

A.N. Sehgal and others

Vs

Raje Ram Sheoram and others

Civil Appeal No. 4094 of 1984

(K. N. Singh, K. Ramaswamy JJ)

05.04.1991

JUDGEMENT

K. RAMASWAMY, J.:-

1. The appellants and the pro forma respondents, thirty in numbers are employed in the Punjab Service of Engineers, Class II.

2. The Governor, in exercise of the power under proviso to Art. 309 of the Constitution of India framed the Punjab Service of Engineers, Class I, P.W.D. (Roads and Buildings) Rules, 1960, for short 'the Rules' constituting the Punjab Service of Engineers, Class I P.W.D. (Roads and Buildings Branch). After the formation of State of Haryana w.e.f. November 1, 1966, the Rules are called Haryana Service of Engineers, Class I P.W.D. (Roads and Buildings Branch). The services consist of Asstt. Executive Engineers, Executive Engineers, Superintending Engineers, and Chief Engineers, as may be specified by the Government of Haryana from time to time (Rule 3(1)). The recruitment to the service is made by the Government as per Rule 5(1); (a) by direct recruitment; (b) by transfer from any other services of the State Govt. or of the Union of India; and (c) by promotion from Haryana Engineers, Class II Service. The appellants for short 'the promotees' from Class II service were promoted as Executive Engineers by relaxing five years length of service as Class II Engineers in officiating capacity on various dates between January 6, 1969 to May 29, 1971. Three of them, namely, A. N. Sehgal, Raj Kumar and H. C. Sethi were confirmed as Executive Engineers w.e.f. July 11, 1973, December 11, 1974 and December 9, 1975 respectively. The rest are yet to be confirmed. Raje Ram Sheoran was recruited and appointed directly as Asstt. Executive Engineer w.e.f. October 25, 1971. He too was given relaxation of the length of service of five years as Asstt. Executive Engineer and was promoted as Executive Engineer on October 8, 1973. He was confirmed w.e.f. December 22, 1976. All the appellants except M. R. Gupta were further promoted as Superintending Engineers on different dates between 1980 to 1984 and Mr. Sheoran was promoted as Superintending Engineer on March 4, 1987. A. N. Sehgal was further promoted as Chief Engineer. Equally Mr. Sheoran was also promoted as Chief Engineer but the validity was challenged and it is not necessary to refer any further as it is subject-matter of proceedings in the High Court.

3. R. R. Sheoran who was shown junior to the appellants, filed Writ Petition No. 5371/ 81 and sought a writ of mandamus directing the second respondent, State Government to consider his case for promotion as Superintending Engineer from the date on which the respondents were promoted; to quash the gradation list; to assign the seniority over the appellants and the consequential reliefs.

On reference, a Division Bench of the High Court by its judgment dated July 9, 1984 agreed with the ratio laid down in *M. S. Mighlani v. State of Haryana* (1983) 1 Serv LR,421: (1983 Lab IC 1458) and held that R.R. Sheoran was a member of the service from the date of his initial appointment as Asstt. Executive Engineer and the appellants and the pro forma respondents are not members of the service and directed the learned single Judge to dispose of the matter on merit. This appeal on leave arises against the judgment of the Division Bench.

4. The controversy centres round the inter se seniority of the appellants and R. R. Sheoran. For its determination the Rules need interpretation. The counsel for parties agreed that we should decide the principles on consideration of the Rules and leave the matter for the State Govt. to determine the inter se seniority by applying the law, so far as the controversy relating to relaxation of the length of service is concerned it is set at rest by this Court in *J. C. Yadav v. State of Haryana* (1990) 2 SCC 189 and *K. K. Khosla v. State of Haryana* (1990) 2 SCC 199 : (AIR 1990 SC 1069) by a bench of three Judges to which one of us (K. N. Singh, J.) was a member. The only question which survives is as to when 'the appellants' and 'R. R. Sheoran' became members of the respective services.

5. Shri P. P. Rao, learned senior counsel for the appellants contends that the appellants were promoted as Executive Engineers against regular vacancies, which were neither a stop-gap arrangement nor fortuitous, and they continued in service without any break from the respective dates of their promotion, therefore, they are members of the service in a substantive capacity as Executive Engineers from the respective dates of promotion. He further argued that since Raje Ram Sheoran was recruited as Asstt. Executive Engineer w.e.f. August 30, 1971 long after the promotion of the appellants up to B. L. Goyal, the appellants are seniors to R. R. Sheoran as Executive Engineers. Proviso to Rule 5(2) entitles them to remain in a substantive capacity as Executive Engineers since requisite number of qualified Asstt. Executive Engineers were not available for promotion. In view of their continuous officiation as Executive Engineers in terms of Rule 2(12)(a) of the Rules, they must be deemed to be the members of the service from the dates of promotion and, therefore, they are seniors to R. R. Sheoran. M/ s. Sachhar, learned counsel for the State and Gupta for R. R. Sheoran on the other hand contended that unless the appellants were appointed substantively to the cadre posts they could not be members of the service. R. R. Sheoran became member of the service from the date of his initial appointment as Asstt. Executive Engineer, therefore, he is senior to the appellants and pro forma respondents and the High Court rightly interpreted Rule 5(2). Since the High Court did not enter into the merits of the respective claims of the appellants and Sheoran, we express no opinion on merits except, as agreed by the parties, we declare the law on the interpretation of the Rules and leave it to the State Govt. to decide the inter se seniority on merits.

6. It is necessary to have a look into the Rules regulating the service. R. 3(1) postulates that the service shall comprise of Assistant Executive Engineers, Executive Engineers, Superintending Engineers and Chief Engineers. R. 3(2) read with Appendix 'A' enjoins the State of Haryana to determine the cadre strength of service each year. Appendix 'A' lays down procedure to determine the cadre strength of service. The senior posts include Executive Engineers and above while the junior scale posts include Asstt. Executive Engineers. Ex-cadre posts also are contemplated in the respective senior posts and union scale posts. Rule 5(1)(a) posits recruitment to the service; (a) by direct recruitment; (b) by transfer and (c) by promotion from Class II service. Sub-rule (4) of Rule 5 says that all direct appointments to the service shall be to the post of Asstt. Executive Engineer. Proviso therein gives power to the Government to appoint by direct recruitment as Executive Engineers, in exceptional circumstances, for reasons to be recorded in writing. Rules 6 and 7 prescribe qualifications and method of appointment by direct recruitment. Sub-rule (3) of Rule 7

states that appointment to the service shall be made according to the number of vacancies to be filled by direct recruitment strictly in the order of merit as indicated by the Public Service Commission. As per R. 11(1) a direct recruit shall remain on probation for a period of two years or extended period up to maximum of three years. On satisfactory completion of probation, the Government may confirm under Cl. (a) of sub-rule (3) of Rule 11 or to discharge him from service otherwise. The post of Asstt. Executive Engineer is a junior scale post. Under Rule 12(3), the year of allotment of an Asstt. Executive Engineer shall be the calendar year in which the order of appointment is issued by the Government.

7. Rule 2(1) defines appointment to the service which includes an appointment made according to the terms and provisions of the Rules to an officiating vacancy or to an ex-cadre post provided that an officer so appointed shall not be deemed to have become member of the service as defined in Cl. (12) of R. 2. The Asstt. Executive Engineer means a member of the service in the junior scale of pay, (Rule 2(2)). Cadre post means permanent post in the service as per Rule 2(3). 'Class II Service' means the Punjab Service of Engineers, Class II, in the Buildings and Roads Branch and includes, for purposes of promotion to and fixation of seniority in the Class I Service, Temporary Asstt. Engineers when a suitable Class II Officer is not available vide Rule 2(5). Direct appointment means an appointment by open competition but does not include- (a) an appointment made by promotion; (b) an appointment by transfer of an officer from the service of the State Government or of the Union, (Rule 2(7)). Ex-cadre post means a temporary post of the same rank as a cadre post vide Rule 2(10). A member of the service means an officer appointed substantively to a cadre post and includes (a) in the case of a direct appointment an officer on probation, or such an officer who, having successfully completed his probation, awaits appointment to a cadre post vide Rule 2(12)(a).

8. A reading of the Rules clearly indicates that an Asstt. Executive Engineer appointed by open competition to a substantive vacancy in a cadre post and put on probation is a member of the service. Equally such Asstt. Executive Engineer recruited by open competition and appointed to an ex-cadre post and put on probation and who having successfully completed his probation and awaits appointment to a cadre post would also become a member of the service. The contention of Shri P. P. Rao is that an officer appointed substantively to a cadre post is a direct recruit and the inclusive definition encompasses within its ambit the promotee and the phrase "such an officer who having successfully completed his probation and awaits appointment to the cadre post" is only referable to a promotee. So promotee is also a member of the service from the date of initial promotion. We may make it clear at this juncture that in normal service jurisprudence a direct recruit would always be recruited and appointed to a substantive vacancy and from the date he starts discharging the duty attached to the post he is a member of the service subject to his successfully completing the probation and declaration thereof at a later date and his appointment relates back to the date of initial appointment, subject to his being discharged from service on failure to complete the probation within or extended period or termination of the service according to Rules. Equally it is settled law that a promotee would have initial officiating promotion to a temporary vacancy or substantive vacancy and on successful completion and declaration of the probation, unless reverted to lower posts, he awaits appointment to a substantive vacancy. Only on appointment to a substantive vacancy he becomes a member of the service. But confirmation and appointment to a substantive vacancy always an inglorious uncertainty and would take unduly long time. Therefore, the confirmation or appointment to a substantive capacity would not normally be a condition precedent to reckon the continuous length of service for the purpose of seniority. On the facts of the case and the settled legal position, at first blush the argument of Shri P. P. Rao carried weight that the appellants would get their seniority from the respective dates of the initial promotion as Executive Engineers. But we find that in the instant case the rules have made departure from the

normal service jurisprudence as would appear' from the scheme under the Rules.

9. Para 11 (b) of Appendix 'A' read with Rule 3(2), while determining the cadre strength of the service, adumbrates creation and appointment of Asstt. Executive Engineers (direct recruit) to an ex-cadre junior scale post in each year. Therefore in a given situation, a direct recruit appointed to an ex-cadre post cannot be kept in lurch until he is appointed to a cadre post so as to become a member of the service. Obviously to avoid such a hiatus, Rule 2(12)(a) was introduced. The main part of R. 2(12)(a) declares that an appointee substantively to a cadre post i.e., permanent post is a member of the service. The inclusive definition brings an officer 'by direct appointment on probation' who having successfully completed probation and awaits appointment to a cadre post is also a member of the service. Take for instance if direct recruitment is made to fill in five posts of Asstt. Executive Engineers of which four are cadre posts and one ex-cadre post and four persons are appointed to cadre posts in the order of merit and the last one to the ex-cadre post. The first four officers appointed on probation to the substantive vacancies and they are covered by the main part of Rule 2(12)(a). The fifth one intended to cover the field of operation of the inclusive definition which says that 'and also includes an officer directly appointed on probation' and such an officer who having successfully completed his probation, awaits appointment to a cadre post'. The words 'and such an officer' directly appointed' would obviously be referable to an Asstt. Executive Engineer directly appointed to an ex-cadre post; who may be placed on probation and awaits appointment to a cadre post. By operation of the definition clause he also becomes the member of the service from the date of initial appointment. This view is further fortified by the definition of the 'appointment to the service' in Rule 2(1) which says that appointment to the service includes an appointment made according to the terms and provisions of these Rules to an officiating vacancy or to an ex-cadre post. Rule 2(7) says that direct appointment means appointment by open competition but excludes 'promotee' or 'transferee'. So a promotee promoted to an officiating vacancy or on ex-cadre post does not become member of the service unless he is appointed substantively to a cadre post. We, therefore, hold that a direct recruit appointed to an ex-cadre post alone is a member of the service even while on probation and Rule 2(12)(a) applies to them and it does not apply to promotee from Class II service.

10. An Asstt. Executive Engineer, on putting five years of service under R. 9(3)(a) and passing the departmental examination as required under R. 15, (unless the qualifications are relaxed in exercise of the power under R. 22 of the Rules) becomes eligible for promotion as Executive Engineer. The State Govt. had relaxed the required length of five years service of the promotees as well as direct recruits. R. R. Sheoran therefore became eligible to be considered for promotion. As per the procedure prescribed in this regard under R. 9(2), he was found fit and suitable and was promoted as an Executive Engineer w.e.f. October 8, 1973. Though M/ s. Sachhar and Gupta contended that the direct recruit need not undergo the required probation as Executive Engineer, we find no force in the contention. The normal channel of appointment to the post of Executive Engineer, a senior post, is by way of promotion to which a direct recruit Asstt. Executive Engineer is entitled to be considered. On promotion he shall be on probation for a period of one year as per Rule 11(1)(a), but the period spent on officiation as Executive Engineer shall be taken into account for purposes of completing the period of probation and on its successful completion, he shall remain in service as Executive Engineer. On a conjoint reading of Rr. 12(3) and 12(5) it is clear that the year of allotment of the Asstt. Executive Engineer in the post of Executive Engineer, shall be the calendar year in which the order of appointment as Asstt. Executive Engineer had been made. Thus his seniority as Executive Engineer, by fiction of law, would relate back to his date of initial appointment as Asstt. Executive Engineer and in juxtaposition to Class 11 Officers' seniority as Executive Engineer is unalterable. The date of the seniority of Mr. R. R. Sheoran thus shall be

August 30, 1971. His seniority as Executive Engineer shall accordingly be reckoned.

11. The question then is what is the date from which the seniority of a promotee as Executive Engineer shall be reckoned? The contention of Shri P. P. Rao is that Rule 5(2) reserves 50% of the posts to the direct recruits but the proviso thereto makes a built in relaxation, namely, so long as the required number of direct recruits are not available to occupy those posts, the promotees are entitled to hold those posts also. Admittedly except R. R. Sheoran no other direct recruit was available. The promotees are eligible to occupy all the cadre posts even in excess of their quota. The seniority has to be determined from the respective dates of initial officiating promotion. Shri Rao's further contention that the phrase 'such an officer appointed to an officiating post' has reference only to promotees cannot be accepted for the reasons given earlier. The officer appointed directly is referable only to Asstt. Executive Engineer and a promotee by operation of Rule 2(7) stands excluded until he is appointed substantively to a cadre post.

12. When an officer is appointed substantively to a cadre post is the next question. It is settled law that all the rules should be harmoniously construed giving life, force and effect to every part of the rule or clause or word so that no part would be rendered redundant, ineffectual, nugatory or otiose. Rule 5(1) regulates recruitment to the service from three sources, namely, direct recruitment; by transfer and by promotion from Class II service. Sub-rule(2)- thereof prescribes the ratio between the promotees and others. It says that, "recruitment to the service shall be so regulated that the number of posts so filled by promotion from Class II service shall not exceed 50%" of the number of posts in the service excluding the posts of Asstt. Executive Engineers; provided that till such time the adequate number of Asstt. Executive Engineers who are eligible and considered fit for promotion are available, the actual percentage of officers promoted from Class II service 'may be larger than 50%'. A reading thereof clearly manifests the legislative animation, namely, that the promotees from Class II service shall not exceed 50% of the posts in the service. The word 'shall' indicates that it is mandatory that the remaining 50% shall be kept open only to the Asstt. Executive Engineers who were directly recruited but later were found eligible and fit for promotion as Executive Engineers. Therefore, unless the Government resorts exceptionally with prior permission of Public Service Commission, vide Rule 10 to recruitment by transfer of an officer from other service of the State Govt. or of the Union, the remaining 50% of the posts as Executive Engineers, Superintending Engineers and Chief Engineers shall be occupied only by the direct recruit Asstt. Executive Engineers. It is settled law that prescription of quota for recruitment from different sources is constitutionally a valid rule.

13. Rule 5(2) limits 50% posts to the promotees from Class II service and no further, but the proviso to the Rule lays down that till adequate number of Asstt. Executive Engineers are available, the rigour of 50% quota may be relaxed and Class II officers may be promoted in excess of their quota. What is the intendment of the clause 'the actual percentage of officers promoted from Class II service may be larger than 50%' is the question. The mandate of Rule 5(2) is that the officers promoted from Class II service shall in no case exceed 50% of the number of posts in the service. Unless it is relaxed, the appointment and occupation of the posts by promotees in excess thereof is irregular or illegal and the Government have no power to promote persons from Class II service to fill in such posts of Executive Engineers, Superintending Engineers and Chief Engineers. It is common knowledge that direct recruitment as Asstt. Executive Engineer or Executive Engineer; in exceptional circumstances as is a tardy process and even after appointment they have to put in the five years service. The balance 50% of the posts cannot be kept vacant. With a view to allow the wheels of the administration moving, the proviso carves out an exception and allows the promotees to occupy temporarily the posts in excess of their quota. In this view the contention of Shri Rao that

the seniority as Executive Engineer is to be counted from the date of initial temporary promotion cannot be accepted as it would allow the promotees to occupy 100% posts of Executive Engineers, Superintending Engineers and Chief Engineers leaving little room for Rule 5(2)(a) to operate in full force. The exception would eat away the flesh and blood of R. 5(2)(a) freezing the channel of promotion to the direct recruits to senior posts for a very long time to come. In the absence of rule of rotation there may be no chance to direct recruits to occupy the senior posts. That does not appear to be the intendment, scope and operation of the proviso. The intendment appears to be that so long as the direct recruit Asstt. Executive Engineer, eligible and considered fit for promotion is not available, the promotee from Class II service in excess of the quota is eligible to occupy in officiating capacity the senior posts, i.e., Executive Engineers and above. The moment direct recruits are available, they alone are entitled to occupy 50% of their quota posts and the promotees shall give place to the direct recruits.

14. It is cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms.

15. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment unless the words of the proviso are such that it is its necessary effect.

16. In *V. B. Badami v. State of Mysore*, (1976) 1 SCR 815 : (AIR 1980 SC 1561), dealing with the problem arising out of quota rule between promotees, this Court observed that (at p 1565. of AIR):

"In working out the quota rule, these principles are generally followed. First, where rules prescribed quota between direct recruits and promotees, confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre. Second, confirmed persons are senior to those who are officiating. Third, as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service. Fourth, direct recruitment is possible only by competitive examination which is prescribed procedure under the rules. In promotional vacancies, the promotion is either by selection or on the principle of seniority-cum-merit, a promotion could be made in respect of a temporary post or for a specified period but a direct recruitment has generally to be made only in respect of clear permanent vacancy either existing or anticipated to arise at or about the period of probation is expected to be completed. Fifth, if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold the promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies which are within the quota of direct recruits, when direct recruitment takes place the direct recruits will occupy vacancies within their quota. Promotees who

were occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of a case."

17. With a view to have efficient and dedicated services accountable to proper implementation of Govt. policies, it is open and is constitutionally permissible for the State, to infuse into the services, both talented fresh blood imbued with constitutional commitments, enthusiasm, drive and initiative by direct recruitment, blended with matured wealth of experience from the subordinate services. It is permissible to constitute an integrated service of persons recruited from two or more sources, namely, direct recruitment, promotion from subordinate service or transfer from other services. Promotee from subordinate generally would get few chances of promotion to higher echelons of services. Avenues and facilities for promotion to the higher services to the less privileged members of the subordinate service would inculcate in them dedication to excel their latent capabilities to man the cadre posts. Talent is not the privilege of few but equal avenues made available would explore common man's capabilities overcoming environmental adversity and open up full opportunities to develop one's capabilities to shoulder higher responsibilities without succumbing to despondence. Equally talented young men/ women of great promise would enter into service by direct recruitment when chances of promotions are attractive. The aspiration to reach higher echelons of service would thus enthuse a member to dedicate honestly and diligently to exhibit competence, straightforwardness with missionary zeal exercising effective control and supervision in the implementation of the programmes. The chances of promotion would also enable a promotee to imbue involvement in the performance of the duties; obviate frustration and eliminate proclivity to corrupt practices lest one would tend to become corrupt, sloven and mediocre and a dead wood. In other words, equal opportunity would harness the human resources to augment the efficiency of the service and undue emphasis on either would upset the scales of equality germinating the seeds of degeneration.

18. With a view to achieve this objective, the rule-making authority envisaged to appoint direct recruits as well as by promotion from Class II Service, otherwise by transfer from other services. In interpreting the rules, effect must be given to allow everyone drawn from these sources to have their due share in the service and chances of involvement to effectively discharge the duties of the posts honestly and efficiently with dedication. Any wanton or deliberate deviation in the implementation of the rules should be curbed and snubbed and the rules must be strictly implemented to achieve the above purpose. If wanton deviations are allowed to be repeated, it would breed indiscipline among the services and amounts to undue favour to some and denial of equality for many for reasons known or unknown subverting the purpose of the rules.

19. It is settled law that appointment to a post in accordance with the rules is a condition precedent and no one can claim appointment to a post or promotion, as of right, but has a right to be considered in accordance with the rules. Appointment by promotion or direct recruitment, therefore, must be in accordance with the rules so as to become a member of the service in a substantive capacity. Seniority is to be fixed in accordance with the principles laid down in the rules.

20. Rule 8 prescribes procedure for appointment by promotion from Class II services. Rule 9(2) states that promotion would be made by selection on the basis of merit and suitability in all respect and no member of the service shall have any claim to such promotion as a matter of right by mere seniority.

The Committee as constituted under Rule 8 shall prepare the list of officers considered fit for

promotion in the order of merit and on approval by the public Service Commission, the State Govt. shall appoint the persons from the list in the order in which the names have been placed by the Commission. Appointment by promotion may be made under Rule 8(12) to an ex cadre post or to any post in the cadre in an officiating capacity from the list prepared as aforesaid. On promotion, as per Rule 11(1), officer shall be on probation for a period of one year, but if the officer had been officiating as an Executive Engineer the period of officiation would be counted towards probation. Rule 11 (4) provides that on satisfactory completion of the probationary period, the Govt. confirms the officiating promotee and "appoint him in a substantive capacity on a cadre post provided the post is available to him". If no cadre post is available, the officer has to wait for an appointment to the cadre post.

21. A promotee within quota under Rule 5(2) gets his seniority from the initial date of his promotion and the year of allotment as contemplated in Rule 12(6) shall be the next below 'the junior most officer in the service whether officiating or confirmed as Executive Engineer before the former's appointment' counting the entire officiating period towards seniority, unless there is break in the service or from the date of later promotion. Such promotee, by necessary implication, would normally become senior to the direct recruit promoted later. Combined operation of sub-rules (3) to (5) of Rule 12 makes the direct recruit a member of the service of Executive Engineer from the date of year of allotment as an Asstt. Executive Engineer. The result is that the promotee occupying the posts within 50% quota of the direct recruits acquired no right to the post and should yield to direct recruit, though promoted later to him, to the senior scale posts i.e., Executive Engineer, Superintending Engineer and Chief Engineer. The promotee has right to confirmation in the cadre post as per Rule 11(4) if a post is available to him within his quota or at a later date under Rule 5(2) read with R. 11(4) and gets appointment under S.8 (11). His seniority would be reckoned only from the date of the availability of the post and the year of allotment, he shall be next below to his immediate senior promotee of that year or the junior most of the previous year of allotment whether officiating or permanent occupying the post within 50% quota. The officiating period of the promotee between the dates of initial promotion and the date of the availability of the cadre post would thus be rendered fortuitous and stands excluded. A direct recruit on promotion within his quota, though later to the promotee is interposed in between the periods and interjects the promotee's seniority; snaps the links in the chain of continuity and steals a march over the approved promotee probationer. Harmonious construction of Rules 2(1), 2(3), 2(7), 2(10), 2(12) (a), 5(2)(a), 8, 9(2), 11, 12(3), 12(5) to 12(7) would yield to the above result, lest the legislative animation would be defeated and the rules would be rendered otiose and surpluses. It would also adversely effect the morale and efficiency of the service. Mere officiating appointment by promotion to a cadre post outside the quota; continuous officiation therein and declaration of probation would not clothe the promotee with any right to claim seniority over the direct recruits. The necessary conclusion would, therefore, be that the direct recruit shall get his seniority with effect from the date of the year of the allotment as Asstt. Executive Engineer which is not alterable. Whereas the promotee would get his seniority w.e.f. the date of the availability of the posts within 50% quota of the promotees. The year of allotment is variable and the seniority shall be reckoned accordingly. Appointment to the cadre post substantively and confirmation thereof shall be made under Rule 8(11) read with Rule 11(4) of the Rules. A promotee Executive Engineer would only then become member of the service, 'Appointed substantively' within the meaning of Rule 2(12)(a) shall be construed accordingly. We, further hold that the seniority of the promotee from Class II service as Executive Engineer shall be determined with effect from the date on which the cadre post was available to him and the seniority shall be determined accordingly.

22. In *K. C. Joshi v. Union of India* (1990)2 Scale 951, a Bench of three Judges to which one of us

(K. Ramaswamy, J.) was a member, considered similar question. In that case U. P. Forest Service Rules, 1952 provides two sources of recruitment to the post of Asstt. Conservators of Forest. The petitioners therein were Forest Range Officers in U. P. Forest Subordinate Service. The respondents were direct recruits as Asstt. Conservators of Forest. The rules prescribed ratio between direct recruits and promotees. Due to delay in recruitment as Asstt. Conservators of Forest, the Forest Rangers were promoted in excess of their quota as Asstt. Conservators of Forest temporarily and continued in service without any break for 5 to 12 years. The promotees claimed seniority from the date of their initial promotion. Considering the scope of the rules and rights acquired by the petitioners therein and the direct recruits, the Court held that:

"When promotion was outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of punishing down the promotees appointed in excess of the quota may work hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Arts. 14 & 16(1). Therefore, the rules must be carefully applied in such a manner as not to violate the rules of equality assured under Art. 14 of the Constitution. This Court interpreted that equity is an integral part of Art. 14. So every attempt would be made to minimise, as far as possible, inequity. Disparity is inherent in the system of working out integration of the employees drawn from different sources, who have legitimate aspiration to reach higher echelons of service. A feeling of hardship to one, or heart burning to either would be avoided. At the same time equality is accorded to all the employees. "

23. Shri P. P. Rao urged that the cadre posts in Rule 2(12) must include not only the permanent posts but also temporary posts continued for more than three years and notional posts which may have existed for short spells during preceding three years taking into account the number of months and days for which each post had existed as per the formula prescribed in appendix 'A' read with Rule 3 of the Rules. He further urged that the promotees appointed to such posts should be treated to be 'members of the service' in terms of Rule 2(12)(a) and that their promotion should be retrospectively declared to have been promoted w.e.f. the dates on which the posts were created. We are unable to accept this contention. Rule 3 read with appendix 'A' confers power and also imposes duty on the State Govt. to determine the cadre posts from time to time and in the first five years on the first day of each year. This exercise should be done in the light of the criteria prescribed in appendix 'A'. The present controversy does not concern itself with the method and manner of determination of the cadre posts, though determination of seniority hinges upon it. Therefore, for determining seniority, the State Govt. should undertake the exercise in terms of Rule 3 read with appendix 'A'. The rules postulate that substantive appointment to a cadre post is a condition precedent to become a member of the service. A Class II officer shall be promoted to a temporary post or in an officiating capacity to a cadre post if vacancy exists; when he occupies a vacancy in a substantive post and continued uninterruptedly it would be open to the appointing authority to put the promotee Executive Engineer on probation. Though confirmation is an inglorious uncertainty depending neither on the efficiency of the officer nor generally on the availability of the post, the mandate of Quota of 50% in Rule 5(2) should be adhered to. Declaration of probation and

confirmation to a cadre post, if available, under Rule 11(4) shall be made. Seniority of such approved or confirmed promotee should be counted from the date of either initial officiating promotion or continuous later officiation from the date of availability of the cadre post, however, should be next below his senior promotee or the junior most of the preceding year of allotment within the quota. If no post is available, till such date of the availability, the entire period of continuous officiation would be rendered fortuitous. The contention, therefore, that the promotion would relate back retrospectively to the date of creation of the post and the appointment to the vacancy shall be with reference to the date of the creation of the post, would result in anomalies and render Rule 5(2) to the direct recruits surpluses.

24. Shri P. P. Rao's further contention that the de facto promotion and the retrospective declaration of cadre post would make the Class II officers as de jure members of the service from the very date of temporary appointment w.e.f. the date of initial appointment also lacks force for the same reasons. The principles laid down in *R. P. Khanna v. S.A.F. Abbas*, (1973) 3 SCR 548 at p. 557 (2) : (AIR 1972 SC 235) is not applicable to the facts of this case. In that case the certain posts in State services were required to be declared as senior cadre posts in the All India Service, but before such declaration could be made some of the promotee officers officiated in the senior cadre post. In that context the Court observed that 'the promotee could not get the benefit of officiation unless the post was declared as equivalent to a senior cadre post before the promotee was appointed; to officiate him would defeat the policy of the government' and held that they are entitled to the benefit of the retrospective declaration in the absence of things practical as well as reasonable'. The scheme of the rules made a definite departure to the normal service jurisprudence and the operation of the scheme in the rules must be given full effect. In the instant case under the Rules 'determination of seniority would be made only after the promotee becomes a member of the service'. Therefore, the year of allotment must be determined having regard to (i) availability of the cadre post within quota; (ii) satisfactory completion of the probation; and (iii) appointment to the post in the substantive capacity in terms of Rules 12(6) and (7) read with R.11 (4). and Rule 8(12). Any other construction would be contrary to the avowed object of the rules as a whole.

25. The inclusive definition of Rule 2(12)(a) must be interpreted liberally and not restrictively. Undoubtedly the inclusive definition always receives liberal interpretation to bring within its ambit cognate but unforeseen similes. But the rules envisage only three sources of recruitment, namely, direct recruitment, appointment by promotion and in exceptional cases with prior approval of the Public Service Commission as per Rule 10, the appointment by transfer from other services of the State or Central Govt. Until the ex-cadre posts are declared to be cadre posts they remain ex-cadre posts. The promotion to the ex-cadre post is temporary or to a cadre post would be only on officiating basis. It may be open to the government to abolish at any time the ex-cadre posts. Determination of cadre strength is a condition precedent for Rule 5(2)(a) to operate. Till a promotee is confirmed in a substantive capacity as Executive Engineer, he continues to retain lien in Class II service. The interpretation that the promotion to the temporary post or ex cadre post within the meaning of Rule 2(10) should also be deemed to be an appointment to a substantive post would do violence to the language of the relevant rules and the scheme. It is true that this Court in *Baleshwar Dass v. State of U. P.* (1981) 1 SCR 449 at p 463 (AIR 1981 SC 41 at pp 48-49), held that there cannot be probation for a government servant who is not to be absorbed substantively in the service on completion. The ratio therein does not apply to the facts of this case for the reason that the Govt. itself did not understand the scope and operation of the rules properly as is amply demonstrated from their mutually irreconcilable inconsistent stand taken in the counter-affidavits filed by the State Govt. in the High Court and in this Court. That apart, it would appear that in the instant case after the formation of the State of Haryana, adequate number of officers were not available to hold

the posts. The length of service and passing of prescribed tests were relaxed en mass. In view of the above peculiar and special facts merely because the promotee Class II Officers were put on probation and the same was declared it does not clothe them with any right to deemed appointment to substantive vacancies in excess of their quota with retrospective effect from the date of initial promotion to the cadre posts. The year of allotment of a direct recruit is always the year in which he is appointed to the junior scale post of Asstt. Executive Engineer but the year of allotment to the promotee is variable depending on the availability of the cadre post within quota of 50% and subject to taking the seniority next below the junior most promotee of the preceding year of allotment of immediate senior of the same year. If the contention of Shri P. P. Rao is accepted it would render Rule 8(11) mutually inconsistent with Rule 5(2) read with Rules 2(7) and 2(12) and Rule 2(1). No countenance could be given to the contention that the officers put on probation in terms of Rule 11 (4) irrespective whether they occupied declared posts, but also posts which ought to have been declared as such from time to time and have continuously remained in service entitle them to become member of service and that, as and when the posts occupied by them are declared as cadre posts with retrospective effect, they are entitled to be treated as members of the service w.e.f. the due dates. In other words, it amounts to put a premium on the inaction on the part of the State Govt. to declare the cadre posts in terms of Rule 3 (2) read with appendix 'A' defeating the scheme of the Rules.

26. The contention that our interpretation renders Rule 2(12) arbitrary and discriminatory violating Arts. 14 and 16 is also not tenable. A direct recruit, by operation of Rule 2(12)(a) read with Rules 2(1) and 2(10), though appointed to an ex-cadre post, by fiction of law, becomes a member of the service from the date of his initial appointment since being a fresh recruit. On his satisfactory completion of the probation and on availability of the cadre post as Asstt. Executive Engineer, he becomes a confirmed Asstt. Executive Engineer. While a promotee Executive Engineer continues to retain his lien on the post as Class II officers till he is appointed substantively to Class I service. There is reasonable classification and discernible distinction drawn between the direct recruit and the promotee. The nexus is to treat direct recruit Asstt. Executive Engineer appointed to the cadre post as well as ex-cadre post at par as members of the service and the deeming clause is to serve this purpose. Thus, there is neither invidious discrimination nor arbitrariness in Rule 2(12)(a) offending Arts. 14 & 16. The differentiation drawn between direct recruit and the promotee bears rational relation to the object of Rule 2(12). The ratio of the Constitution Bench in *B. S. Yadav State of Haryana, (1980) 1 SCR 1024* (sic) and the *Direct Recruit, Class II Engineering Officers' Association v. State of Maharashtra, (1990) 2 SCC 715* at p. 745 : (AIR 1990 SC 1607), cannot be imported bodily and applies to the facts of the case in the light of the operation of the rules in question.

27. The further contention that Rule 12 adumbrates that not only a member of the service, but even an officer officiating as an Executive Engineer before becoming a member of the service is entitled to an year of allotment because the rules nowhere say that only members of service are entitled to year of allotment is devoid of substance. As already discussed a promotee cannot be given year of allotment, before he becomes a member of the service and his seniority cannot be fixed arbitrarily with reference to the date of his initial promotion to an ex-cadre post or continuous officiation in a cadre post without break as the case may be.

28. We accordingly, direct the Government of Haryana to determine the cadre posts, if not already done, regularly from time to time including the post created due to exigencies of service in terms of Rule 3(2) read with appendix 'A' and allot the post in each year of allotment as contemplated under Rule 12 read with Rule 5(2)(a) and issue orders appointing substantively to the respective posts within the quota and determine the inter se seniority between the appellants promotees and R. R.

Sheoran, direct recruits in the respective quota cadre posts of Executive Engineers etc. within four months from the date of receipt of this judgment. The inter se seniority of promotees and direct recruits shall be determined accordingly. All the impugned promotions or those pending proceedings in the High Court or in this Court shall be subject to the above determination and the status quo would continue till the appointments according to the rules are made and seniority is determined in the light of the law declared in this judgment. The appeal is disposed of accordingly. In the circumstances, parties are directed to bear their respective costs.

Order accordingly.

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