

Direct Recruit Class II Engineering Officers' Association

Vs

State of Maharashtra and Others

Civil Appeals Nos. 194-202 of 1986

(CJI Sabyasachi Mukharji, L. M. Sharma, K. Ramaswamy, S. R. Pandian, P. B. Sawant JJ)

02.05.1990

JUDGMENT

SHARMA, J. -

1. The perpetual rivalry for seniority in service between the direct recruits and the promotees has once more engaged the attention of this Court for several days. The dispute which was brought to Court by S. B. Patwardhan in 1972 by a writ petition in the Bombay High Court and which was supposed to have been finally settled by the judgment of this Court reported in S. B. Patwardhan v. State of Maharashtra ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) has been kept alive by some direct recruits till this date. The events relevant for the case are spread over a long period and the issues joined by the parties have been described in the earlier judgments as involving ticklish and complicated questions of unrivalled complexity with no earlier case comparable. The position as now stands is that the field of controversy on legal questions has been considerably narrowed down by the earlier decisions of this Court, but the relevant facts and the issues to be settled have multiplied by further events and subsequent rules framed under the Proviso to Article 309 of the Constitution.

2. For appreciating the controversy which has to be resolved, a brief survey of several sets of rules is necessary. The parties are Engineers in the employment of the State of Maharashtra excepting the petitioners in W.P. Nos. 3947-48 of 1983 who are in Gujarat Service. Avoiding the details, the position may be briefly stated by dividing that the entire period into four sub-periods and mentioning the scope of such of the provisions of the rules which have direct bearing on the questions involved in the present cases. By a resolution of the year 1937 of the Government of Bombay, two new Provincial Engineering Services described as the Bombay Engineering Service Class I consisting of posts of Chief Engineer, Superintending Engineers, Executive Engineers and Assistant Engineers Class I, and the Bombay Engineering Service Class II, having officers designated as Deputy Engineers, were created. All the posts were permanent. In 1939, Rules were made for regulating the methods of recruitment to the said Services which directed the recruitment to be made either by nomination from amongst the students of the College of Engineering, Pune or by promotion of officers holding inferior posts. The next Rules to which the parties in the present cases have made reference were those made by the resolution dated November 21, 1941 for determination of the seniority of the direct recruits and the promoted officers, containing only two rules out of which Rule 1 admittedly is not relevant for the present purpose. Rule 2 said that in case of officers promoted to substantive vacancies, the seniority would be determined with reference to the date of their promotion to the substantive vacancies. In 1960, detailed rules for recruitment to Class I and Class II Services were framed by a government resolution dated April 29, 1960. Learned counsel for the parties have referred to these Rules as the 1960 Rules and have made elaborate

arguments with reference to some of the provisions. In place of nomination from the successful students of College of Engineering, Pune as direct recruits, these Rules prescribed for a competitive examination to be held by the Public Service Commission, and introduced a quota system by fixing a ratio of appointments of direct recruits and promotees. The Rules also made reference to promotion, as Executive Engineers on officiating basis, and Temporary Deputy Engineers and Officiating Deputy Engineers. By Rule 8 the posts of Deputy Engineers were reorganised, and by sub-rule (iii) it was provided that the direct recruits in any year shall in a bunch replaced senior to promotees confirmed during that year. A review of these Rules was later undertaken by the government and ultimately in partial supersession thereof a fresh set of rules, described by the learned counsel in the present cases as the 1970 Rules, were adopted by another government resolution. In the meantime, however, a serious dispute in regard to the interpretation of one of the provisions of the 1960 Rules arose which was settled by this Court in the case of *P. Y. Joshi v. State of Maharashtra* ((1969) 3 SCC 134 : (1970) 2 SCR 615). The judgment in this case has been the subject matter of considerable discussion during the hearing of present cases. By Rule 5 of the 1970 Rules, Class I and Class II Services were redefined and Rule 12(a) declared that the cadre of Deputy Engineers would consist of all the direct recruits, the confirmed Deputy Engineers and the other officers who were officiating as Deputy Engineers on April 30, 1960.

3. During the period 1960-1970 adequate number of direct recruits were not available, and a large number of promotees, therefore, had to be appointed to officiate as Deputy Engineers on continues basis. These appointments were made after following the procedure applicable to regular promotion, including consultation with the Public Service Commission. By Rule 12(b) the strength of the permanent Deputy Engineers was fixed at the total number of (a) the Deputy Engineers confirmed up to the date of commencement of the Rules, (b) direct recruits to the posts of Deputy Engineers appointed till the date of commencement of the Rules, and (c) the Deputy Engineers officiating on April 30, 1960; and it was provided that no fresh appointments in future would be made to this cadre and the vacancies arising would be transferred to the officers holding subordinate posts detailed in the sub-rule in proportions indicated. The learned counsel for the parties have referred to this cadre as the 'frozen cadre'. The question of seniority was dealt with in several rules, out of which Rule 33 is important. It said that the seniority list in each cadre in Class I and Class II shall be prepared in two parts - one for the confirmed officers and other for those who were not confirmed; and that the confirmed officers would be treated as senior to the unconfirmed officers. Since the direct recruits were all appointed against the permanent posts, they were reckoned to be senior to the officiating Deputy Engineers irrespective of the period for which they had been working continuously on the Deputy Engineer's posts. These Rules were amended in 1972, but there was no departure from the main scheme and the principle governing seniority.

4. In pursuance of the 1970 Rules seniority lists were prepared leading to the filing of several cases which were ultimately disposed of by this Court in *S. B. Patwardhan v. State of Maharashtra* ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 755). Patwardhan, the appellant in that case, was promoted temporarily as Deputy Engineer in 1959 and was confirmed after the coming in force of the 1970 Rules. Respondents 2 and 3 who were directly appointed as Deputy Engineers later were, in view of the Rules, shown as senior to Patwardhan. Patwardhan challenged the validity of Rule 8(iii) of the 1960 Rules and of Rule 33 of the 1970 Rules as being violative of Articles 14 and 16 of the Constitution. The judgment in the case is treated as a landmark in the service jurisprudence and has covered extensive grounds dealing with several important aspects relevant in the case. The learned counsel for the parties have in the course of their arguments read and re-read the judgment and made elaborate comments on its interpretation and effect, which we will discuss later. In the result, Patwardhan succeeded and Rule 8(iii) of the 1960 Rules and Rule 33 of the 1970

Rules were struck down.

5. In view of the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775), it became necessary to prepare fresh seniority list, and since the reorganised States of Bombay and Gujarat were formed on November 1, 1956 under the provisions of the States Re-organisation Act, 1956, it was considered expedient to make rules for preparing seniority lists of Deputy Engineers in respect of the period November 1, 1956 to April 30, 1960, that is, the date immediately after coming into force of the 1960 Rules. Rules were framed under Article 309 of the Constitution read with, Section 81(6) of the Bombay Re-organisation Act, 1960, and were called the Reorganised Bombay State Overseers and Deputy Engineers Seniority Lists Rules, 1978, and have been referred to before us as the 1978 Rules. The seniority list of the Deputy Engineers as on November 1, 1956 which had been prepared earlier was declared by these Rules as valid and final. This was consistent with the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775). The further seniority lists were directed to be prepared for the years 1957, 1958, 1959 and 1960 in accordance with the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) wherein the seniority of the promotee Deputy Engineers was made dependent on the continuous officiation subject to certain other conditions.

6. Since the preparation of the seniority list and reversion of the direct recruits whose promotion was illegal, in view of the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775), were being delayed, one Bagayat Patil, a promotee Deputy Engineer officiating as Executive Engineer, filed a writ application being W.P. No. 3483 of 1980 in the High Court for implementation of the judgment, inter alia, on the ground that Rule 6(iii) of the 1960 Rules relating to Class I being similar to the struck down Rule 8(iii) was also illegal. Another writ application being W.P. No. 672 of 1981 was filed by the direct recruits challenging the validity of the 1978 Rules mainly on the ground that the Rules omitted to fix proportionate quota for the direct recruits and the promotees. The two cases were disposed of by a common judgment upholding the validity of the 1978 Rules, striking down Rule 6(iii) of the 1960 Rules, and issuing appropriate directions for reversion of the illegally promoted direct recruits as also for preparation of seniority lists in accordance with the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775). Kulkarni, one of the direct recruits, in representative capacity, challenged the judgment before this Court in S.L.P. No. 8064 of 1981 which was dismissed on October 29, 1981. On the same date S.L.P. No. 9161 of 1981, filed by one Samtani was also rejected. A special leave petition by the State Government was also dismissed later. One of the direct recruits J. H. Bhatia, who was admittedly represented by the petitioner in S.L.P. No. 8064 of 1981, filed an application under Article 32 of the Constitution before this Court on February 1, 1982, that is, after the dismissal of S.L.P. No. 8064 of 1981, which has been registered as W.P. No. 1327 of 1982 and is being disposed of by the present judgment.

7. In 1981 further rules called Re-organised Bombay State Assistant Engineers and Executive Engineers Seniority Lists Rules, 1981, described by the parties as the 1981 Rules, were framed laying down the rule of determination of seniority of the Assistant Engineers and the Executive Engineers for the period November 1, 1956 to April 30, 1960. With respect to the preparation of the seniority list of the Executive Engineers, Rule 3(3) (a) read with Explanation to Rule 3(4) fixed quota with retrospective effect between the direct recruits and the promotees, and these rules were successfully challenged in the High Court in W.P. No. 362 of 1982. The judgment in the case striking down the above rules has not been directly questioned in this Court.

8. The main Rules which are the subject matter of the present cases framed in 1982 under Article

309 of the Constitution laying down the principle for fixing the seniority for the period dated May 1, 1960 to December 20, 1970, and are called the Maharashtra Service of Engineers (Regulation of Seniority and Preparation and Revision of Seniority Lists for Specified Period) Rules, 1982, hereinafter referred to as the 1982 Rules. The Preamble states that they were framed in view of the decision of the Supreme Court in S. B. Patwardhan v. State of Maharashtra ((1977) 3 SCC 399 : 1977 (L&S) 391 : (1977) 3 SCR 775) and of Bombay High Court in W.P. No. 3483 of 1980. On their face, they are consistent with the aforesaid judgments, but by including two rules there in - Rules 4 and 9, deleted later - fixing rigid quota with retrospective effect, attempt was made to neutralise the decision and rob the promotees the benefit of their continuous officiation. Rule 9 (omitting the Explanation which is not relevant for the present purpose) read as follows :

"9. Allocation of vacancies in cadre of Deputy Engineers for direct recruits and promotees. - The number of vacancies in the cadre of Deputy Engineers in every year during the specified period and in the fractional year shall be deemed to be equal to the number of vacancies actually filled in that year or, as the case may be, fractional year, and the first three-fourths of such vacancies in each year or in the fractional year shall be deemed to be allocated for persons recruited directly as Deputy Engineers and the subsequent remaining vacancies in that year or in the fractional year shall be deemed to be allocated for filling any promotions from amongst Overseers who may be eligible for such promotions in accordance with rules or orders made by government from time to time during the specified period."

Rule 4, dealing with the promotion of Assistant Engineers and Deputy Engineers in vacancies in the cadre of Executive Engineers was in similar language. Section 2(h) defined "fortuitously appointed" in the following terms :

"fortuitously appointed" means appointed in any vacancy which, according to Rule 4 or 9, is not allocated for the class of officers to which the person appointed in that vacancy belongs."

These rules were challenged in Writ Petitions Nos. 955 and 956 of 1983, filed respectively by promotee Deputy Engineers Dafle and Kanitkar, and by promotee Executive Engineers Lele and Panse (hereinafter mentioned as Dafle-Lele case) before the Bombay High Court and were struck down as illegal. The High Court further ordered the State to carry out the directions given in Bagayat Patil case (W.P. No. 3483 of 1980). None of the Engineers came to this Court against this judgment, except the State Government in S.L.P. Nos. 16614-15 of 1983 which also have been heard by us. However, the prayer for stay was rejected. The result is that the seniority has to be reckoned on the basis of continuous officiation. By an amendment in 1984 the Rules 4 and 9 were formally deleted.

9. For the purpose of fixing the seniority of Executive Engineers and Assistant Engineers for the period commencing on December 21, 1970, separate rules were framed under Article 309 of the Constitution and are called the Executive Engineers and Assistant Engineers belonging to the Maharashtra Service of Engineers Class I and the Maharashtra Service Engineers Class II (Regulation of Seniority and Preparation and Revision of Seniority Lists) Rules, 1983 and will be referred to hereafter as the 1983 Rules. The validity of these Rules has been challenged in W.P. No. 1169 of 1986 filed under Article 32 in this Court.

10. As stated earlier, J. H. Bhatia filed Writ Petition No. 1327 of 1982 in person and obtained an ex

parte rule. Another application under Article 32 of the Constitution being W.P. No. 5187 of 1983 was filed by Srikant Bharat Sohoni, a direct recruit to Class II, who, besides challenging the 1978 Rules, has also attacked the validity of the 1982 Rules, although he did not file an appeal against the judgment of the High Court on this point. According to the learned counsel for the promotee respondents he was not concerned with the 1978 Rules at all but he mentioned the same in his application for the sole purpose of obtaining a rule on the ground of admission of Bhatia's writ petition. Encouraged by these two cases, several others writ petitions were also filed and have been heard along with the civil appeals.

11. Although the claim of the promotees to reckon the seniority according to the continuous officiation was accepted by this Court in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) in 1977, the State Government continued denying them the fruits of the litigation. The High Court on a complaint made by Bagayat Patil, took note of the delay and issued directions for implementation of the judgment. Still nothing was done till 1984 and an application for staying proceedings in contempt was made before the High Court. In the meantime a fresh writ petition being W.P. No. 660 of 1984 was filed by the direct recruits before the Aurangabad Bench of the Bombay High Court and stay was obtained. Thereafter a number of similar applications were filed one after another, either before the Nagpur Bench or the Aurangabad Bench of the Bombay High Court. When the promotees pointed out before this Court the game of the direct recruits, a direction was issued for hearing of all the cases at Bombay. Accordingly all the 15 writ applications were transferred and heard together at Bombay. The High Court rejected the case of the direct recruits and dismissed the writ petitions. The petitioner in nine of them have challenged the judgment in Civil Appeals Nos. 194-202 of 1986.

12. The main argument on behalf of the direct recruits has been addressed by Mr. V. M. Tarkunde, who represents the appellants in the civil appeals and the writ petitioners in W.P. No. 1169 of 1986. The learned advocates in some of the other writ cases and two of the writ petitioners in person made supplementary arguments. It has strenuously been contended that the 1978 Rules, 1982 Rules, 1983 Rules and the 1984 Rules are invalid and must be struck down. The judgment in Daffe-Lele case has also been challenged. The cases were earlier heard for some time by a Division Bench when the bench referred the matter to be dealt with by a larger bench for examining the correctness of the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775).

13. When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) was unsound and if to be overruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause. But if the appointment is made after considering the claims of all eligible candidates and the appointee

continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary. This principle has been followed in innumerable cases and has been further elaborated by this Court in several judgments including those in *Balshwar Dass v. State of U. P.* ((1980) 4 SCC 226 : 1980 SCC (L&S) 531 : (1981) 1 SCR 449) and *Delhi Water Supply and Sewage Disposal Committee v. R. K. Kashyap* (1989 Supp (1) SCC 194 : 1989 SCC (L&S) 253 : (1989) 9 ATC 784) with which we are in agreement. In *Narender Chadha v. Union of India* ((1986) 2 SCC 157 : 1986 SCC (L&S) 226 : (1986) 1 SCR 211) the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long period of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.

14. Mr. Tarkunde in the course of his argument made it clear that he was not questioning the ratio in *Patwardhan case* ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) but was challenging the judgment therein as erroneous on the ground that the posts of temporary Deputy Engineers held by the promotees were not in the cadre of the Deputy Engineers, which included only permanent posts, and this position was not correctly appreciated there. The argument is that since the permanent posts held by the direct recruits and the temporary posts which the promotees were allowed to officiate did not form a single cadre, there could not arise any question of inter se seniority amongst them. The finding to the contrary in *Patwardhan case* ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) is said to have been incorrectly arrived at, mainly due to the failure on the part of the State Government to place all the relevant materials before the Court. The stand of the appellants is that having regard to all the facts and circumstances leading to the present litigation, the direct recruits cannot be held to be bound either by a rule of *res judicata* or otherwise and they are free to challenge the *Patwardhan decision* ((1977) 3 SCC 399 : (1977) SCC (L&S) 391 : (1977) 3 SCR 775) as incorrect. It is claimed that if the relevant position is correctly appreciated, there is no escape but to hold that the 1960 Rules excepting Rule 8(iii) and the 1970 Rules except Rule 33, were perfectly legal and the declaration about their invalidity was erroneous. The learned counsel contended that since the fresh Rules, which are now impugned, were framed as a result of the said erroneous judgment, they have to be struck down. The observations in the judgment in *P. Y. Joshi case* ((1969) 3 SCC 134 : (1970) 2 SCR 615) were characterised as *obiter dicta* which cannot be held to be binding on this Court at a subsequent stage, and the question whether the direct recruits and promotees were in the same cadre or held posts on two separate and distinct cadres must be answered in accordance with the decision in *State of Gujarat v C. G. Desai* ((1974) 1 SCC 188 : 1974 SCC (L&S) 116 : (1974) 2 SCR 255) in favour of the appellants. Developing his argument Mr. Tarkunde said that since the 1960 Rules and the 1970 Rules were perfectly valid, they clothed the direct recruits with right of seniority over the promotees which could not be retrospectively taken away in view of their fundamental rights under Articles 14 and 16 of the Constitution. He further urged that the quota rule applicable to the Service under the 1960 Rules was binding on all concerned and the High Court has in the *Dafle-Lele case* erred in quashing Rules 4 and 9 of the 1982 Rules. The plea of the respondents that the quota rule was not strictly enforceable on account of the words "as far as practicable" in Rule 1(b) of the 1960 Rules or that it was relaxed or given up

later has been denied and it is said that the appointments of the promotees in excess of the quota, therefore, could not be treated as valid until the date when the posts became available in their share and consequently the earlier period cannot be considered for the question of their seniority.

15. The main thrust of Mr. Tarkunde's argument is that the permanent Deputy Engineers and the officiating Deputy Engineers were in two cadres and as the officiating Deputy Engineers could not be treated to be included in the permanent cadre having only permanent posts, they were not entitled to compete with the direct recruits in the matter of seniority. It is true that initially the cadre consisted of only permanent posts. The promotees, however, claim that the additional posts were subsequently added to the cadre and no new cadre was formed.

16. Great emphasis was laid by Mr. Tarkunde on the language of certain rules on the basis of which it was urged that the cadre of the permanent Engineers was higher in rank than that of the officiating Engineers, who had to be further promoted for becoming members of the said cadre, Rule 8(i) of the 1960 Rules, which was relied on for this purpose, reads as follows :

"8(i) The Sub-Divisional posts in the Department are, at present, manned by direct recruits to Bombay Service of Engineers, Class II cadre, Deputy Engineers confirmed from Subordinate Service of Engineers, the temporary Deputy Engineers recruited by the Bombay Public Service Commission, officiating Deputy Engineers and similar other categories. These various categories are being complied into two lists only, viz. Bombay Service of Engineers, Class II cadre of permanent Deputy Engineers and a list of officiating Deputy Engineers. The future recruitments to Bombay Service of Engineers, Class II cadre shall be made by nomination of candidates recruited direct by competitive examination, held by the Commission, and by promotions from the list of officiating Deputy Engineers. The number of such promotions shall be about one third the number of direct recruits appointed in that year."

The argument is that if the officiating Deputy Engineers could be "promoted" to Bombay Service of Engineers, Class II cadre, how could they be treated as part of the said cadre earlier. It was pointed out that the second sentence of the above rule in express terms directs two lists to be prepared, one of the permanent Deputy Engineers, and the other of officiating Deputy Engineers. Admittedly the appointment of all the direct recruits was made as against the permanent vacant posts and on their successfully completing the probationary period they were confirmed against those posts while the promotees were posted in the temporary posts as officiating Deputy Engineers. Rule 8(i), according to the appellants, therefore, make a clear distinction between the two groups, which could not be lumped together. Reliance was also placed on the language of Rules 5, 6, 12(a), 30 and 33 of the 1970 Rules. We are not in a position to agree with the learned counsel that the rules indicate that the officiating posts were not included in the cadre of the Deputy Engineers. It is true that the use of word "promotions" in Rule 8(i) of the 1960 Rules is not quite appropriate, but that by itself cannot lead to the conclusion that the officiating Deputy Engineers formed a class inferior to that of the permanent Engineers. As was stated with reference to the expressions like 'substantive capacity', 'service' and 'cadre' in *Baleshwar Dass v. State of U. P.* ((1980) 4 SCC 226 : 1980 SCC (L&S) 531 : (1981) 1 SCR 449) (SCR p. 463 C-E : SCC p. 238, para 22), we cannot attribute fixed connotation to the expression 'promotion' without reference to the context. The expression there has been used in the sense of confirmation. The language used in several other rules is inconsistent with two-cadre theory, and by way of illustration Rule 12(a) may be considered. Rules 5 and 24 of the 1970 Rules mention only 4 cadres in Class II - namely, those of Sub-Divisional Officers, Sub-Divisional

Engineers, Assistant Engineers Class II and Deputy Engineers and there was no separate cadre of officiating Deputy Engineers. Rule 12(a) of the 1970 Rules expressly includes some of the officiating Deputy Engineers within the cadre of the Deputy Engineers, although it leaves behind the other officiating Deputy Engineers who started officiating later than April 30, 1960. Rule 13 speaks of officers "officiating in the erstwhile cadre of Deputy Engineers" and Rule 27 of "officiating promotions" which are inconsistent with two-cadre theory. In Rule 33 of the 1970 Rules also two lists were directed to be prepared, not cadrewise but in each cadre, clearly indicating that the lists were different from cadres. In Rule 8(i) of the 1960 Rules also the different groups were not described as different cadres. They were referred to as "categories" and what the re-organisation suggested was with reference to "lists" to be prepared. It will not, therefore, be right to equate the lists with cadres. It is true that the Rules have not in express language stated that the officiating posts also will be in the cadre but if all their relevant provisions are considered, they unmistakably lead to the said conclusion. Excepting the use of the word "promotions" in Rule 8(i) of the 1960 Rules no other provision appears to help the appellants.

17. This question was considered in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) at considerable length, and a categorical finding against the direct recruits was arrived at, which has been followed for the last more than a decade, in many cases arising between members of Maharashtra and Gujarat Engineering Services. The question is of vital importance affecting a very large number of officers in the departments concerned and many disputes have been settled by following the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775). In such a situation it is not expedient to depart from the decision lightly. It is highly desirable that a decision, which concerns a large number of government servants in a particular Service and which has been given after careful consideration of the rival contentions, is respected rather than scrutinised for finding out any possible error. It is not in the interest of the Service to unsettle a settled position every now and then. Besides, the learned counsel for the parties have placed the rival arguments on the issue in great detail with reference to every available material, and in our opinion the finding was correctly arrived at. We also agree that the interpretation given in P. Y. Joshi v. State of Maharashtra ((1969) 3 SCC 134 : (1970) 2 SCR 615) by a bench of five Judges on Rule 8 of the 1960 Rules, which answers one of the main grounds of the direct recruits in support of two-cadre theory, must be respected. Mr. Tarkunde has attempted to distinguish P. Y. Joshi case ((1969) 3 SCC 134 : (1970) 2 SCR 615) and has challenged the correctness of the observations at SCR p. 795 (SCC p. 419) of the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 (L&S) 391 : (1977) 3 SCR 775). We do not agree with the learned counsel. The dispute in that case was in respect of promotion of promotee Deputy Engineers to posts of officiating Executive Engineers. Rule 7(ii) of the 1960 Rules prescribed, as necessary conditions for promotion, the minimum service of seven years as Deputy Engineer. The respondents in P. Y. Joshi case ((1969) 3 SCC 134 : (1970) 2 SCR 615) were eligible, provided their experience as officiating Deputy Engineers was allowed to be counted. The petitioners in that case were direct recruits to the posts of Deputy Engineers and they challenged the promotion of the respondents on the ground that they had not completed the seven years' period after their confirmation as Deputy Engineers and the period for which they had been officiating as such was not available to them for the purpose. Their contention was "that under the rules in force the respondents who were in substantive rank of Overseers were only officiating Deputy Engineers and that as they did not belong to the cadre of Deputy Engineers they were not entitled to promotion inasmuch as they had to put in after confirmation as Deputy Engineers 7 years of actual service before being eligible for promotion as officiating Executive Engineers". The arguments were addressed with reference to several rules including rule 8, and this Court while rejecting the stand of the direct recruits observed

thus : (SCC pp. 143-144, para 11)

"In our view it is the list of such persons that is referred to in clause (ii) of Rule 8 and not that there should be a list of persons actually officiating as Engineers for further promotion to the same post which will have little meaning, for there cannot be a promotion of a person in the same cadre of service who is already promoted whether as an officiating or temporary or permanent incumbent. If clause (i) of Rule 8 provides that Class II cadre shall be recruited by competitive examination, the promotees also are promoted from the list of persons considered fit to hold sub-divisional charge, i.e. post of Deputy Engineers. If in the case of direct recruits the appointment is without reference to confirmation, it cannot be any different in the case of promotees."

This interpretation of Rule 8 is binding as a precedent. It is urged by Mr. Tarkunde that the ratio of the Division Bench judgment in *State of Gujarat v. C. G. Desai* ((1974) 1 SCC 188 : 1974 SCC (L&S) 116 : (1974) 2 SCR 255) supports his argument and should be followed. We do not think so. The controversy, there, also related to the construction of Rule 7(ii) of the 1960 Rules requiring the minimum service of 7 years for a Class II officer to be promoted as officiating Executive Engineer. Respondent 1 C. G. Desai who was not considered eligible for promotion was earlier officiating as Deputy Engineer from May 1955 to December 1959. Thereafter he successfully competed at an examination for direct recruitment to Class II Service held by the Public Service Commission and was appointed as permanent Deputy Engineer. For the purpose of his promotion to the higher cadre he relied on his officiating service before he was selected as a direct recruit, which was denied by the government. In a writ case his claim was accepted as legitimate by the High Court. This decision was challenged before this Court; and it was held by the judgment in the reported case that the respondent was not entitled to count his experience as officiating Deputy Engineer before his selection as a direct entrant in the Service. It was, inter alia, observed that if a person like the respondent leaves his position in the long queue of officiating Deputy Engineers with a view to avoid the tortuous wait for promotion and takes a short-cut, "he gives up once for all the advantages and disadvantages" of continuing as an officiating Deputy Engineer and accepts all the handicaps and benefits which attached to the group of direct recruits. "He cannot, after his direct recruitment claim the benefit of his pre-selection service and thus have the best of both the worlds." In this set up and for the purpose of construing Rule 7 and considering the necessary qualification for promotion as an Executive Engineer, it was observed that the direct recruits and the promotees in Class II constituted two groups or classes, and it was pointed out that unless the pre-selection service as officiating Deputy Engineer of direct recruits was excluded for reckoning the 7 years experience, it would create two classes amongst the same group of direct, recruits and result in discrimination against those direct recruits who had no such pre-selection service to their credit. The decision has to be understood in this background and it cannot be of any help to the present appellants.

18. Even on an independent consideration of the provisions of the Rules, the relevant materials and the arguments addressed on behalf of the parties, we are of the view that the temporary posts of Deputy Engineers against which promotes officiated, did not form a separate cadre and were additions to the main cadre. These temporary posts were created in pursuance of several resolutions of the State Government and an examination of their language is helpful in resolving the controversy. The Resolution No. ENH-1062-C, dated November 8, 1962 (Ex. 'A' at page 277 of Vol. V of the paper book) after referring to the sanction accorded by the government for creation of the temporary posts stated :

"The posts of Executive Engineer and Deputy Engineer should be treated as temporary additions to their respective cadres."

Similarly the Resolution No. CDS 1170-F, dated November 3, 1970, dealing with the temporary posts created in the Departments of Irrigation and Power stated as follows : (pages 283-286, at page 284, paragraph 3 of Vol. V of the paper book) :

"The temporary posts in each department be treated as temporary additions to the respective cadres."

Mr. K. K. Singhvi, the learned counsel for the promotees relied upon these resolutions and several other documents in support of the finding of this Court in P. Y. Joshi case ((1969) 3 SCC 134 : (1970) 2 SCR 615) and Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) comprising the single-cadre theory and contended that these and other materials were available to the court in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775). Mr. Tarkunde, on the other had, argued that some fresh materials have some to light since after the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775), which had not been made available by the State earlier. There is serious controversy as to the interpretation of these documents alleged to have been later discovered by the direct recruits and in our opinion they do not furnish any evidence of substantial nature to outweigh the materials produced by the State in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) including the aforementioned resolutions. In the circumstances, we do not consider it necessary to discuss this question any further and close the issue by holding that the officiating Deputy Engineers were in the same cadre with the other Deputy Engineers in permanent posts.

19. It has been next contended that even if the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) be held to be correct, and it is assumed that the posts of officiating Deputy Engineers are also included in the cadre of permanent Deputy Engineers, Rules 4 and 9 of the 1982 Rules could not have been challenged as illegal and the decision of the Bombay High Court in Dafle-Lele case striking down these rules is erroneous and fit to be overruled. It was pointed out that the 1984 Rules framed as a result of the said decision expressly stated that they were subject to the result in the Special Leave Petitions Nos. 16614-15 of 1983 filed by the State of Maharashtra against the said decision, and if the judgment in Dafle-Lele case is set aside then the 1984 Rules will automatically disappear. Great emphasis was laid by Mr. Tarkunde on the provision in the 1960 Rules fixing the ratio of the direct recruits and the promotees in the Deputy Engineers cadre; and it was urged that the question of seniority must be settled with reference to the time when posts became available to the promotees in accordance with the said quota rule. Merely for the reason that the promotees were allowed to officiate on the temporary posts in excess of their quota they cannot be permitted to steal a march over the genuine claimants to the posts namely, the subsequently appointed direct recruits. Repelling the stand of the respondents it was argued that the quota rule never collapsed and remained operative and was confirmed by the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775). About the rule applying at the stage of appointment and not at the stage of confirmation, as was held in the said judgment, it was suggested that the observations cannot be legitimately interpreted as setting the officiating Deputy Engineers free of the principle of quota. It meant, according to the learned counsel, that if an officer was promoted within his quota, the rule would be applicable with reference to the date of promotion and not the date of confirmation, but where his promotion was in excess of the permissible quota his seniority would be reckoned with reference to the date when a vacancy became available for him, and not on the basis of his continuous officiation. He will be

entitled to count his officiating experience only on a vacancy being available to him in accordance with the quota rule. Reliance was placed on *S. G. Jaisinghani v. Union of India* ((1967) 2 SCR 703 : AIR 1967 SC 1427 : 65 ITR 34), *A. K. Subraman v. Union of India* ((1975) 1 SCC 319 : 1975 SCC (L&S) 36 : (1975) 2 SCR 979), *V. B. Badami v. State of Mysore* ((1976) 2 SCC 901 : 1976 SCC (L&S) 353 : (1976) 1 SCR 815) and *paramjit Singh Sandhu v. Ram Rakha* ((1973) 3 SCC 478 : 1979 SCC (L&S) 309 : (1979) 3 SCR 584). Alternatively it was contended that assuming that the quota rule had collapsed as a result of non-availability of direct recruits, the State Government was under a duty to change the ratio by allotting a large share to the promotees, which was belatedly done in 1970. So long the rule was not amended the same had to be respected. On the strength of observations in *Bishan Sarup Gupta v. Union of India* ((1973) 3 SCC 1 : 1973 SCC (L&S) 1 : 1975 Supp SCR 491) it was urged that collapse of quota rule does not make seniority dependent on continuous officiation. It calls upon the government to frame better rules to meet the requirements of the situation.

20. The quota rule was for the first time introduced by the 1960 Rules. As already mentioned, these Rules were introduced through executive instructions issued by the State Government. The statutory rules which were holding the field earlier did not fix and ratio between the direct recruits and the promotees. Rule 1 of the 1960 Rules which is relevant in this context is quoted below :

"1. Appointment to the Bombay Service of Engineers, Class I and Class II, shall be made either -

(a) by nomination after a competitive examination held by the Bombay Public Service Commission hereafter called the Commission in accordance with the rules appended, or

(b) by promotion from amongst the members of the lower cadres concerned :

Provided that the ratio of the appointment by nomination and by promotion shall, as far as practicable, be 75 : 25."

It will be noticed that the ratio of 3:1 was fixed for the purpose of "appointment", and not for the strength in the Service, as was suggested on behalf of the appellants. The other important feature was that the Proviso fixing the ratio, far from being imperative, permitted the State Government to exercise its discretion according to the demand of the exigencies, by using the expression "as far as practicable". The case of the appellants is that the said expression was inserted in the Proviso with the object of avoiding fractions in arithmetical calculations of number of posts available to the two groups, and for no other purpose. We do not see any reason to so restrict the scope and meaning of the expression "as far as practicable". A similar expression in identical terms used in certain other rules came up for consideration in *N. K. Chauhan v. State of Gujarat* ((1977) 1 SCC 308 : 1977 SCC (L&S) 127 : (1977) 1 SCR 1037) and it was held that if it became non-feasible and impracticable for the State to fill up the requisite quota by direct recruits after making a serious effort to do so, it was free to fill the posts by promotion of suitable hands, if the filling up of the vacancies was administratively necessary and could not wait. Similar is the position here, and the Rule 1 of the 1960 Rules must be held to be realistic and flexible, true to life rather than abstractly absolute. It was strenuously contended by Mr. Tarkunde and was reiterated by the other learned counsel that the State Government erred in promoting the officers from the lower cadre far in excess of their legitimate share in the Service, and the promotees cannot be allowed to take advantage of this wrong perpetuated from year to year. Reply of the respondents is that direct recruits suitable for

appointment were not available and if appointments had been deferred on that account the fast developing departments, entrusted with quick improvement in several fields would have been rendered crippled, leading to grave injury to the industrial and other growths in the State. The public interest demanded that the improvement work did not suffer on account of non-availability of suitable candidates for nomination, when competent Engineers fit to shoulder the responsibility were available in abundant number in the departments themselves. It will bear repetition that the promotees were not appointed in a casual manner; the Rules applicable for substantive appointments were meticulously followed and eligible officers were subjected to all the tests including scrutiny by the Public Service Commission before they were promoted. The reason for not adhering to the quota rule was admittedly the non-availability of the direct recruits and was specifically mentioned in the government's resolution of 1970 as a reason for replacing the old rules by new ones. Mr. Singhvi, the learned counsel for the respondents, argued that having regard to the relevant facts and circumstances, there is no escape from the conclusion that the quotas rule spelt out by the executive instructions in the 1960 Rules had in fact collapsed, and that this fact can be recognised even without issuing a formal amending instruction. It is permissible to draw an inference to that effect by the steps taken by the state Government, repeatedly and for a considerable period, in disregard of such a rule, an specially so where the quota is not fixed in imperative terms. Reliance was placed on the observations at page 209 of the judgment of this Court in *P. C. Sethi v. Union of India* ((1975) 4 SCC 67 : 1975 SCC (L&S) 203 : (1975) 3 SCR 201). The quota of direct recruits in that case had not been enforced "perhaps for good reasons as noted above, the policy of the government being different". In this back-ground it was stated that administrative instructions, if not carried into effect for obvious and good reasons, cannot confer a right upon entrants on later recruitment to enforce the same. The learned counsel appears to be right.

21. It has, however, been rightly suggested on behalf of the appellants that when recruitment is from more than one source, there is no inherent invalidity in introducing quota system, but as was observed in *Subraman case* ((1975) 1 SCC 319 : 1975 SCC 319 : 1975 SCC (L&S) 36 : (1975) 2 SCR 979), the unreasonable implementation of such a rule may attract the frown of the equality clause. Further, if a rule fixing the ratio for recruitment from different sources is framed, it is meant to be respected and not violated at the whims of the authority. It ought to be strictly followed and not arbitrarily ignored. This, of course, may not prevent the government from making slight deviations to meet the exigencies. If it is discovered that the rule has been rendered impracticable, it should be promptly substituted by an appropriate rule according to the situation. The question, however, is as to what is the conclusion if the quota rules is not followed at all continuously for a number of years, after it becomes impossible to adhere to the same. Admittedly in the present cases direct recruits were not available in adequate number for appointment, and appropriate candidates in the sub-ordinate rank capable of efficiently discharging the duties of Deputy Engineers were waiting in their queue. The development work of the State peremptorily required experienced and efficient hands. In the situation the State Government took a decision to fill up the vacancies by promotion in excess of the quota, but only after subjecting the officers to the test prescribed by the rules. All the eligible candidates were considered and the opinion of the Public Service Commission was obtained. The appointments were not limited to a particular period and as a matter of fact continued till 1970 when the fresh rules were introduced.

22. The stand of the appellants is that whenever appointments are made in violation of a quota rule the appointees will have to go down below the new entrants, joining the service in accordance with their quota. The cases relied upon by Mr. Tarkunde do discuss the general principles about the enforceability of quota rule and the effect of its violation, but do not profess to lay down the universal rule applicable to every case irrespective of the other relevant circumstances arising

therein. On the other hand, the decisions cited by Mr. Singhvi deal with circumstances similar to those in the present cases, and are illustrative of situations where the general rule has to yield to just exceptions. Indeed, Mr. Tarkunde himself attempted to distinguish them on the ground that the government had relaxed the quota rule in those cases. The fallacy in the argument, however, is that the present cases are also of the same category.

23. Mr. Tarkunde is right that the rules fixing the quota of the appointees from two sources are meant to be followed. But if it becomes impractical to act upon it, it is no use insisting that the authorities must continue to give effect to it. There is no sense in asking the performance of something which has become impossible. Of course, the government, before departing from the rule, must make every effort to respect it, and only when it ceases to be feasible to enforce it, that it has to be ignored. Mr. Tarkunde is right when he says that in such a situation the rule should be appropriately amended, so that the scope for unnecessary controversy is eliminated. But, merely for the reason that this step is not taken promptly, the quota rule, the performance of which has been rendered impossible, cannot be treated to continue as operative and binding. The unavoidable situation brings about its natural demise, and there is no meaning in pretending that it is still vibrant with life. In such a situation if appointments from one source are made in excess of the quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are inducted in the Service subsequently. The later appointees may have been young students still prosecuting their studies when the appointments from the other source take place - and it is claimed on behalf of the respondents that this is the position with respect to many of the direct recruits in the present case - and, it will be highly inequitable and arbitrary to treat them as senior. Further, in cases where the rules themselves permit the government to relax the provisions fixing the ratio, the position for the appointees is still better; and a mere deviation therefrom would raise a presumption in favour of the exercise of the power of relaxation. There would be still a third consideration relevant in this context : namely, what is the conclusion to be drawn from deliberate continuous refusal to follow an executive instruction fixing the quota. The inference would be that the executive instruction has ceased to remain operative. In all these cases, the matter would however be subject to the scrutiny of the court on the ground of mala fide exercise of power. All the three circumstances mentioned above which are capable of neutralising the rigours of the quota rule are present in the cases before us, and the principle of seniority being dependent on continuous officiation cannot be held to have been defeated by reason of the ratio fixed by the 1960 Rules.

24. The decisions relied upon by Mr. Singhvi deal with similar situation and are consistent with our opinion.

25. The decisions relied upon by Mr. Tarkunde support his argument in general terms but are distinguishable on account of the special features in the present cases. Mr. Singhvi contended that many important observations in those cases also support the respondents on several relevant aspects, as for example, the statement at SCR pp. 990H-991B in the judgment in A. K. Subraman case ((1975) 1 SCC 319 : 1975 SCC (L&S) 36 : (1975) 2 SCR 979) to the following effect : (SCC pp. 330-31, para 23)

"It is submitted by the respondents that one-third quota cannot be filled unless the two-third quota was exhausted. This, is in our view, will introduce sterility in the quota rule so far as the promotees are concerned. Their hopes and aspirations cannot be related to the availability or non-availability of the direct recruits to fill the two-third quota. Each quota will have to be worked independently on its own force. The

word "rest' in the quota rule cannot be pressed into service to defeat the object of the rule coming in aid of advancement of prospects of promotees in the hierarchy of the Service."

26. Relying on the observations at SCR p. 505H (SCC p. 131) of the judgment in Gupta case ((1973) 3 SCC 1 : 1973 SCC (L&S) 1 : 1975 Supp SCR 491), Mr. Tarkunde strenuously urged that even on the assumption that the quota rule in the present cases had, in fact, broken down, it was imperative on the part of the government to have framed fresh workable rules before promoting the respondents. The learned counsel for the promotees distinguished the decision, and to our mind correctly, on the ground that there the manner and terms of the appointments made in breach of the quota rule, were widely different from those in the present cases. The special facts as they appear from the other judgment in the Gupta case (Bishan Sarup Gupta v. Union of India, ((1975) 3 SCC 116 : 1974 SCC (L&S) 506 (1975) 1 SCR 104) were stated at SCR p. 113E-F thus : (SCC pp. 125-126, para 13)

"It is necessary to remember, however, in this connection that all these officers had been told when promoted that their appointments were on an officiating or ad hoc basis and the question of their seniority had not been determined. It was thereby implied that orders about seniority could only be passed after the department was in a position to take a decision with regard to the inter se seniority between the promotees and the direct recruits. That being the situation of all these officers, they could hardly contend that the dates of appointments will not be altered for the purposes of determining seniority."

The decision was later considered in P. S. Mahal v. Union of India ((1984) 4 SCC 454 : 1985 SCC (L&S) 61 : (1984) 3 SCR 847) and the analysis given at SCR pp. 877E-880 (SCC pp. 573-575, paras 13 and 14) clearly indicates that the decision has to be understood in the back-ground of the facts therein and cannot have a universal application irrespective of the situation. This judgment ((1973) 3 SCC 1 : 1973 SCC (L&S) 1 : 1975 Supp SCR 491) as well as the decision in Badami case ((1976) 2 SCC 901 : 1976 SCC (L&S) 353 : (1976) 1 SCR 815) were rightly distinguished in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) at SCR p. 797 (SCC p. 421).

27. It has also been alternatively argued on behalf of the appellants that by the statement in the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) that the quota rule applied at the stage of appointment and not at the stage of confirmation, this Court did not mean to say that those who were promoted in an officiating capacity were no subject to the quota rule. The contention is that what was meant to be conveyed by the aforesaid observations was that if an officer had been promoted within his quota then it would be the date of his promotion and not the date of confirmation which would be relevant for the officer's seniority, but where the officer is promoted in excess of his quota his seniority would arise when a vacancy in his quota becomes available. We are afraid, it is not possible to read the judgment as suggested. The finding at SCR pp. 795F-796A, in the following words does not leave any room for controversy : (SCC p. 419, para 38)

"In this view of the matter, the prescription contained in the closing sentences of Rule 8(i) that "the number of such promotions shall be about one-third the number of direct recruits appointed in that year" would apply to initial appointments and cannot govern the confirmation of those who have already been appointed to Class II cadre. In other words, direct recruits and promotees have to be appointed in the proportion

of 75:25 to Class II cadre, the former as Deputy Engineers and the latter as officiating Deputy Engineers, but once that is done, the quota rule would cease to apply with the result that confirmations in the posts of Deputy Engineers are not required to be made in the proportion in which the initial appointments had to be made. Thus Rule 8(i) only requires that for every three direct recruits appointed as Deputy Engineers only one promotee can be appointed as officiating Deputy Engineer. The rule cannot be construed to mean that for every three confirmations of Deputy Engineers, not more than one promotee can be confirmed as Deputy Engineer."

Relying upon the observations in the Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) that the quota system was an important feature of the 1960 Rules, it was contended by Mr. Tarkunde that it is not permissible to hold that the rule in this regard had been relaxed by the government or that it had at any point of time broken down. We do not find it permissible to construe the statement in the judgment, referred to, to lead to such a conclusion. This argument, as has been addressed before us on the basis of the quota rule as an additional contention was not pressed in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) and so there was no occasion for this Court to deal with the same. The observations referred to by Mr. Tarkunde were made in a different context altogether. If it be assumed that this argument was constructively involved in the Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775), then it follows that the same must be deemed to have been overruled. The case clearly, in unambiguous terms, rejected the claim of the direct recruits for seniority over the promotees. The appellants by trying to interpret a part of the observation made in the judgment in a different context, in an artificial and uncalled for manner, are suggesting that the judgment is self-contradictory, but we do not find any justification for such an inference.

28. Still another point confined against a certain category of the officiating Deputy Engineers who were not included in the frozen cadre under the 1970 Rules was attempted. The contentions is that the expressions "all the promoted Deputy Engineers" and "all directly recruited Deputy Engineers" used in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) should be given restricted meaning, so as not to include those officiating Deputy Engineers who were not included in the frozen cadre within the group of "promoted Deputy Engineers"; and the Assistant Engineers Class II within the group of "directly appointed Deputy Engineers". It is said that although in the judgment it was stated that the different groups in the Service were there in representative capacity, these groups were actually not represented. Even assuming that to be so, it is not possible to hold that the principle of seniority being dependent on continuous officiation will not apply to these groups of the officers. The reasons for rejecting the case of the appellants are equally applicable to all the promoted Deputy Engineers including those who were earlier Sub-Divisional Engineers and Sub-Divisional Officers, as well as all the directly recruited Deputy Engineers. The suggested division of the two groups into further sub-categories will result in illegal discrimination.

29. Mr. Tarkunde also urged that as a result of the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) it was not necessary to frame the entire rules afresh, inasmuch as only Rule 8(iii) of the 1960 Rules and Rule 33 of the 1970 Rules had been struck down. The grievance against the 1982 Rules is that it has disturbed the order of seniority of the parties with retrospective effect, which is illegal. The argument has to be rejected as it fails to take note of the finding that the direct recruits who joined the service later than the promotees were at no point of time senior. The 1982 Rules merely recognised this position and gave effect to it. They

have (excepting the arbitrary and discriminatory provisions of Rules 4 and 9) undone the inequality, inequity and illegality which were the products of the offending provisions of the earlier Rules, and there is no reason what-so-ever to doubt their validity.

30. The judgment of the Bombay High Court striking down Rules 4 and 9 of the 1982 Rules has been seriously criticised on behalf of the appellants. The grounds of challenge, however, are the same which have been considered earlier. Excepting the State of Maharashtra challenging this judgment in S.L.P. Nos. 16614-15 of 1983 no other party has directly impugned it. So far Mr. A. S. Bhasme, who appeared on behalf of the State of Maharashtra, is concerned, he faintly defended all the steps of the State taken from time to time, and made certain statements which were criticised on behalf of the appellants in the civil appeals as amounting to unjustified concessions in favour of the promotees. Since we have not gone by the stand taken on behalf of the State of Maharashtra before us during the argument, and our decision is based on a consideration of the merits of the different questions argued by the parties and not on any concession, we do not consider it necessary to deal with Mr. Bhasme's argument at any length. We hold that the Rules 4 and 9 of the 1982 Rules were rightly struck down and consequently the 1984 Rules were correctly framed and have to be upheld as legal and valid.

31. Mr. Tarkunde took great pains in analysing the practical effect of the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) with which we agree and contended that the direct recruits shall suffer seriously if the present civil appeals, writ petitions and the special leave petitions are not allowed. Mr. Singhvi challenged the figures worked out on behalf of the appellants. We do not consider it necessary to go into this controversy as it cannot be denied that as a result of Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) and on dismissal of present cases a large number of promotees have to be treated as senior to the direct recruits, and in that sense the direct recruits do suffer. This, however, cannot be avoided. If their case on merits is not correct, it cannot be assumed that they were at any point of time clothed with any right, which they are being deprived of. If the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) had been given effect to promptly, many of them would have been reverted to inferior posts but by their persistence, both before the higher authorities of the State and the courts, they have sufficiently delayed the matter so as to avoid the reversion of any one of them.

32. Mr. Bhandare, appearing in W.P. No. 5187 of 1983 and W.P. No. 8594 of 1983, generally adopted the argument addressed by Mr. Tarkunde and added by saying that the officers should have been, on a proper classification, divided into 3 classes, namely, (i) Assistant Engineers Class I, (ii) the Deputy Engineers directly recruited in Class II, and (iii) the officiating Deputy Engineers promoted from Class III, and quota should have been fixed separately for 3 classes right up to the top stage where appointments are to be made by promotion. He prayed for a declaration to the authorities to frame fresh rules including appropriate provisions on the lines suggested by him. In view of our finding that the 1982 Rules as amended by the 1984 Rules do not suffer from any infirmity, there is no occasion for issuing any further direction. So far the question of fixing the ratio of the appointments from different sources is concerned, it is a matter of policy for the government and it is not for us to offer our advice.

33. The petitioner in W.P. No. 5187 of 1983, S. B. Sohoni, was directly appointed as a Deputy Engineer in March 1961 and was confirmed in 1963. It was, therefore, rightly point out by Mr. Singhvi that he was not concerned with the 1978 Rules at all. The writ petition, in absence of grounds relating to the 1978 Rules, confirms this impression. He has of course challenged the 1982

Rules, as they stood before the amendment in 1984, but did not, after 1984 amendment, make any prayer for modification of his writ petition. He also did not consider it necessary to file an appeal against the High Court judgment. No additional ground has been raised on his behalf to be dealt with separately.

34. So far as the petitioner in Writ Petition No. 8594 of 1983, J. T. Jangle is concerned, he was an earlier appointee and was included in the seniority list of November 1956. This list was confirmed by the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) (vide SCR p. 800G : SCC p. 424) of the judgment. It has been stated in his petition that although some junior officers were prompted as Executive Engineers earlier, his promotion was delayed and took place in October 1973. He has not given the details in this regard or the names of the junior officers who superseded him. He was not considered eligible for promotion as Executive Engineer earlier as he had not completed 7 years' service as required by the 1960 Rules. He has not impleaded those who have superseded him and has not made any specific prayer in this regard. Besides, in view of the decision in P. Y. Joshi case ((1969) 3 SCC 134 : (1970) 2 SCR 615) he could not have claimed promotion before completing 7 years of service. We do not find any merit in either of the two writ petitions - W.P. No. 5187 of 1983 and W.P. No. 8594 of 1983 - pressed by Mr. Bhandare.

35. Writ Petition No. 1327 of 1982 was argued by J. H. Bhatia, the petitioner, in person. He was directly recruited as Deputy Engineer Class II in July 1959 and has challenged the constitutional validity of the 1978 Rules. Mr. Singhvi, the learned counsel for the respondents, took a preliminary objection to the maintainability of the writ application on the ground that his claim stands barred by principles of res judicata. Admittedly, he was represented in W.P. No. 672 of 1981, filed before the Bombay High Court which was dismissed on September 7, 1981, upholding 1978 Rules. An application under Article 136 of the Constitution being numbered as S.L.P. No. 8064 of 1981 was filed from this judgment in representative capacity and was dismissed by this Court on December 29, 1981. These facts were not denied by the petitioner before us, and it was therefore contended on behalf of the respondents that so far the validity of the 1978 Rules is concerned, it must be held to be binding on the petitioner in respect of identical relief now pressed by him in the present writ case. The objection appears to be well founded. It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in *Daryao v. State of U. P.* ((1962) 1 SCR 574 : AIR 1961 SC 1457) held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea as was observed at SCR p. 595 of the reported judgment, thus : (SCR p. 595)

"We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are substantially the same."

The decision in *Forward Construction Co. v. Prabhat Mandal (Regd.)*, Andheri ((1986) 1 SCC 100 : 1985 Supp 3 SCR 766), further clarified the position by holding that an adjudication is conclusive and final one as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata.

36. The petitioner, however, was permitted during the hearing, to place his case on merits as he did so at some length, and Mr. Singhvi replied thereto. We have considered the arguments carefully and do not find any substance in the claim of the petitioner and we proceed to indicate our reasons briefly.

37. The petitioner J. H. Bhatia was appointed Deputy Engineer as a direct recruit in 1959 and was promoted as Executive Engineer in 1969. According to his case, he was governed by the 1941 Rules and was, therefore, entitled to a higher position in the list of seniority. It has been contended by him that he was entitled to the benefit of either the 1941 Rules or the provision relating to quota in 1960 Rules and in either event he would have been eligible for promotion to the rank of Executive Engineer three years earlier, that is, in 1966. On account of this delay in his promotion he seriously suffered by the further delay in his next promotion as Superintending Engineer by a considerable period. With reference to the criticism against the 1941 Rules in the judgment of Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) the petitioner urged that the same should be treated as passing remarks, fit to be ignored. Alternatively he has adopted the arguments addressed on behalf of the appellants challenging the correctness of the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775).

38. As has been stated earlier, the seniority list of the Deputy Engineers for the period up to November 1, 1956 was confirmed in the Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775). The question of determining the seniority for the subsequent period arose in pursuance of the further decision in this judgment. The 1960 Rules were enforced with effect from April 30, 1960 which introduced, for the first time, several new provisions including the quota rule. The period from November 1, 1956 to April 30, 1960 was, therefore, separately dealt with by framing the 1978 Rules under Article 309 of the Constitution. In accordance with the decision in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) the seniority list of the Deputy Engineers as on November 1, 1956 was declared by these Rules as valid, final and binding, and thereafter the further seniority lists were directed to be prepared for the years 1957, 1958, 1959 and 1960 on the basis of continuous officiation in accordance with the judgment. The petitioner contends that the judgment in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) cannot be interpreted to have struck down the 1941 Rules and the claim of the direct recruits appointed prior to the coming in force of the 1960 Rules must be upheld in view of the provisions of Rule 2 of the 1941 Rules. The 1941 Rules contained only two rules which are quoted below :

"1. In the case of direct recruits appointed substantively on probation, the seniority should be determined with reference to the date of their appointment on probation.

2. In the case of officers promoted to substantive vacancies, the seniority should be determined with reference to the date of their promotion to the substantive vacancies provided there has been no break in service prior to their confirmation in those vacancies."

39. Mr. Singhvi replied by saying that Rule 2, aforementioned, when properly understood, does not help the petitioner at all, inasmuch as the rule refers to substantive vacancies and not permanent appointments, and substantive vacancies can arise even in temporary posts. Reliance was placed on the observations in Baleshwar Dass case ((1980) 4 SCC 226 : 1980 SCC (L&S) 253 : (1989) 9 ATC 784). However, we do not consider it necessary to deal with this argument, as in our view the petitioner cannot succeed even otherwise. The substance of the petitioner's argument is again the same as has been contended on behalf of the appellants in the civil appeals, namely, that the principle of seniority being dependent on continuous officiation as laid down in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) should not be accepted. The contention is that the seniority ought to be reckoned with reference to the date of permanent appointment in the cadre. This argument precisely was rejected in Patwardhan case ((1977) 3 SCC 399 : 1977 SCC 391 : (1977) 3 SCR 775) and we are in complete agreement with the same. We also do not accept the argument of the petitioner that the judgment did not deal with the 1941 Rules. The same Rules were pointedly considered at SCR pp. 790G-791E (SCC pp. 414-15, paras 28 and 29) in the published report and it was, inter alia, held : (SCC p. 415, para 28)

"The 1941 Rules contained the real germ of discrimination because the promotees had to depend upon the unguided pleasure of the government for orders of confirmation. In the pre Constitution era, such hostile treatment had to be suffered silently as a necessary incident of government service."

It has to be remembered that the 1941 Rules, made under an executive instruction, do not stand on a stronger footing than the provisions of the subsequent similar Rules which have been struck down on the ground of illegal discrimination; and as in the case of the 1982 and the 1984 Rules, the 1978 Rules also were framed under Article 309 of the Constitution. No valid objection can be taken against the 1978 Rules made for undoing the wrong resulting from arbitrariness and offensive discrimination which had visited the promotees.

40. Mr. Bhatia has, by his written argument, belatedly alleged mala fides on the part of the State Government on the ground that it failed to prepare and publish select list for a number of years and it attempted to mislead this Court by not stating the correct position in regard to the cadre of the Deputy Engineers and the 1941 Rules. We do not find any justification for the petitioner or any other direct recruit to urge lack of bona fides on the part of the State. We do not find any merit in any of the submission addressed by the petitioner.

41. The retired Superintending Engineer, Shripad Shankar Patwardhan, intervenor in Writ Petitions Nos. 1327 of 1982, 5187 of 1983 and 8594 of 1983, also made a few submissions in person and filed a note of his argument in the shape of an affidavit. He has not raised any additional ground, and it is not necessary to discuss his case any further.

42. The two petitioner in Writ Petitions Nos. 3947-48 of 1983 are Executive Engineers in the

Irrigation Department of the Government of Gujarat. Although the case was initially filed through advocates, at the hearing on a request by them petitioner 1 was allowed to argue the case in person on their behalf. Besides impleading the State of Gujarat, the Government of Maharashtra and the Union of India as respondents 1, 2 and 3 respectively, H. N. Shah, another officer of the same department, was made a party as respondent 4 in the writ petition. The case of the petitioners is that respondent 4 was junior to them and was erroneously treated as senior in the seniority lists of the period November 1, 1956 to April 30, 1960 prepared in accordance with the 1978 Rules.

43. The writ petition states that the petitioners were in Subordinate Engineering Service of the former State of Bombay when they appeared at the competitive examination held for direct recruitment and were appointed Deputy Engineers. At the same examination, H. N. Shah, respondent 4, who was an officiating Deputy Engineer, also appeared and was appointed a Deputy Engineer as a direct recruit and his name appeared in the list below the petitioners. After the bifurcation of the two States of Maharashtra and Gujarat in 1960, the petitioners as well as respondent 4 were allocated to the State of Gujarat. In 1969 petitioner 1 and respondent 4 were promoted as Executive Engineers and the name of respondent 4 was again shows lower in the list. It is stated in paragraph 13 of the writ petition that petitioner 2 was temporarily dropped in this promotion order on administrative grounds. It is contended on behalf of the petitioners that these lists correctly placed respondent 4 below the petitioners but the subsequent lists prepared in pursuance of the 1978 Rules wrongly show him as senior.

44. A counter-affidavit on behalf of the State of Maharashtra was filed inter alia denying several allegation in the writ petitions explaining certain circumstances by giving all the relevant materials, and explaining the situation. S. B. Patwardhan, the petitioner in the reported case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775), also intervened and refuted the claim of the petitioners. Respondent 4 has retired in the meantime and has not appeared in this case.

45. Petitioner 1, after making a very brief argument, filed written submissions, but since in our view the Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) was correctly decided, the State was under a duty to prepare fresh seniority lists for the period November 1, 1956 to April 30, 1960, and this was done after framing the 1978 Rules. We do not find any merit in the challenge to the 1978 Rules, as indicated earlier, and in that view these writ petitions are fit to be rejected, specially as respondent 4 has already retired.

46. The only other case which was separately argued on behalf of the petitioners was Writ Petition Nos. 12570-72 of 1983. Mr. Vinod Arvind Bobde the learned counsel of the petitioners, in a brief submission adopted the arguments of Mr. Tarkunde and reiterated that the finding the Patwardhan case ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775) about the temporary posts being included in the main cadre was erroneous. The point has already been dealt with.

47. To sum up, we hold that :

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down but he rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the ends of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition No. 1327 of 1982, we further hold :

(K) That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles or res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by judgment which became final.

In view of the above and other findings recorded earlier, we do not find any merit in any of the civil appeals, writ petitions and special leave petitions which are accordingly dismissed. There will be, however, no order as to costs.

</html