants 1 to 4 were confirmed in 1955 and their seniority was determined by Government Order of July 20, 1956. Out of the petitioners of the

writ petition, petitioners 4 and 5 made representations in 1959 against the aforesaid seniority list. Subsequently, petitioner 6 filed another representation. Petitioners 6, 7 and 4 made their representation in 1959 and petitioner 6 gave a reminder in June 1965 and April 1970. The other petitioners 2, 3, 9 and 10 did not make any representation in the matter of seniority. It is only in 1970 that Writ Petition No. 2254 of 1970 was moved challenging the confirmation of petitioners 1 to 4 (appellants in the instant appeal). This challenge was negated on the ground of laches and delay. An appeal being Special Appeal No. 287 of 1971 was also dismissed on the ground of laches and delay as regards the confirmation of the appellants was concerned. Of course, it had been observed that the seniority in service of these appellants was not questioned in the said writ petition and the Government would consider the representation made by the petitioners of the writ petition (appellants in the instant appeal) as far back as in 1959, which were pending before the Government. Writ Petition No. 1080 of 1973 which gave rise to the civil appeal was moved in 1973 challenging the determination of seniority of the appellants in the instant appeal. It appears from the affidavit-in-opposition sworn by one of the appellants Shri G. C. Gupta that at the time when the writ petition was moved appellants 1 to 4 were officiating as Superintending Engineers and respondents 2 and 3 were officiating as Superintending Engineers but junior to all the four appellants and respondents 1 and 4 to 12 were then Executive Engineers. At present appellants 1, 2 and 3 are permanent Superintending Engineers and officiating as Additional Chief Engineers. Appellant 4 is also a permanent Superintending Engineer. Appellant 4 is also a permanent Superintending Engineer. At this juncture if the seniority of these appellants vis-a-vis the respondents of this appeal is directed to be determined it will create much administrative difficulties and would amount to depriving the appellants of their valuable rights which have accrued to them. It is pertinent to refer in this connection to the observation made by this Court in the case of *Rabindra Nath Bose v. Union of India* ((1970) 2 SCR 697 : (1970) 1 SCC 84 : AIR 1970 SC 470). It has been observed that the attack to the seniority list prepared on the basis of 1952 Rules 15 years after the Rules were promulgated and effect given to the seniority list prepared on August 1, 1953 should not be allowed because of the inordinate delay and laches in challenging the said rule.

49. Similar observation have been made by this Court in the case of *State of Orissa v. Pyarimohan Samantaray* ((1977) 3 SCC 396), *State of M. P. v. Nandlal Jaiswal* (AIR 1987 SC 251 : (1986) 4 SCC 566), *Ramana Dayaram Shetty v. International Airport Authority of India* ((1979) 3 SCR 1014 : (1979) 3 SCC 489 : AIR 1979 SC 1628), *Ashok Kumar v. Collector, Raipur* (AIR 1980 SC 112 : (1980) 1 SCR 491 : (1980) 1 SCC 180), *K. R. Mudgal v. R. P. Singh* ((1986) 4 SCC 531) and *R. S. Makashi v. I. M. Menon* ((1982) 2 SCR 69 : (1982) 1 SCC 379 : 1982 SCC (L&S) 77 : AIR 1982 SC 101) where relief was refused on the ground of laches in moving the Court for redress of the grievances after lapse of a period of years after the cause of action arose. It has been observed in *State of M. P. v. Nandlal Jaiswal* (AIR 1987 SC 251 : (1986) 4 SCC 566] : (SCC pp. 594-95, para 24)

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

inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the mean while is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction.

50. In this case the challenge to the seniority of the appellants which was determined by order dated July 20, 1956 was made in 1973 i.e. after nearly 17 years and they have sought relief for re-determination of the seniority in accordance with the provisions of the aforesaid service rules. This cannot be permitted as it would amount to unjust deprivation of the rights of the appellants which had accrued to them in the mean time. The observation that (SCC p. 97, para 33) "Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years" as made in the above case (Rabindra Nath Bose v. Union of India ((1970) 2 SCR 697 : (1970) 1 SCC 84 : AIR 1970 SC 470)) will be applicable to this case. Considering all these aspects it would be just and proper not and to give any relief to the respondents on the ground of inordinate laches and delay in challenging the seniority list made in July 1956. I have already mentioned hereinbefore that at the time of moving the writ petition in 1973 all the appellants had been confirmed as Superintending Engineers in the United Provinces Service of Engineers and appellants 1 to 3 had been officiating as Additional Chief Engineers. Appellants 4 who was also a permanent Superintending Engineer, we were told by the parties at the time of hearing of this appeal, had been promoted and appointed as Additional Chief Engineer. Whereas out of 12 respondents 10 have already retired from services as it appears from the affidavit sworn by appellant 1 Mr. G. C. Gupta in accordance with the directions of this Court. We are also told that out of the remaining two respondents, one has already retired from service. So, only one respondent is at present in service. In these circumstances I think that the cause of justice will be served if the authorities concerned consider the case of the said respondent for promotion in accordance with law.

51. For the reasons aforesaid the appeal is allowed and the judgment and order of the High Court is set aside. There will be no order as to costs.

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

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