

SUPREME COURT OF INDIA

B.S. Mathur

Vs.

Union of India

Writ Petition (Civil) No. 477 of 2007

(K.G. Balakrishnan, P. Sathasivam and J.M. Panchal)

15/10/2008

JUDGMENT

P. SATHASIVAM, J.

1) These writ petitions, under Article 32 of the Constitution of India, are filed by the directly recruited Additional District and Sessions Judges who were appointed to the Delhi Higher Judicial Service praying for an order quashing the Resolution dated 18.05.2007 of the Full Court of the High Court of Delhi approving the majority report of the Administrative Committee determining the seniority of the petitioners in terms of O.M. dated 03.07.1986 and also quashing the final seniority list of the officers of Delhi Higher Judicial Service. They also prayed for appropriate direction to respondent Nos. 1-4 to determine the seniority of the petitioners in terms of Rule 8(2) read with Rule 7 of the Delhi Higher Judicial Service Rules, 1970.

2) Since all the petitioners were appointed to the Delhi Higher Judicial Service (hereinafter referred to as "DHJS") as Additional District and Sessions Judges and the challenge as well as the relief prayed for in all these writ petitions are one and the same, they are being disposed of by a common judgment:

a) For convenience, we shall refer to the facts in the case of the petitioners in Writ Petition (c) No. 477 of 2007. The DHJS was constituted in the year 1970 under Delhi Higher Judicial Service Rules, 1970 (hereinafter referred to as "the Rules"). Rule 5 provides for the method of recruitment by way of promotion from amongst the officers of the Delhi Judicial Service and Direct Recruitment. Rule 7 provides that after the initial recruitment, regular recruitment would be made on the basis of selection from the Members of the Delhi Judicial Service who have completed not less than 10 years of service in the Delhi Judicial Service and by direct recruitment from the Bar. Proviso to Rule 7 provides that minimum 1/3rd of the substantive posts in the service shall be held by direct recruits. Rule 8 provides for inter se seniority. Rule 8(2) provides that seniority of the Direct Recruits vis-à-vis promotees is to be determined in order of rotation of vacancies

between the direct recruits and the promotees based on "Quotas of Vacancies" reserved for both categories. Rule 8(2) further provides that first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on. As originally framed, Rule 16 provides for creation of temporary posts in the service and filling up of the same only by way of promotion from amongst the Members of the Delhi Judicial Service. Rule 17 provides for filling up of the vacancies by making temporary appointments from amongst the Members of the Delhi Judicial Service.

b) The posts in the DHJS were advertised to be filled up by way of direct recruitment from amongst the practicing members of the Bar by an advertisement issued in March, 1994. Last date for submission of the applications was 11.4.1994. Since the petitioners fulfilled the qualifications for the same, they applied in pursuance of the said advertisement. All the candidates who applied were screened and ultimately 90 candidates were called for interview which was conducted from 16.9.1994 to 20.9.1994. Upon conclusion of the same, 9 candidates were selected, 6 in the general category, 2 in the reserved category of Scheduled Castes and one in the Scheduled Tribes category. All the writ petitioners were amongst those who were selected. All the respondents (except the Government Bodies) in these writ petitions were promotees promoted to the DHJS from the Delhi Judicial Service. According to the petitioners, the cadre strength of the DHJS as on 31.12.1991 was of 60 officers. Later on the strength was increased and as on date the cadre strength of DHJS is of 174 officers. The seniority of DHJS officers was not settled by the High Court of Delhi ever since the year 1992. Till 1980, only substantive appointees to the service from the Bar as also promotees were being given seniority under Rule 8(2). In 1980, a writ petition was filed in this Court by the promotee officers challenging Rules 7 and 8

of the Rules, which provided Rota and Quota. In the said writ petition, the promotee officers claimed that even appointments to the temporary posts/vacancies under Rules 16 & 17 [as in the original Rules] was similar to the substantive appointments to the service and the incumbents under those rules were also entitled to get seniority from the date of their appointments. This Court, in *O.P. Singla & Anr. vs. Union of India & Ors.* (1984) 4 SCC 450, held that

appointments under Rules 16 & 17 to the temporary posts/vacancies are similar to those of the substantive appointments. With the said equation by legal fiction, the distinction between the said two types of appointments i.e. temporary and substantive, having been extinguished, the Court came to the conclusion that since no appointments of the direct recruits under Rules 16 & 17 were possible under the Rules at that point of time, inevitably the Rota Quota had been broken down. However, this Court upheld the constitutional validity of Rule 7 and held that there is a quota for 1/3rd of the direct recruits in the service and further upheld the constitutional validity of Rule 8 (2) which provides for the rotation of the vacancies under Rule 7. Though this Court equated the temporary post with permanent post but had noticed that the judgment will upset the balance between the Direct Recruits and the Promotees in the DHJS. In those circumstances, this Court gave directions in paragraph 43 to frame appropriate Rules to remove the imbalances and thereafter implement the Rules in letter and spirit.

c) After the judgment in O.P. Singla's case in 1985, the High Court of Delhi undertook the exercise of the amendment of the Rules to provide for filling up of the temporary posts/vacancies under Rules 16 and 17 also by direct recruitment as per the quota prescribed under Rule 7 for the respective categories. The High Court had also decided that in order to restore the balance between the number of direct recruit appointees and promotees, 14 existing vacancies are to be filled up by direct recruitment. The Association of promotee officers, in order to highlight their grievances, made a representation to the Chief Justice of the Delhi High Court claiming that the newly created temporary posts should be filled up by promotion from amongst the members of the Delhi Judicial Service. Since according to them the said representation failed to evoke any response, they filed Writ Petition No. 1540 of 1986 titled as Delhi Judicial Service Association vs. Union of India under Art. 32 of the Constitution of India before this Court wherein they prayed for the issuance of mandamus to the official respondents that all 14 temporary posts of the Additional District and Sessions Judge were to be filled up by promotion. The said writ petition was disposed of by an order dated 18.12.1986 with a request to the High Court to finalise the amendment in the draft rules by 15.1.1987 and also to the Delhi Administration/Union of India to sanction the amendment expeditiously. It was further directed that thereafter advertisement would be published inviting applications from the members of the Bar so as to fill up all the 14 posts by way of direct recruitment. Consequent to the said direction, 1970 Rules were amended by Notification issued on 17.3.1987. The expression "in substantive capacity" occurring in Rule 2(d) was deleted and consequential amendments were made in the Rules so that appointments could be made to the posts temporarily created under Rule 16 both from the Bar and by promotion from the Delhi Judicial Service. In the meanwhile, certain promotees and direct recruits of DHJS have filed Writ Petition No. 490 of 1987, Writ Petition No. 1252 of 1990 and others before this Court raising issue as to whether inter-se seniority between the promotees and the direct recruits had actually been determined as per directions given by this Court in O.P. Singla's case. Those writ petitions came to be decided by this Court on 22.8.2000 in the judgment in Rudra Kumar Sain & Ors. vs. Union of India & Ors., (2000) 8 SCC 25. In the said judgment, this Court quashed the seniority list both provisional and final so far as it related to the appointees either by direct recruitment or by promotion in the DHJS, prior to the amendment of the Recruitment Rules in the year 1987, and held that their inter se seniority must be re-determined on the basis of continuous length of service in the cadre, as indicated in O.P. Singla's case. Pursuant to the said decision, the officers of DHJS appointed/promoted to the service against vacancies prior to the amendment of the Rules, 1987 have given seniority on the basis of the principle of length of service.

d) In these writ petitions, the claim of the petitioners was that 14 temporary posts which were in existence in 1986 should have been filled up by promotion from amongst the Delhi Judicial Service Officers as per the Rules then existing. As the Rules were amended on 17.3.1987, an individual officer in his writ petition challenged Rules 7, 16 & 17 as violative of Articles 233 and 16(1) of the Constitution of India. This Court rejected the contention raised by the Association as well as by the individual officer and dismissed Writ Petition (C) No. 1023 of 1987 etc. titled Delhi Judicial Services Association & Ors. vs. Delhi High Court & Ors., (2001) 5 SCC 145.

e) On 14.8.2002, the Delhi High Court circulated the tentative seniority list of the officers of DHJS and invited objections from the concerned officers. Thereafter the High Court appointed a Committee of five Hon'ble Judges to decide the issue of seniority of the officers of DHJS appointed after

1991. The writ petitioners as well as the promotee officers of DHJS submitted their objections to the draft seniority list. Some of the promotee officers of DHJS also sought application of the Office Memorandum (in short "OM") dated 3.7.1986 issued by the Department of Personnel and Training (in short "DOPT") applicable to the Central Civil Services. The Committee heard the arguments of the direct recruits as well as the promotee officers. Both of them filed written statements on 23.6.2006. After considering the arguments raised by both the parties and also the written submissions filed, four Hon'ble Judges of the Committee submitted a report being of the majority view. A dissenting view was taken by one Hon'ble Judge who separately submitted an independent report. The majority report submitted by the Committee took the view that Rota Quota Rules for determining seniority is workable only if simultaneous recruitment is resorted to

failing which they 'break down'. They took the view that no simultaneous recruitment had taken place as such and there was need for search for an equitable and reasonable principle and in their opinion 1986 memorandum fitted the description.

As per the majority report, the inter se seniority of DHJS after Shri K.C. Lohia should be settled as per O.M. dated 3.7.1986 of DOPT. The Committee also issued further directions for proper implementation. The learned dissenting Judge took the view that Rota and Quota had broken down as the appointments from two sources had taken place after lot of delay. As such the learned dissenting Judge recommended that the principle of continuous length of service should be applied for inter se seniority of the officers of DHJS. Two views expressed by the members of the Committee as well as individual views of Justice Rekha Sharma and Justice S.N. Dhingra were considered by the Full Court of the Delhi High Court. The Full Court accepted the majority view expressed by the Committee and decided to confer seniority to the members of DHJS on the basis of O.M. dated 3.7.1986. Based on the said decision, the High Court by letter dated 18.5.2007 circulated the final list of officers of DHJS as on 1.1.2007. Feeling aggrieved by the said decision of the Full Court dated 18.5.2007 and consequent determination of the final seniority list, the petitioners have filed the present writ petitions on various grounds.

3) In all the writ petitions, the High Court of Delhi has filed separate but identical counter affidavit highlighting its stand. The salient features of the stand of the High Court are as follows:

(i) The disputes are about inter se seniority and preparation of the final seniority list. After the tentative seniority list was circulated, representations were made by various persons i.e. the direct recruits and the promotees making different grievances and a Committee was constituted to examine the same. The Committee consisting of five Hon'ble Judges gave a personal hearing to the representative groups and, thereafter, submitted two reports, majority report of four Hon'ble Judges and another report by one Hon'ble Judge in regard to determination of inter se seniority. Thereafter the matter was considered by the Full Court which adopted the report of the majority (four Members Committee). The Full Court also considered the note circulated by two other Hon'ble Judges before taking a final view in the matter. The disputes and grievances relating to inter se seniority was done after giving due opportunity to all concerned and detailed consideration and deliberations and conscious application of mind to various aspects of the matter.

(ii) Appointments to DHJS are made both by direct recruitment from the Bar and also by way of promotion of eligible officers from Delhi Judicial Service. Rule 7 provides for appointment to the extent of 1/3rd of the posts in the service by direct recruitment and 2/3rd of the posts being filled up by promotee officers. Earlier to 1987, the division of posts between the direct recruits and the promotees was confined to the substantive posts in the service and insofar as temporary posts in the service were concerned, they were to be filled up exclusively by promotees. This resulted in grievances being made by persons promoted against such temporary posts in regard to their seniority vis-à-vis the direct recruits appointed against substantive posts. After the decision of this Court in O.P. Singla's case, the Rules were amended in 1987 providing for direct recruitment also against temporary posts.

iii) Insofar as inter se seniority of the members of DHJS appointed to the same post by way of direct recruitment and promoted to the same post from the Delhi Judicial Service is concerned, Rule 8 provides that it shall be determined in the order of rotation of vacancies between the direct recruits and the promotees, based on the quota of vacancies reserved for both the categories by Rule 7. Rule 27 of DHJS Rules provides that where no provision regarding conditions of service has been made or insufficient provision has been made in the DHJS Rules, resort could be had to directions or orders of the Government of India in force which are applicable to officers of comparable status in the Indian Administrative Service and serving in connection with the affairs of Union of India. The relevant portion of O.M. dated 03.07.1986 makes it clear that to the extent the direct recruits are not available, the promotees would be bunched together at the bottom of the seniority list below the last position up to which it is possible to determine seniority, on the basis of rotation concluded with reference to actual number of the direct recruits, who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year for taking action for direct recruitment for the total number according to the usual practice. Thereafter, in that year, while seniority will be determined between the direct recruits and the promotees, to the extent of number of vacancies for the direct recruits and the promotees as determined according to the quota for that year, the additional direct

recruits selected against the carried forward vacancies of the previous year would be placed en bloc below the last promotee in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carrying forward, if any, of direct recruitment or promotion quota vacancies in the subsequent year.

iv) The principle set out in the O.M. dated 03.07.1986 was found to be reasonable, just and fair by the Full Court for application to DHJS having regard to the fact that recruitment from the two sources did not take place simultaneously in some years, making it difficult to follow the rotational principle of fixation of seniority for all the appointees. Therefore, while applying the principle of rotation to the extent possible, year-wise, seniority has been fixed in a reasonable and consistent manner.

v) The majority report (submitted by four Hon'ble Judges) which was accepted by the Full Court and pursuant to which the impugned seniority list was prepared, noticed the rival submissions and finding the principles laid down in O.M. dated 03.07.1986 are equitable, applied the same along with the Rules for resolving disputes concerning inter-se seniority arising out of appointments not being made from either source in any given year, delays in appointments from either source and appointments not being made to the full extent of the respective quotas every year etc. The inter se seniority between the direct recruits and the promotees has been worked out on a year to year basis, applying the ratio provided in Rule 7 and the rotation between the direct recruits and the promotees provided in Rule 8 and rotating them to the extent officers from both the categories are available in that year and placing the remaining officers en bloc thereafter below them by applying the principle laid down in the O.M. dated 03.07.1986. There is no legal infirmity in the same. On the other hand, it is just and fair.

vi) The statutory Rules are to be enforced on their true construction in precedence to any circular/guideline as the latter are only intended to supplement or fill-up the gaps in complete enforcement of the Rules. At best, it must be read and applied to a situation but certainly in comity to the Rules. Because of undue delay in appointments, the rule of Rota- Quota in stricto sensu could not be applied. It is an equitable principle which can be applied on harmonious construction. The language of Rule 27 in no way prohibits adoption or reference to the memorandum issued by the Government of India as it is equally applicable to the IAS Rules wherever and whenever it is so needed. The 1986 Memorandum affords a reasonable and non-discriminatory solution to the vexed issue at hand. It minimizes the hardship to one or other class of officials, in the event of inaction in recruitment, by adding the inadequately represented class/group in the next vacancy year, even while applying the quota as between the two groups, to the extent feasible. The guideline neither favours "continuous officiation" nor blanket rotation of vacancies and instead suggests a middle path. For the period 1987 to 1991, the rule or principle applied thereto was different; it, however, was certainly not a strict application of the quota/rota rule. Equally, application of the continuous officiation principle, an option suggested by some of the promotees, is unfeasible, more so, after the 1987 amendment. The 1986 memorandum fits the description. In the above premises, all the writ petitions are without merit and the same deserve to be dismissed.

4) In the reply filed by the petitioners, they once again reiterated the stand taken in the writ petition. Apart from the Delhi High Court, the promotee officers shown as respondents. were also filed rejoinder highlighting their stand. They also reiterated the stand taken by the Delhi High Court.

5) In the light of the pleadings of the parties, we heard Mr. Harish Salve, Mr. Rakesh K. Khanna, Mr. P.S. Patwalia, Mr. A.K. Ganguli, learned senior counsel for the petitioners and Mr. G.E. Vahanvati, learned Solicitor General, Mr. Gopal Subramaniam, learned Addl. Solicitor General, Mr. Arun Jaitley, Mr. R. Venkataramani and Mr. P.P. Rao, learned senior counsel for the respondents.

6) All the counsel appearing for the petitioners mainly contended that,

(i) seniority has to be determined in terms of Rule 8(2) read with Rule 7 of 1970 Rules;

(ii) the course adopted by the High Court in passing the resolution based on an administrative instruction i.e. O.M. dated 03.07.1986 instead of Rules 7 and 8(2) is ultra vires of the provisions of Article 14 read with Article 309 of the Constitution of India;

(iii) Applying the O.M. is totally unjustified, uncalled for, unconstitutional and liable to be set aside;

(iv) Upon the promulgation of DHJS Rules, 1970 the O.M. or its modification or amendment will cease to have applicability to the service;

(v) The said O.M. has failed to bring in any equity.

7) On the other hand, learned counsel appearing for the respondents including learned senior counsel appearing for the High Court submitted that,

(i) There is no challenge to the rule of seniority, in such case, the writ petition under Article 32 will not be maintainable;

(ii) The tentative seniority list was circulated to all the members and representations were made by the direct recruits as well as the promotees. The Committee of five Judges, after affording personal hearing, considered the same and submitted their reports. Having regard to the various circumstances including the fact that the appointment from both sources was not followed regularly and there exists disparity between the direct recruits and the promotees, the Full Court by applying O.M. dated 3.7.1986, accepted the majority report of the Committee, hence, the course adopted by the High Court and its ultimate decision cannot be faulted with and all the writ petitions are liable to be dismissed.

8) We have carefully perused the pleadings of both the parties, Committee reports, deliberation of the Full Court and considered the rival contentions. The Lieutenant Governor of Delhi in consultation with the High Court of Delhi by exercising the power conferred by the proviso to Article 309 of the Constitution read with the Government of India, Ministry of Home Affairs Notification dated 29.05.1970 and 25.07.1970 made the Rules called Delhi Higher Judicial Service Rules,

1970. In order to appreciate the above contentions, it is useful to refer the relevant Rules/provisions from DHJS Rules, 1979 as amended by Notification issued on 17.3.1987:

2 (b) "Cadre Post" means any post specified in schedule and includes a temporary post carrying the same designation as that of any of the posts specified in that schedule and any other temporary post declared as cadre post by the Administrator.

(d) "Member of the Service" means a person appointed to the service under the provisions of these rules.

(e) "Service" means the Delhi High Judicial Service.

(g) "Initial recruitment" means the first recruitment and appointment made to the service after the commencement of these rules.

(h) "Promoted Officer" means a person who is appointed to the service by promotion from Delhi Judicial Service.

(i) "Direct recruit" means a person who is appointed to service from the Bar.

7. Regular Recruitment:- Recruitment after the initial recruitment shall be made:-

(a) by promotion on the basis of selection from members of the Delhi Judicial Service who have completed not less than 10 years of service in the Delhi Judicial Service;

(b) by direct recruitment from the Bar. Provided that not more than 1/3rd of the posts in the service shall be held by direct recruits;

Provided further that where a member of the Delhi Judicial Service is considered for such appointment under clause (a) all persons senior to him in the Service shall also be considered, irrespective of the fact whether or not they fulfil the requirement as to the minimum of 10 years service. Explanation.- For calculating the period of 10 years of service for the purpose of clause (a) with respect to officer appointed to the Delhi Judicial Service at the time to its initial constitution, service rendered by them in the cadre to which they belonged at the time of the initial recruitment to that service which was counted for determining the seniority under rule 11 of the Delhi Judicial Service Rules, shall also be counted.

8. (1) The inter-se seniority of members of the Delhi Judicial promoted to the service shall be the same as in the Delhi Judicial Service.

(2) The seniority of direct recruits vis-à-vis promotees shall be determined in the order of rotation of vacancies between the direct recruits and promotees based on the quotas the vacancies reserved for both categories by rule 7 provided that the first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on.

16. (1) Administrator may create temporary posts in the service.

(2) Such posts shall be filled by Administrator, in consultation with the High Court, from amongst the members of the Delhi Judicial Service and by direct recruitment from the Bar
Explanation: Rule 5 and rules 7,8,9,10, and 11 shall apply to appointments made under this rule.

17. Notwithstanding anything contained in these rules, the Administrator may, in consultation with the high Court, fill substantive vacancies in the service by making temporary appointments thereto from persons appointed under rule 16."

27. Residuary matters In respect of all such matters regarding the conditions of service for which no provision or insufficient provision has been made in these rules, the rules, directions or order for the time being in force, and applicable to officers of comparable status in the Indian Administrative Service and serving in connection with the affairs of the Union of India shall regulate the conditions of such service. "

9) The validity of Rule 7 or 8 of the Rules is not in dispute. On the other hand, the main prayer of the petitioners is that the resolution dated 22.05.2007 of the Full Court approving the majority report determining the seniority of the members of DHJS in terms of O.M. dated 03.07.1986 is bad and the seniority of member of DHJS should be determined strictly in accordance with Rule 8(2) read with Rule 7 of 1970 Rules. In the year 1970, DHJS was constituted under the said Rules. We have already referred to the relevant provisions of the Rules in the earlier part of our judgment. Rule 5 provides for method of recruitment to the service i.e. by way of promotion from amongst the officers of Delhi Judicial Service and also by direct recruitment from amongst the eligible members of the Bar. Rule 7 provides that after initial recruitment regular recruitment would be made on the basis of selection from the members of Delhi Judicial Service who have completed not less than 10 years in DJS and by direct recruitment from the Bar. The proviso to Rule 7 provides that minimum 1/3rd of the posts shall be held by direct recruits. Rule 8 provides for inter-se seniority. Rule 8(2) provides that inter se seniority of the direct recruits vis-`-vis the promotees is to be determined in order of revision of vacancies between the direct recruits and the promotees based on "quotas of vacancies" reserved for both categories by Rule 7. The said Rule further provides that

first available vacancy will be filled by the direct recruits and the next two vacancies by the promotees and so on.

10) As originally framed, Rule 16 of the Rules provided for creation of temporary posts in the service and filling up of the same only by way of promotion from amongst the members of DJS. Rule 17 provides for filling up of the vacancies by making temporary appointments from amongst the members of DJS. According to the petitioners, till 1980 no problem arose in the operation of the rules as till that time only the substantive appointees to the service from the Bar as also the appointees by promotion were being given seniority under Rule 8(2). In the year 1980, a writ petition was filed before this Court by the promotee officers challenging Rule 7 and 8 of the Rules which provide rota-quota. The promotee officers claimed that even appointment to the temporary posts/vacancies under Rules 16 and 17 of the Rules, is similar to the substantive appointment to the service and the incumbents under those Rules are also entitled to get seniority from the date of their appointment. In O.P. Singla's case (supra) this Court held that appointments made under Rules 16 and 17 to temporary post/vacancies are similar to those of the substantive appointments. With the said equation by legal fiction, distinction between the two types of appointments i.e. temporary and substantive, having been extinguished, this Court reached to the

conclusion that since no appointments of direct recruits under Rule 16 or 17 were possible in accordance with the rule as then existed, the inevitable conclusion is that rota/quota had broken down. However, this Court upheld the Constitutional validity of Rule

7 and held that there is a quota of 1/3rd vacancies for the direct recruits in the service. The Court also upheld Constitutional validity of Rule 8(2) which provides for the rotation of vacancies under Rule 7.

It is relevant to point out that though this Court had equated temporary post with permanent post it also noticed that this judgment will upset the balance between the direct recruits and the promotees in the DHJS. In those circumstances, it directed to frame appropriate rules to remove the imbalances for future application.

11) After the judgment in O.P. Singla's case, in the year 1985, the High Court undertook the exercise of amendment of the Rules to provide for filling up of temporary posts/vacancies under Rules 16 and 17 also by the direct recruitment as per the quota prescribed under Rule 7. Simultaneously, the High Court also decided that in order to restore the balance between the number of the direct recruit appointees and the promotee appointees in the service, 14 existing vacancies be filled up by direct recruitment. The promotee officers again filed a writ petition before this Court challenging the decision of the High Court. This Court, by order dated 18.12.1986, and by consent of all the parties set a time-frame for finalization and publication of the amendment to DHJS Rules and directed that thereafter all the vacancies are to be filled up. Accordingly, in March, 1987, the DHJS Rules were amended and disparity in the matter of regular appointments as well as appointments against temporary posts and temporary vacancies under Rules 16 and 17 of the Rules were removed. It was provided that even under these Rules, appointments of the direct recruits could be made. While implementing the judgment of this Court in O.P. Singla's case, the High Court granted seniority to the DHJS officers. However, the said final seniority list was again challenged before this Court by way of Writ Petition No. 490 of 1987. The dispute so raised was finally settled by a Constitution Bench of this Court in Rudra Kumar Sain (supra). The Constitution Bench, in its judgment, upheld the principles laid down in O.P. Singla's case and held that in DHJS, for appointees of the pre-amended rules seniority had to be assigned on the basis of length of service only.

12) It is the grievance of the petitioners that since 1992 till their selection in the year 1997 vacancies were available; yet despite of the availability of new vacancies for the direct recruits as also for the promotees, the recruitment process was commenced only for the promotees and the direct recruits were consistently held back. The Full Court, in its meeting held on 20.07.2002, considered the issues concerning inter-se seniority of the direct recruits and the promotees of DHJS appointed after amendment of DHJS Rules. It approved the tentative seniority list for circulation to the officers. The Full Court, after its meeting held on 30.08.2000, directed that the seniority list of the officers is to be circulated amongst the officers of DHJS to invite their objections, if any. Accordingly, by letter dated 12.08.2002, the tentative seniority list of 130 officers of DHJS appointed up to the year 2000 was circulated amongst the concerned officers for inviting their

objections. After receipt of objections, the matter regarding finalization of seniority list of officers of DHJS was considered in the Full Court held on 25.10.2002. A Committee of Hon'ble Judges of the High Court was constituted to go through the objections and submit a report for consideration of the Full Court. Accordingly, the Committee considered the objections and submitted reports. The Full Court accepted the recommendations of the Committee dated 13.10.2004 in respect of seniority of Mr. S.L. Bhayana. The Full Court also accepted the majority view in respect of seniority of three more officers. After due approval by the Full Court, the same was circulated amongst the concerned officers and objections of the remaining officers directed to be considered in the next meeting of the Committee. The Full Court, by decision dated 20.05.2006, reconstituted a Committee. Pursuant to the communication of the High Court dated 02.06.2006, 24 direct recruit officers and 15 promotee officers of DHJS submitted their written statement. The reconstituted Committee heard the officers on several occasions. Apart from the Committee, two Hon'ble Judges gave their views which were also circulated among the Judges. The Full Court, in its meeting dated 18.05.2007, considered two different reports and views received from the two Hon'ble Judges. Finally, the Full Court approved the majority view for settling inter-se seniority of the officers of DHJS. By letter dated 18.08.2007, the final seniority list of officers of DHJS as on 01.01.2007 supplied by the High Court was forwarded to District and Session Judges, Delhi for circulation among the concerned officers.

13) The Committee constituted by the High Court had received objections both from the direct recruits as well as from the promotee officers. All the direct recruits who have filed their objections against the tentative seniority list have claimed determination of their inter se seniority by applying the rule of Rota Quota laid down in the statutory rules, i.e. Rule 8(2) read with Rule 7 of the DHJS Rules, 1970. The promotee officers were divided in their stand. Some of the promotee officers want their seniority to be decided by applying the principle of Rota Quota as claimed by the direct recruits. Some promotee officers want their seniority to be decided on the principle of continuous length of service as laid down in O.P. Singla and Rudra Kumar Sain's cases and a handful of the promotee officers have stated in their objections that the High Court should apply the principle contained in the O.M. dated 3.7.1986 for determining their inter se seniority.

14) In view of the objections of the officers against tentative seniority list, three options available before us for deciding the inter se seniority dispute amongst the officers of DHJS are as follows:

- (i) Principle of Rota Quota as laid down in Rule 8(2) read with Rule 7 of DHJS Rules.
- (ii) Principle as laid down in the O.M. of DOPT dated 3.7.1986.
- (iii) Principle of "continuous length of service", i.e., date of appointment.

15) Let us consider the applicability of the above norms in Delhi Higher Judicial Service for ascertaining as to which of these norms would be most equitable, reasonable and justiciable for determining the inter se seniority of the officers in the said service. In our view, an equitable rule for determining the inter se seniority would be one that satisfy the competing claims of both the groups.

16) The cadre strength of DHJS as on 31.12.1991 was of 60 officers. The said strength, later on, stood increased by addition of more and more new posts from time to time. As on the date of considerations, cadre strength was of 174 officers. The details of recruitment by promotion and direct recruitment made to the service from 1992 to 2006 are as under:-

Appointments under Promotion quota

<u>Year</u>	<u>No. of Promotees</u>	<u>Date of Promotion</u>
1992	7	17.12.92
1994	7	28.04.94
1995	9	4 on 25.02.95, 5 on 24.08.95
1996	21	5 on 24.08.95, 5 on 06.01.96, 10 on 24.07.96, & 1 on 20.11.97
1997	14	20.11.97
2000	23	8 on 26.05.2000 & 15 on 16.08.2000
2003	24	06.08.2003

2006	28+15 (fast Track Promotion on ad-hoc basis)	04.01.2006
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Appointments under direct recruitment quota

Year	No.of Recruits	Direct Date of promotion
1992	1	09.12.1992
1995	9	7/9.03.1995
1997	8	21.04.1997
2000	7	26.05.2000
2002-03	12	26.11.2002

17) Rule 5 of DHJS Rules provides recruitment from two sources, namely, by direct recruitment from amongst eligible Advocates and also by promotion from the feeder cadre i.e., Delhi Judicial Service. Rule 7 provides 1/3rd quota for direct recruitment and 2/3rd quota for promotee officers. As per Rule 8, the first vacancy goes to the direct recruits while the next two are to be given to the promotee officers and so on.

18) The DHJS Rules were amended in March, 1987. Before amendment of the Rules, direct recruits could not have been appointed against the temporary posts created in the service from time to time but after amendment of the Rules, they also became entitled to get their quota for appointment even against the temporary posts. Rule 8(2) of the Rules provides for following the rule of Rota Quota in the ratio of 1:2 for fixing the inter se seniority between the direct recruits and the promotee officers. As prior to amendment of the Rules, there was no quota for direct recruits against the temporary posts, the Rota Quota rule either in the matter of appointment or for fixing of inter se seniority could not be followed as there was a breakdown of this rule. On taking stock of the situation, this Court in O.P. singla's case (supra) while upholding the constitutional validity of Rule 8(2) found a workable solution for fixing the inter se seniority of the officers of DHJS and directed

the High Court to fix their inter se seniority by applying the principle of continuous officiation, i.e. length of service. This principle was reiterated by this Court in its constitution Bench judgment in Rudra Kumar Sain's case (supra) which is also a case regarding dispute in seniority of the officers of DHJS. Since the requisite balance between the direct recruits and the promotee officers in terms of rule 8(2) could not be achieved till date, the High Court has consistently applied the principle of continuous length of service for determining the inter se seniority of the officers of DHJS up to Mr. K.C. Lohia. The seniority up to Mr. K.C. Lohia has not been disputed either by the direct recruits or by the promotee officers.

19) Perusal of the Seniority List drawn by application of principle of Rota Quota as laid down in Rule 8(2) read with Rule 7 of DHJS Rules shows that in case the principle of Rota Quota is followed, then it would cause a serious injustice to the promotee officers inasmuch as, the direct recruits who have not yet entered the service would rank senior to the promotee officers promoted in their quota way back on 16.8.2000. If this is allowed to happen, this would not only be unreasonable but create a great heart-burning amongst the officers appointed from the two sources. Hence, in our view, the principle of Rota Quota contained in the statutory Rule 8 (2) read with Rule 7 of DHJS Rules, does not properly address the problem of resolving inter se seniority dispute between the direct recruits and the promotee officers.

20) The other Seniority List got prepared on the basis of the principle of seniority as laid down in the O.M. of DOPT dated 3.7.1986, adopted by the majority view for determining the inter se seniority of the officers of the two groups reveals certain important facts having a bearing on the determination of inter se seniority of the officers of the two groups and they are as under:

a) Promotions of the promotee officers from the cadre of DJS to the cadre of DHJS took place shortly within a few months as and when vacancies became available to them, either through increase in the cadre strength or creation of temporary post.

b) The process for direct recruitment was started many months before the promotions of the promotee officers in the cadre of DHJS. The delay that occasioned in the appointment was only in the case of direct recruits and not of the promotee officers.

c) The vacancies against which direct recruits were appointed became available to them many months before the promotions of the promotee officers against subsequent addition of vacancies.

d) The direct recruits were working as Additional District Judges against the substantive post

whereas the promotee officers who were proposed to be made senior to such direct recruits were at the same time working as subordinate Judges in the cadre of DJS. There are other reasons in law why the principle contained in the said O.M. cannot be taken in aid for determining the inter se seniority of the officers of DHJS but before going into those reasons, it would be necessary to discuss the adverse consequences that would flow by application of the principle contained in the said Office Memorandum. It is useful to refer the relevant clauses in O.M., which were adopted in the majority report, are reproduced hereunder:

"GOVERNMENT OF INDIA DEPARTMENT OF PERSONNEL AND TRAINING OFFICE
MEMORANDUM No. 22011/7/86-Estt.(D) Dated 3rd July, 1986

"2.4.1 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

2.4.2 If adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees.

In other words, to the extent direct recruits are not available, the promotees will be punched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed en bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year."

Now let us consider the applicability of this provision in the cases on hand. From 1992 to 2006, only five batches of direct recruits were appointed, details of which are as follows:-

Year of direct recruitment	No. of Direct Recruits
1992	1

1995	9
1997	8
2000	7
2003-03	12

In the batch of 1992, only one direct recruit, Ms. Veena Birbal was appointed. She being at S.No.1 her seniority is not at all affected by the application of any of the three rules i.e., the principle of Rota Quota as contained in the statutory Rule 8(2) read with Rule 7 of DHJS Rules, principle as contained in the O.M. referred above or the principle of continuous length of service. The seniority of the officers of other three batches of direct recruits appointed in 1995, 1997 and in the year 2000 is adversely affected to their detriment, if the seniority is decided on the basis of principle contained in the above referred O.M. It may be seen from the seniority list which is based on the principle contained in the O.M. that the six direct recruits of 1995 batch, namely, Ms. I.K. Kochhar, Mr. A.K. Pathak, Mr. B.S. Mathur, Mr. P.S. Teji, Mr. I.S. Mehta and Mr. Lal Singh who all were appointed against the substantive vacancies in their quota on 7/9.3.1995 would become junior to the promotee officers, Mr. Ajit Bharihoke, Mr. D.K. Saini, Mr. R.S. Khanna, Mr. S.K. Tandon and Mr. Prem Kumar who were promoted from DJS to DHJS on 24.8.1995 against vacancies that became available to them after the appointment of the above named six direct recruits. In the same way, the seven direct recruits of 1997 batch, namely, Mr. V.P. Vaish, Mr. S.N. Gupta, Mr. S.C. Malik, Mr. A.K. Chawla, Mr. Vinod Goel, Mr. R.P.S. Teji and Mr. S.C. Rajan appointed against substantive vacancies in the quota of direct recruits on 21.4.1997 would become junior to the promotee officers Mr. Mahavir Singhal, Mr. S.K. Sarvaria, Mr. P.C. Ranga, Mr. Babu Lal, Mr. D.C. Anand, Mr O.P. Gupta, Mr. C.K. Chaturvedi, Mr. A.S. Yadav, Mr. R.K. Gauba, Mr. H.S. Sharma, Mr. J.R. Aryan, Mr. K.S. Pal, Mr. M.K. Gupta and Ms. Sangita Dhingra Sehgal, who were promoted from DJS to DHJS after them on 20.11.1997. Similarly, the three direct recruits of 2000 batch, namely, Mr. Rajnish Bhatnagar, Mr. Rakesh Siddartha and Mr. Amar Nath appointed in the direct recruit quota against substantive vacancies on 26.5.2000 would become junior to the promotee officers, Mr. N.P. Kaushik, Ms. Asha Menon, Mr. Pradeep Chaddah and Mr. Narender Kr. Sharma promoted to DHJS on 16.8.2000. None of the abovenamed promotee officers was even promoted to the cadre of DHJS when the above named direct recruits over whom they are proposed to be made senior were appointed in the cadre of DHJS against substantive vacancies. Those promotee officers were working as sub- Judges/Metropolitan Magistrates in the cadre of Delhi Judicial Service at the time the above named direct recruits were appointed as Additional District Judges in the cadre of DHJS. We are of the view that by no stretch of imagination or legal fiction, a promotee officer working in the lower cadre can be made senior to an officer working on a higher post as an Additional District Judge at that point of time. In case by application of principle as contained in the O.M., officers working in the lower cadre are made senior to the Additional District Judges of that time, then it would cause a great heart burning amongst those direct recruits who were appointed in their own quota against substantive vacancies before the promotion of the promotee officers in question.

21) Further, in our view, the principle of inter se seniority contained in the above O.M. can even otherwise be not applied for determining the inter se seniority of the officers of DHJS for the following reasons, (i) The principle of inter se seniority contained in the O.M. of DOPT dated 3.7.1986 cannot supplant statutory Rules for determining the inter se seniority contained in the statutory Rules viz., Rule 8(2) read with Rule 7 of DHJS Rules, 1970; (ii) The pre-conditions for applicability of the principle contained in the above referred O.M. never existed in the service in question. The O.M. contemplates recruitment on yearly basis and also for maintaining year-wise record of the vacancies remaining unfilled in any particular category before they are bunched as carry forward vacancies for the next year, (iii) Rule 27 of the DHJS Rules which is a residuary provision explicitly provides that with regard to matters on which DHJS Rules are silent, help can be taken from the Rules that are applicable to the IAS officers. As specific provisions for determining the inter se seniority of the officers of DHJS have been made in the DHJS Rules, there is no question of taking any aid from any outside Rule as contained in the O.M. Further the IAS Seniority Rules, 1987 prescribed principle that is altogether different from the kind of Rota Quota principle embodied in DHJS Rules, 1970. The majority report has also noted that though the O.M. of 1986 does not apply by recourse to Rule 27 of the DHJS Rules 1970, yet has recommended its applicability for determining the inter se seniority of the officers of DHJS on the assumption that the Central Government would be within its right to apply the said Memorandum or make similar principle for application to the members of the All India Service in future. The inter se seniority of IAS Officers is determined by reference to the year of allotment as provided in Rule 4 of IAS (Regulation of Seniority) Rules, 1987. The principle of bunching of officers appointed against carry forward vacancies and then putting them below the last officer appointed against the current vacancy of that year is not applicable to the IAS officers for determining their inter se seniority but in DHJS, the circumstances are entirely different. The appointments from 1992 to 2006 were never made from either source on yearly basis. No record was maintained regarding the unfilled vacancies available to either source on year-wise basis.

22) In view of what has been discussed above, we are of the view that we should not apply the principle of bunching as contained in the above referred O.M. for determining the inter se seniority of the officers of DHJS as by application of the said principle the promotee officers who at the relevant time (i.e. 1995, 1997 and 2000) were still in the lower cadre of DJS would become senior to those direct recruits appointed as Additional District and Sessions Judges much before their promotions in the cadre of DHJS. This is unjust and inequitable.

23) Now let us have a glance the seniority list prepared on the basis of the principle of "continuous length of service". Ever since the inception of the service till the seniority up to Mr. K.C. Lohia was finally decided, the High Court has continuously followed the principle of "continuous length of service" as directed to be applied to the officers of DHJS by this Court in O.P. Singla and Rudra Kumar Sain's cases (supra). When O.P. Singla and Rudra Kumar Sain's cases were decided by this Court, this Court had noticed breakdown of Rota Quota in the service and it was for that reason, directions were given for determining the inter se seniority by applying the principle of continuous length of service.

24) A perusal of seniority list which is based on the principle of Rota Quota would show that the Rota Quota remains broken down even today. It may be pertinent to mention here that steps for appointment of direct recruits were actually taken by the High Court many years before their appointment actually took place but the appointments came in place only after considerable delay. Though as per law the direct recruits cannot be faulted with for the delay caused in their appointments, the fact remains that delay in appointments should not cause any disadvantage to the incumbents appointed in the service. We need not go into all these aspects because the fact that has emerged is that the appointment of direct recruits and promotee officers in the service have not taken place simultaneously. This only shows that Rota Quota has remained broken down right from the inception of service till now. There is absolutely no change in the factual position relating to breakdown of Rota Quota even after the decision of this Court in O.P. Singla and Rudra Kumar Sain's cases. There is no reason to depart from the said principle and take a shelter under the O.M. of DOPT dated 3.7.1986 for determining the inter se seniority of the officers of DHJS.

25) The High Court while fixing seniority of officers upto Shri K.C. Lohia including those who were appointed after amendment of the Rules and whose seniority was not determined in Rudra Kumar Sain's case, did not apply the O.M. dated 3.7.1986 or the principles contained therein. Their seniority was fixed essentially on the basis of "length of service". There was no good reason for the High Court to discard the principle of "continuous length of service", which it had followed for determining seniority of officers upto Shri K.C. Lohia and apply the O.M. dated 3.7.1986 for the purpose of fixing the seniority of officers appointed after the appointment of Shri K.C. Lohia. Rule 8(2) cannot be applied on account of gross inequity and injustice which its application is bound to produce and since this Court has already held in the case of Suraj Prakash Gupta & Ors. vs. State of J & K, (2000) 7 SCC 561 that direct recruits cannot claim seniority from the date of occurrence of vacancy in the direct recruitment quota, the seniority should be determined on the basis of continuous length of service as was done by this Court in O.P. Singla's case and Rudra Kumar Sain's case and was also done by Delhi High Court in case of officers upto Shri K.C. Lohia. If the seniority is fixed in this manner, it will not cause any injustice either to promotees or to direct recruits.

26) Further it has to be kept into consideration that seniority even by one day may materially affect the future prospects and career of an officer. The person appointed even on day earlier may reach a position which the person appointed one day later may not be able to reach due to reasons such as limited number of higher posts or his becoming age barred by the time next vacancy arises. The only advancement in the career of a member of Delhi Higher Judicial Service is elevation to the High Court. Therefore, it will not be fair and equitable to give march to a later appointee over a prior appointee of the same year, even if that march is for a few months or even for a few days. It, therefore, cannot be disputed that the application of O.M. dated 3.7.1986 which does not ipso facto apply to officers of Delhi Higher Judicial Service would produce inequity for officers from one or the other source and therefore, has to be avoided if a better principle, which is fair and reasonable to all can be applied.

27) As observed earlier, perusal of the seniority list prepared on the basis of the principle of "continuous length of service" clearly demonstrates that in case the seniority of the officers of DHJS is fixed by reference to their date of appointment, then nobody would suffer any injustice. Each and every officer would get due weightage of the service rendered by him or her in the cadre of DHJS. If inter se seniority is finally decided by applying the principle of "continuous length of service", it may bring an end to litigation between the officers of the two groups. Therefore, the principle of "continuous length of service" should be applied for determining the inter se seniority of the officers of Delhi Higher Judicial Service appointed up to the year 2006. In case of officers appointed on the same date, whether direct appointees or promotees, the seniority should be fixed on the principles as stated in O.M. dated 3.7.1986 since it cannot be determined on the basis of length of service alone in case of appointment from two different sources on the same date.

28) As far as the inter se seniority of the officers to be appointed in DHJS after the year 2006 is concerned, this Court in its judgment in All India Judges Association vs. Union of India , (2002) 4 SCC 247 has directed all the High Courts to make necessary amendment in the Rules providing for determining the inter se seniority on the basis of 40 point Roster considered and approved in the case of R.K. Sabharwal & Ors. vs. State of Punjab, (1995) 2 SCC 745. The necessary amendment relating to inter se seniority for future be made in the DHJS Rules in consonance with the directions of this Court as referred in the above mentioned cases. Till such time the principle of "continuous length of service" i.e. date of appointment should be applied for determining the inter se seniority of the officers of Delhi Higher Judicial Service.

29) For the aforesaid reasons, we allow all the writ petitions. The inter se seniority list of DHJS as suggested by the majority view and consequential order of the High Court are set aside. Now, the High Court is requested to finalise fresh inter se seniority list of DHJS, as observed above, as expeditiously as possible. No order as to costs.