

# SUPREME COURT OF INDIA

Pawan Pratap Singh & Ors.

Vs.

Reevan Singh & Ors.

C.A.No.9906 of 2003

([Aftab Alam](#) and R.M.Lodha,JJ.,)

10.02.2011

## JUDGMENT

**R.M. Lodha,J.,**

1. In this group of three appeals, by special leave, the question presented for consideration before this Court relates to determination of seniority between two groups of direct recruits to the posts of Deputy Jailor (Group `C' post), one appointed in 1991 through the selection made by Uttar Pradesh Subordinate Services Selection Commission (for short, `Selection Commission') and the other in 1994 by Uttar Pradesh Public Service Commission (for short, `UPPSC').

2. The Uttar Pradesh Jail Executive Subordinate (Non- Gazetted) Service Rules, 1980 (for short, `1980 Rules') were framed by the Governor of the State in exercise of the powers conferred by the proviso to Article 309 of the Constitution which were published in U.P. Gazette, Extraordinary on June 9, 1980. Rule 5 of the 1980 Rules deals with the recruitment to the posts of Deputy Jailor and Assistant Jailor in the service. The recruitment to the posts of Deputy Jailor is by two sources: (i) by direct recruitment and (ii) by promotion from amongst the permanent Assistant Jailors. Rule 15 provides for procedure for direct recruitment to the posts of Deputy Jailor and Assistant Jailor. It reads thus :

"15. Procedure for direct recruitment to the posts of Deputy Jailor, Assistant Jailor.—  
(1) Applications for permission to appear in the competitive examination shall be called by the Commission in the prescribed form, which may be obtained from the Secretary to the Commission on payment.

(2) No candidate shall be admitted to the examination unless he holds a certificate of admission issued by the Commission.

(3) After the results of the written examination have been received and tabulated, the Commission shall having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and others under

Rule 6, summon for interview such number of candidates as, on the result of the written examination, have come up to the standard fixed by the Commission in this respect. The marks awarded to each candidate at the interview shall be added to the marks obtained by him in the written examination.

(4) The Commission shall prepare a list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by each candidate at the written examination and interview and recommend such number of candidates as they consider fit for appointment. If two or more candidates obtain equal marks in the aggregate, the name of the candidate obtaining higher mark in the written examination shall be placed higher in the list. The number of names in the list shall be larger, but not larger by more than 25 per cent of the number of vacancies. The Commission shall forward the list to the appointing authority."

3. Part-VI of the 1980 Rules deals with appointment, probation, confirmation and seniority. For the purposes of these appeals, rule 22 of the 1980 Rules needs to be referred which is as follows:

"22. Seniority.--Seniority in any category of posts in the service shall be determined from the date of substantive appointment and if two or more persons are appointed together, from the order in which their names are arranged in the appointment order :  
Provided that—

(1) the inter se seniority of persons directly appointed to the service shall be the same as determined at the time of selection.

(2) the inter se seniority of persons appointed to the posts of Deputy Jailor by probation shall be the same as it was in the substantive post held by them at the time of promotion; and ....."

4. On December 26, 1987, the UPPSC published an advertisement (No. A-5/E-4/87-88) for holding the Combined Lower Subordinate Services Examination, 1987. It was mentioned in the advertisement that the number of vacancies to be filled on the result of the examination is expected to be approximately 600 which included the vacancies in the cadre of Deputy Jailor. There is dispute of fact about actual number of vacancies in the cadre of Deputy Jailor notified by the UPPSC in the above advertisement but the stand of the first respondent that 114 vacancies of Deputy Jailors were notified may be assumed as fact for the purpose of these appeals.

5. The Uttar Pradesh Subordinate Services Selection (Commission) Act, 1988 (for short, '1988 Act') was enacted by the U.P. Legislature to establish a Subordinate Services Selection Commission for direct recruitment to all Group 'C' posts in the State of U.P. The 1988 Act came into force on February 15, 1988.

6. On November 25, 1989, a notification was issued by the Governor of Uttar Pradesh clarifying that the vacancies already referred to the UPPSC shall be filled on the recommendation of the UPPSC alone.

7. Pursuant to the advertisement (No. A-5/E-4/87-88) dated December 26, 1987, the UPPSC conducted the preliminary examinations on September 24, 1989.

8. On October 27, 1990, the Selection Commission advertised and notified that for filling 60 posts of Deputy Jailor, a competitive examination, 'U.P. Karapal (Deputy Jailor) Examination, 1990' shall be held. The examination was held on due date and after holding oral interview, the Selection Commission sent a select list to the State Government in 1991 for issuance of appointment letters.

9. On November 23, 1991, the State Government issued appointment letters to the candidates selected by the Selection Commission. The present appellants in Civil Appeal No. 9906 of 2003 and Civil Appeal No. 9908 of 2003 were amongst those who were appointed by the State Government pursuant to the selection made by the Selection Commission.

10. In 1991, the UPPSC also conducted the main examination for filling up different posts of Group 'C' including the posts of direct recruitment of Deputy Jailor. The result thereof was declared on July 27, 1993. The UPPSC, then, sent the select list to the State Government. The State Government issued appointment letters to the selected candidates on April 26, 1994. The private first respondent was one of them.

11. The Uttar Pradesh Government Servants Seniority Rules, 1991 (for short, '1991 Rules') were framed under the proviso to Article 309 of the Constitution effective from March 20, 1991. The 1991 Rules were made applicable to all government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor under the proviso to Article 309 of the Constitution and had overriding effect to other service rules. Rule 5 and rule 8 of the 1991 Rules which are relevant for the purposes of these appeals read as under:

"5. Seniority where appointments by direct recruitment only.--Where according to the service rules appointments are to be made only by the direct recruitment the seniority inter se of the persons appointed on the result of any one selection, shall be the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be:

Provided that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons when vacancy is offered to him, the decision of the appointing authority as to the validity of reasons, shall be final: Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.

Explanation.--Where in the same year separate selections for regular and emergency recruitment are made, the selection for regular recruitment shall be deemed to be the previous selection.

....."

8. Seniority where appointments by promotion and direct recruitment.--(1) Where according to the service rules appointments are made both by promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub- rules, be determined from the date of the order of their substantive appointments, and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order :

Provided that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean the date of issuance of the order:

Provided further that a candidate recruited directly may lose his seniority if he fails to join without valid reasons, when vacancy is offered to him the decision of the appointing authority as to the validity of reasons, shall be final.

(2) The seniority inter se of persons appointed on the result of any one selection,--

(a) through direct recruitment, shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be;

(b) by promotion, shall be as determined in accordance with the principles laid down in Rule 6 or Rule 7, as the case may be, according as the promotion are to be made from a single feeding cadre or several feeding cadres.

(3) Where appointments are made both by promotion and direct recruitment on the result of any one selection the seniority of promotees vis-`-vis direct recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for the two sources.

Illustrations.--(1) Where the quota of promotes and direct recruits is in the proportion of 1 : 1 the seniority shall be in the following order :

First .. .. Promotee

Second .. .. Direct

Recruits

and so on

(2) Where the said quota is in the proportion of

1 : 3 the seniority shall be in the following order :

First .. .. Promotee

Second to fourth .. .. Direct

Recruits

Fifth .. .. Promotee

Sixth to eight .. .. Direct

recruits

and so on

Provided that :

(i) where appointment from any source are made in excess of the prescribed quota, the persons appointed in excess of quota shall be pushed down, for seniority, to subsequent year or years in which there are vacancies in accordance with the quota;

(ii) where appointment from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year but shall get the seniority of the year in which their appointments are made, so however, that their names shall be placed at the top followed by the names, in the cyclic order of the other appointees;

(iii) where in accordance with the service rules the unfilled vacancies from any source could, in the circumstances mentioned in the relevant service rules be filled from the other source and appointment in excess of quota are so made, the persons so appointed shall get the seniority of that very year as if they are appointed against the vacancies of their quota." The parties are in agreement that 1991 Rules were in existence when the appointments were made to the posts of Deputy Jailor in 1991 and 1994.

12. On August 29, 1995, a tentative seniority list of Deputy Jailors was notified by the Inspector General (Prisons) - the appointing authority - and objections were called for from the concerned officers. In that list, the candidates appointed in 1991 were shown senior to the candidates appointed in 1994. The litigation between the two groups started with this list. The tentative seniority list dated August 29, 1995 came to be challenged before Allahabad High Court in three writ petitions; one by Bholanath Mishra (Writ Petition No. 26560 of 1996), the other by Samar Bahadur Singh (Writ Petition No. 13138/2000) and the third by the first respondent herein Reevan Singh (Writ Petition No. 22919/2001). The writ petition filed by Samar Bahadur Singh was dismissed by the High Court on the ground of availability of alternative remedy before the State Service Tribunal. The writ petition filed by the first respondent herein was allowed on December 2, 2002 and the High Court directed the State of Uttar Pradesh and the Director General (Prisons), Lucknow to treat the appointees of 1994 senior to 1991 appointees. The contention raised by the writ petitioner (first respondent herein) before the High Court was that in view of the second proviso to rule 5 of 1991 Rules, the Deputy Jailors who were selected in the selection which commenced in 1987 must be treated senior to those selected pursuant to the selection that commenced in 1990. The Division Bench agreed with this contention and held as follows:

".....In our opinion the correct interpretation of the proviso to Rule 5 of the U.P. Govt. Servant Rules, 1991 is that persons like the petitioner who were selected in the selection process which commenced in 1987 should be treated as senior to there (sic) selected in selection process which commenced in 1990."

While construing the words 'appointed on the result of a subsequent selection' in second proviso to rule 5 of the 1991 Rules, the High Court held as under :

"It may be noted from the language used in the proviso to Rule 5 that a distinction has been made between appointment and selection. The words "appointed on the result of a subsequent selection" clearly indicate that for the purpose of the proviso appointment is different from selection. Hence even if persons selected on the basis of the selection which commenced in 1990 were given appointment before giving appointment to the petitioner and others similarly situate the latter will be senior to the former because proviso to Rule 5 treats selection different from appointment. Had that not been so the language of the provision would have been different? The High Court went on to observe further as under :

"There is no dispute that the process of selection of the petitioner and others similarly situate had begun in 1987 whereas selection in which the newly amended (sic) respondent nos. 3 and 4 and others situated similar to them had begun in 1990. Thus the selection process of the petitioner and others similarly situate had begun three years prior to the beginning of the selection of respondent nos. 3 and 4 and others similarly situate. It was no fault of the petitioner and others similarly situate that their selection was prolonged far as much as six years, whereas the selection of respondent no. 3 and 4 and others similarly situate was completed in just one year."

The High Court held that 1991 Rules will prevail over 1980 Rules, if there is any conflict between the two Rules. It held :

".....In the present case the proviso to Rule 5 of the 1991 Rules makes it clear that appointment is not to be treated as part of the selection because the words used in the provision are "appointed on the result of a subsequent selection". The petitioner and others similarly situate were appointed against the vacancy which existed in 1987 while the selection of respondent nos. 3 and 4 and others similarly situate by the U.P. Subordinate Selection Commission were made against vacancies which existed in 1990. In our opinion the petitioner and others similarly situate should not suffer, for no fault of theirs."

13. Being not satisfied with the judgment of the High Court dated December 2, 2002, three appeals, by special leave, have been filed, one by the State of Uttar Pradesh and the other two by 1991 appointees.

14. We have heard M/s. P.N. Mishra, Vijay Hansaria and Subodh Markandey, senior counsel for the appellants and Shri Pramod Swaroop, senior counsel for Respondent No. 1. On behalf of the appellants, it is urged that rule 5 of the 1991 Rules has no application as it is applicable where the service rules provide for appointment by direct recruitment only. Since the posts of Deputy Jailor, as per 1980 Rules, are to be filled by direct recruitment as well as by promotion, the mode and manner of determination of seniority provided in rule 5 cannot be applied and instead rule 8 of the 1991 Rules would be applicable for the purposes of determination of seniority.

15. Learned senior counsel for the appellants submitted in the alternative that even if rule 5 of the 1991 Rules is held to be applicable, second proviso appended to rule 5 does not contemplate that the persons appointed pursuant to the result of a subsequent selection (although their date of substantive appointment is earlier in point of time) shall rank junior to the persons appointed later because their process of selection was initiated earlier. It was submitted that the word 'result' in second proviso of rule 5 of the 1991 Rules is not without significance. Our attention was drawn to rule 4 (h) of the 1991 Rules that defines the expression 'substantive appointment' and rule 9 which provides for preparation of seniority list and it was submitted that the private appellants were substantively appointed in 1991 in the cadre of Deputy Jailors by following the procedure and in accordance with the 1980 Rules much before the 1994 appointees. It was argued on behalf of the appellants that the year of vacancy against which a particular person is appointed is wholly irrelevant for the purpose of determination of seniority and seniority cannot relate back to the date of vacancy. In this regard, reliance was placed upon the decisions of this Court in : (i) *Jagdish Ch. Patnaik & Ors. v. State of Orissa & Ors.*<sup>1</sup>; (ii) *Ajit Kumar Rath v. State of Orissa & Ors.*<sup>2</sup>; (iii) *Uttaranchal Forest Rangers' Assn. (Direct Recruit) & Ors. v. State of U.P. & Ors.*<sup>3</sup> and (iv) *State of Uttaranchal & Anr. v. Dinesh Kumar Sharma*<sup>4</sup>.

16. Learned senior counsel for the appellants also contended that the High Court erred in invoking Article 226 of the Constitution in the matter when the writ petition filed by Samar

Bahadur Singh (Writ Petition No. 13138/2000) was dismissed on the ground of alternative remedy. In this regard, the Constitution Bench decision of this Court in *L. Chandra Kumar v. Union of India & Ors.*<sup>5</sup> was referred.

17. On the other hand, Mr. Pramod Swaroop, learned senior counsel for the contesting first respondent stoutly defended the judgment of the High Court. He argued that the High Court was justified in relying upon second proviso to rule 5 of the 1991 Rules and holding that the candidates appointed on the basis of result of earlier selection process must rank senior to the candidates who were appointed on the basis of the result of subsequent selection. He would submit that the UPPSC started selection process for filling posts of Deputy Jailor in 1987; it was in this process of selection that the contesting private respondent was selected and appointed (although in the year 1994) and insofar as the 1991 appointees are concerned they underwent the subsequent selection process which started in the year 1990. Mr. Pramod Swaroop contended that 1991 Rules have the overriding effect and the seniority amongst 1991 and 1994 appointees has to be determined with reference to rule 5 of 1991 Rules. According to him, the expression 'selection' in second proviso to rule 5 cannot be construed to mean only the 'final selection' and since the process of selection involves several steps which begins with the issuance of the advertisement and ends with the preparation of select list, the expression 'result of selection' means the result of entire selection process. In this regard, heavy reliance was placed by him on few decisions of this Court, namely, (i) *A.P. Public Service Commission, Hyderabad & Anr. v. B. Sarat Chandra & Ors.*<sup>6</sup> (ii) *State of U.P. v. Rafiquddin & Ors.*<sup>7</sup>; (iii) *Surendra Narain Singh & Ors. v. State of Bihar & Ors.*<sup>8</sup> and (iv) *Balwant Singh Narwal & Ors. v. State of Haryana & Ors.*<sup>9</sup>

18. It must be stated immediately that the recruitment to the posts of Deputy Jailor in the State of Uttar Pradesh is governed by the 1980 Rules which have been framed by the Governor in exercise of the powers conferred by the proviso to Article 309 of the Constitution. 1980 Rules provide for cadre of service, procedure for recruitment to the post of Deputy Jailor, reservation, academic qualifications, determination of vacancies, appointment, probation, confirmation and inter se seniority of persons appointed to the service. However, by subsequent Rules, namely, 1991 Rules which too were made by the Governor under the proviso to Article 309 of the Constitution, comprehensive provisions have been made for the determination of seniority of all government servants in the State of Uttar Pradesh. Rule 2 of the 1991 Rules says that these rules shall apply to all government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor under the proviso to Article 309 of the Constitution and rule 3 gives to the 1991 Rules overriding effect notwithstanding anything to the contrary contained in earlier service rules. In this view of the matter, inter se seniority amongst 1991 and 1994 appointees by direct recruitment has to be determined under the 1991 Rules and rule 22 of the 1980 Rules has to give way to the 1991 Rules.

19. Now, insofar as 1991 Rules are concerned, the said Rules provide for determination of seniority in relation to different categories. Rule 5 makes provision for determination of seniority in cases where according to service rules, appointments are made only by the direct

recruitment. It would be seen that 1980 Rules are the relevant service rules for appointment to the posts of Deputy Jailor. As per rule 5 of the 1980 Rules, there are two sources of recruitment to the post of Deputy Jailor; one, by direct recruitment and the other, by promotion from amongst the permanent Assistant Jailors in ratio of 50% each. The word 'only' in rule 5 of the 1991 Rules is of significance and it becomes clear therefrom that rule 5 of the 1991 Rules has no application at all for determination of inter se seniority of the 1991 and 1994 appointees because 1980 Rules provide for appointment to the posts of Deputy Jailor by direct recruitment as well as by promotion. It is only where service rules in the State of U.P. provide for appointments by direct recruitment alone that rule 5 of 1991 Rules comes into play for determination of seniority and not otherwise. The reliance placed by the High Court upon second proviso to rule 5 of the 1991 Rules for determination of inter se seniority amongst 1991 and 1994 appointees is, thus, misplaced. The High Court fell into grave error in not appreciating that rule 5 of the 1991 Rules operates where service rules provide for appointments by direct recruitment only. Rule 6 and rule 7 of the 1991 Rules also have no application as these rules provide for determination of seniority where appointments are made by promotion only from a single feeding cadre or only from several feeding cadres. These appeals are not concerned with the determination of inter se seniority between the promotees. Rule 8 of the 1991 Rules makes a provision for determination of seniority where according to service rules appointments are made both by promotion and by direct recruitment. The marginal note of rule 8 'seniority where appointments by promotion and direct recruitment' and the body of sub-rule (1) of rule 8 that provides, 'where according to the service rules appointments are made both by promotion and by direct recruitment', leave no manner of doubt that rule 8 of the 1991 Rules would govern the controversy in the present case since 1980 Rules clearly provide for appointments to the posts of Deputy Jailor by two sources i.e., by direct recruitment as well as by promotion. It is true that the controversy in hand relates to determination of seniority between two groups of direct recruits to the posts of Deputy Jailor, one appointed in 1991 through the selection made by the Selection Commission and the other in 1994 by the UPPSC and the controversy does not relate to determination of inter se seniority between direct recruits and the promotees, but that does not take away the applicability of rule 8 of the 1991 Rules. It is so because in the 1991 Rules, the basis of categorization for the purpose of determination of seniority is the method and manner for appointments in the service rules. It is in this view of the matter that rule 5, rule 6, rule 7 and rule 8 of the 1991 Rules provide for determination of seniority amongst different categories of appointments made under the service rules. Once it is held that rule 8 is applicable for determination of inter se seniority amongst 1991 and 1994 recruits to the posts of Deputy Jailor, it is clear that their seniority has to be determined on the basis of their substantive appointments. Insofar as the present controversy is concerned, none of the provisos to sub-rule (1) is attracted since the appointment orders of 1994 appointees do not specify the back date nor these appeals are concerned with a situation where 1991 appointees failed to join on time. These appeals are also not concerned with seniority inter se of persons appointed on the result of one selection through direct recruitment or through direct recruitment and promotion in one selection and, therefore, provisions of sub-rules (2) and (3) of rule 8 are also not attracted. Sub-rule (1) of rule 8 in unambiguous terms states that the seniority of persons, subject to the provisions of the sub-rules (2) and (3), shall be determined from the date of the order of their substantive appointments. Rule 4(h) defines

`substantive appointment' as an appointment, not being an ad-hoc appointment, on a post in the cadre of service, made after selection in accordance with the service rules relating to that service. It, thus, becomes abundantly clear that for determination of inter se seniority between the two rival groups (1991 and 1994 appointees by direct recruitment) what is relevant is the date of the order of their substantive appointment and since the substantive appointment of 1991 appointees is much prior in point of time, they must rank senior to the 1994 appointees.

20. It is now appropriate to consider the authorities cited at the Bar and a couple of other decisions. In Rafiquddin<sup>7</sup>, this Court in the context of U.P. Civil Service (Judicial Branch) Rules, 1951 made general observations that seniority in the service is determined on the basis of the year of the competitive examination irrespective of the date of appointment and inter se seniority of candidates recruited to the service is determined on the basis of their ranking in the merit list.

21. In A.P. Public Service Commission<sup>6</sup>, this Court was concerned with the Andhra Pradesh Police Service Rules, 1966. While dealing with the word `selection' in rule 5(A)(i) of the said Rules, this Court observed as follows :

"If the word `selection' is understood in a sense meaning thereby only the final act of selecting candidates with preparation of the list for appointment, then the conclusion of the Tribunal may not be unjustified. But round phrases cannot give square answers. Before accepting that meaning, we must see the consequences, anomalies and uncertainties that it may lead to. The Tribunal in fact does not dispute that the process of selection begins with the issuance of advertisement and ends with the preparation of select list for appointment. Indeed, it consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment. Rule 3 of the Rules of Procedure of the Public Service Commission is also indicative of all these steps. When such are the different steps in the process of selection, the minimum or maximum age for suitability of a candidate for appointment cannot be allowed to depend upon any fluctuating or uncertain date. If the final stage of selection is delayed and more often it happens for various reasons, the candidates who are eligible on the date of application may find themselves eliminated at the final stage for no fault of theirs. The date to attain the minimum or maximum age must, therefore, be specific, and determinate as on a particular date for candidates to apply and for recruiting agency to scrutinise applications. It would be, therefore, unreasonable to construe the word selection only as the factum of preparation of the select list. Nothing so bad would have been intended by the rule making authority." Pertinently, the aforesaid observations of this Court with regard to the word `selection' are in the context of the age eligibility as the provision under consideration read, `has completed the age of 21 years and had not completed the age of 26 years on the first day of July of the year in which the selection is made'. The aforesaid

observations, therefore, have to be read in the context of the provision under consideration before this Court.

22. In *Ram Janam Singh v. State of U.P. and Anr.*<sup>10</sup>, this Court reiterated that the date of entry into a service is the safest rule to follow while determining the inter se seniority between one officer or the other or between one group of officers and the other recruited from the different sources. It was observed that this is consistent with the requirement of Articles 14 and 16 of the Constitution. It was, however, observed that if the circumstances so require, a group of persons can be treated a class separate from the rest for any preferential or beneficial treatment while fixing their seniority, but, normally such classification should be by statutory rule or rules framed under Article 309.

23. A two-Judge Bench of this Court in *Jagdish Ch. Patnaik*<sup>1</sup>, while construing the word 'recruited' occurring in Orissa Service of Engineers Rules, 1941, held that a direct recruit is recruited when formal appointment order is issued and not when recruitment process is initiated. This is what this Court said :

"34. The only other contention which requires consideration is the one raised by Mr Raju Ramachandran, learned Senior Counsel appearing for the intervenors, to the effect that the expressions "recruitment" and "appointment" have two different concepts in the service jurisprudence and, therefore, when Rule 26 uses the expression "recruited" it must be a stage earlier to the issuance of appointment letter and logically should mean when the selection process started and that appears to be the intention of the rule-makers in Rule 26. We are, however, not persuaded to accept this contention since under the scheme of Rules a person can be said to be recruited into service only on being appointed to the rank of Assistant Engineer, as would appear from Rule 5 and Rule 6. Then again in case of direct recruits though the process of recruitment starts when the Public Service Commission invites applications under Rule 10 but until and unless the Government makes the final selection under Rule 15 and issues appropriate orders after the selected candidates are examined by the Medical Board, it cannot be said that a person has been recruited to the service. That being the position it is difficult for us to hold that in the seniority rule the expression "recruited" should be interpreted to mean when the selection process really started. That apart the said expression "recruited" applies not only to the direct recruits but also to the promotees. In case of direct recruits the process of recruitment starts with the invitation of application by the Commission and in case of promotees it starts with the nomination made by the Chief Engineer under Rule 16. But both in the case of direct recruits as well as in the case of promotees the final selection vests with the State Government under Rules 15 and 18 respectively and until such final selection is made and appropriate orders passed thereon no person can be said to have been recruited to the service. In this view of the matter the only appropriate and logical construction that can be made of Rule 26 is the date of the order under which the persons are appointed to the post of Assistant Engineer, is the crucial date for determination of seniority under the said Rule....."

24. While dealing with the dispute relating to inter se seniority of Munsifs--one set of Munsif recruited on the basis of 15th examination held by the Public Service Commission under the Bihar Judicial Service (Recruitment) Rules, 1955 and another set of Munsifs appointed under the Bihar Civil Service (Judicial Branch) Ad hoc Recruitment Rules, 1974, in Surendra Narain Singh<sup>8</sup>, this Court held that candidates recruited against earlier vacancies shall rank senior to those recruited against the later vacancies.

25. In Ajit Kumar Rath<sup>2</sup>, this Court followed Jagdish Ch. Patnaik<sup>1</sup> and did not accept the contention that those who were appointed against the vacancies of the earlier years although, appointed later in point of time, must rank senior to the appointees of the vacancies of the subsequent years though appointed in prior point of time.

26. This Court emphasized in the case of Uttaranchal Forest Rangers' Association<sup>3</sup> that no retrospective promotion can be granted nor any seniority can be given on retrospective basis from a date when an employee has not even born in the cadre. In this regard, the Court relied upon earlier decisions of this Court in *State of Bihar & Ors. v. Akhouri Sachindra Nath & Ors.*<sup>11</sup> and Jagdish Ch. Patnaik<sup>1</sup>.

27. In the case of Dinesh Kumar Sharma<sup>4</sup>, this Court was concerned with U.P. Agriculture Group `B' Service Rules, 1995 and the 1991 Rules. With reference to rule 8 of the 1991 Rules, this Court held that seniority cannot be reckoned from the date of occurrence of the vacancy and should be reckoned only from the date of substantive appointment to the vacant post under the Rules and not retrospectively from the date of occurrence of vacancy.

28. The dispute in Balwant Singh Narwal<sup>9</sup> related to seniority of the Principals, some of whom were appointed between 1995 and 2000 and others on May 26, 2000. The Principals who were appointed on May 26, 2000 were given seniority with retrospective effect from June 2, 1994. This Court while relying upon a decision in Surendra Narain Singh<sup>8</sup> held as under :

"9. There is no dispute about these general principles. But the question here is in regard to seniority of Respondents 4 to 16 selected on 1-10-1993 against certain vacancies of 1992-1993 who were not appointed due to litigation, and those who were selected against subsequent vacancies. All others from the same merit list declared on 1-10-1993 were appointed on 2-6-1994. Considering a similar situation, this Court, in Surendra Narain Singh v. State of Bihar held that candidates who were selected against earlier vacancies but who could not be appointed along with others of the same batch due to certain technical difficulties, when appointed subsequently, will have to be placed above those who were appointed against subsequent vacancies."

29. The Constitution Bench of this Court in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors.<sup>12</sup> stated the legal position with regard to inter se seniority of direct recruits and promotees and while doing so, inter alia, it was stated that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

30. From the above, the legal position with regard to determination of seniority in service can be summarized as follows :

(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the back date and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even born in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the mean time.

31. In light of the legal position summed up above and rule 8 of the 1991 Rules, it is plain that 1991 appointees who were selected and appointed in accordance with the service rules cannot be made junior to 1994 appointees even if it is assumed that the selection and appointment of 1994 appointees was for earlier vacancies. The 1991 appointees having been appointed substantively much prior in point of time, they are entitled to rank senior to 1994 appointees. As already noticed above, rule 5 of the 1991 Rules has no application for determination of inter se seniority of the Deputy Jailors appointed by direct recruitment in 1991 and 1994. The consideration of the matter by the High Court is apparently flawed and cannot be sustained. In the present fact situation, it must be held that 1994 appointees cannot legitimately claim their seniority over 1991 appointees.

32. In view of the above, it is not necessary to deal with the objection raised by the appellants about maintainability of writ petition filed by contesting private respondent directly before the High Court bypassing the remedy before the State Service Tribunal.

33. For the foregoing reasons, these appeals are allowed; the judgment and order dated December 2, 2002 passed by the Allahabad High Court is set aside. The seniority of the two groups of direct recruits to the posts of Deputy Jailor, one appointed through the selection made by the Uttar Pradesh Subordinate Services Selection Commission in 1991 and the other

by Uttar Pradesh Public Service Commission in 1994 shall be now determined as indicated above, if not determined in the manner stated above, so far. The parties shall bear their own costs.

## **JUDGMENT**

**Aftab Alam,J.,**

34. I have had the benefit of going through the judgment prepared by my brother Lodha J. The judgment deals with all the relevant facts and the statutory provisions and by application of rule 8 of the Uttar Pradesh Government Servants Seniority Rules, 1991 (the 1991 Rules) concludes that the appellants who were appointed as Deputy Jailers in 1993 (on the basis of the selection process that commenced on October 27, 1990) would rank senior to the first respondent who was appointed in 1994, even though in his case the selection process had commenced much earlier on December 26, 1987. I too reach the same conclusion but by a different way and for slightly different reasons.

35. The Uttar Pradesh Jail Executive Subordinate (Non-Gazetted) Service Rules, 1980 (the 1980 Rules) under which the appellants and the first respondent were appointed as Deputy Jailers had, in rule 22, the provision for determination of seniority in any category of posts in the service. But rule 22 of the 1980 Rules was superseded by the 1991 Rules framed under Article 309 of the Constitution and coming into force with effect from March 20, 1991. The 1991 Rules were made applicable to all government servants whose recruitments were governed by rules framed under Article 309 of the Constitution and were given overriding effect over all other service rules. Both the appellants and respondent no. 1 were appointed after the 1991 Rules came into force. Hence, both sides agreed that the question of their inter se seniority can be determined only under the provisions of the 1991 Rules.

36. The High Court on application of the (second) proviso to rule 5 of the 1991 Rules held that respondent no.1 would rank senior to the appellants, observing that the candidates who were selected in the selection process that commenced in 1987 should rank senior to those selected in the selection process commencing much later in 1990. By a process of semantic reasoning, the High Court tried to make a distinction between 'selection' and 'appointment' and held that under the proviso to rule 5 what was determinative was not appointment but selection. Proceeding on that basis the High Court held that though the appellants were appointed earlier (in 1991) than respondent no.1 who was appointed later (in 1994), nevertheless they would rank junior to him because they were appointed "on the result of a subsequent selection".

37. I am completely unable to see how the facts of this case can be squeezed to fit into the proviso to rule 5 of the 1991 Rules. An indication of the kind of cases to which the proviso would apply is given in the explanation to it. Further, in service law it is not unknown (especially in cases where recruitments are made regularly and the selection process is not inordinately prolonged) that even while a select list is alive and it is yet to be completely exhausted another select list on the basis of the next selection comes into being and appointments are made from that list. In such a situation certain vacancies relatable to the

previous selection may still be filled up from the waiting list/unexhausted previous list and in those cases even though the appointment might take place later, by virtue of the proviso in question, the candidate from the previous list would rank senior to the candidate appointed from the third list. To my mind, the proviso relied upon by the High Court has no application to the facts of this case where the two appointments, based on selections made by two different agencies, are separated by a gap of two and a half years.

38. In my brother's judgment, rule 5 is discarded in preference to rule 8 of the 1991 Rules because the post of Deputy Jailer is open to two modes of recruitment, one direct and the other by promotion from amongst the permanent Assistant Jailers (vide rule 5 of the 1980 Rules). It is pointed out that rule 5 of the 1991 Rules begins by expressly stating, "Where according to the service rules appointments are to be made only by the direct recruitment...." On the other hand rule 8 begins by saying, "Where according to the service rules appointments are made both by promotion and by direct recruitment...." And under rule 8, seniority is to be determined on the basis of the date of the order of the substantive appointment. Applying the date of substantive appointment as the basis to determine seniority the appellants would indeed rank senior to respondent no.1.

39. With full respect, however, I am unable to persuade myself in regard to the application of rule 8 of the 1991 Rules to the facts of the case. The facts of the case are extraordinary and they seem to me, to fall completely outside the provisions of the 1991 Rules. An attempt to fit those facts into any of the provisions of the 1991 Rules would, to my mind, amount to doing violence to the rules. The 1991 Rules were not made exclusively for the Jail Executive Subordinate Service (to which the post of Deputy Jailer belongs) but those rules apply to all government servants for whose recruitments rules are framed under the proviso to Article 309 of the Constitution. In making rules of general application it is not possible to take into account a situation that is way out of the normal.

40. In the main judgment, the facts of the case are taken note of in detail but it would be useful to briefly recapitulate them here. Before November 25, 1989, the statutory agency to make the selection for appointment to the post of Deputy Jailer was the Uttar Pradesh Public Service Commission (hereinafter "UPPSC"). On December 26, 1987 the UPPSC issued an advertisement for filling up a large number of vacancies in different posts, including 144 vacancies in the post of Deputy Jailers. It held the main examination of the candidates applying in response to the advertisement in 1991 and finally declared the result on July 27, 1993. On the basis of the list received from the UPPSC, the State Government issued appointment letters to the selected candidates (one of them being respondent no. 1) on April, 26 1994. In short, the selection process started by the UPPSC was completed and materialized in appointments of the selected candidates in seven years. In the meanwhile, it seems, the State Legislature, having regard to the long delays in the completion of selection by the UPPSC, decided to lighten its burden by taking away from it the recruitments on all group 'C' posts in the State. The State Legislature, accordingly, passed the Uttar Pradesh Subordinate Services Selection (Commission), Act, 1988 to establish a Subordinate Services Selection Commission for direct recruitment to all group 'C' posts in the State. The Act came into force with effect from February 15, 1988. After coming into force of this Act, a

notification had to be issued by the Governor on November 25, 1989, clarifying that the vacancies for which requisition had earlier been made to the UPPSC would be filled up on the recommendation of the UPPSC alone and that is how the UPPSC continued to have seisin over the vacancies advertised by it on December 26, 1987. The newly formed Selection Commission issued an advertisement on October 27, 1990, for filling up 60 posts of Deputy Jailer. It completed the selection process and sent the select list to the State Government in 1991 and on that basis the appellants were appointed vide appointment letter dated November 23, 1991 issued by the State Government. At this stage, it is important to note that in terms of the advertisement issued by the Selection Commission on October 27, 1990, there was nothing to prevent those (including respondent no.1) who might have applied in response to the earlier advertisement by the UPPSC to also apply for the 60 vacancies under the later advertisement by the Selection Commission. When this aspect of the matter was pointed out, it was stated on behalf of the respondents that by the time the later advertisement by the Selection Commission was issued on October 27, 1990 some of the applicants before the UPPSC had become overage and were no longer eligible to apply. There are no details available as to how many of the 144 candidates appointed from the select list of the UPPSC had become overage by the time the advertisement of the Selection Commission came on October 27, 1990; even in the case of respondent no. 1 it is not stated clearly and definitely that he was unable to apply in response to the advertisement of October 27, 1990, issued by the Selection Commission because by that time he had become over age. Be that as it may, this aspect of the matter is only incidental and it is recalled simply to point out that it is not open to the respondents to contend that the position in which they are placed is the result of circumstances over which they had no control and to make an appeal in the name of equity.

41. The purpose in recapitulating the facts of the case is to show that the situation arising from the two sets of appointments and the resultant dispute of seniority is highly anomalous. It should be accepted as such instead of trying to fit the facts into any of the rules of the 1991 Rules. The 1991 Rules were not designed to resolve a dispute of seniority arising from such facts. If I put on the cap of the rule maker I cannot imagine myself conceiving of a fact situation of this kind and making a provision to meet the contingency.

42. Now, in case the seniority between the appellants and the first respondent is to be determined outside the 1991 Rules, one has to go to the basic principles for determination of seniority. One cardinal principle for determination of seniority is that unless provided for in the rules, seniority can not relate back to a period prior to the date of the incumbent's birth in the service/cadre.

43. As a matter of fact this principle is fully dealt with in the main judgment in which reference is made to the decisions of this Court in *Ram Janam Singh v. State of UP*<sup>13</sup>; *Uttaranchal Forest Rangers' Association (Direct Recruit) & Ors. v. State of UP & Ors.*<sup>14</sup>; *State of Bihar & Ors. v. Akhouri Sachindra Nath & Ors.*<sup>15</sup>, and the principle is summarized in sub-paragraphs (2) & (4) of paragraph 30 of the judgment.

To the decisions referred to on this point in the main judgment I may add just one more in *Suraj Parkash Gupta v. State of J & K*<sup>16</sup>, The decision relates to a dispute of seniority between direct recruits and promotees but in that case the Court considered the question of ante-dating the date of recruitment on the ground that the vacancy against which the appointment was made had arisen long ago. In paragraph 18 of the decision (at page 578 of the SCC) the Court framed one of the points arising for consideration in the case as follows:

"(4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter? "

44. This Court answered the question in the following terms:

"Point 4:

Direct recruits cannot claim appointment from date of vacancy in quota before their selection. We have next to refer to one other contention raised by the respondent-direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under the direct recruitment quota. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service. This principle is well settled. In *N.K.Chauhan v. State of Gujarat*, Krishna Iyer, J. stated:

Later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service. Again, in *A. Janardhana v. Union of India*, it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in *A.N. Pathak v. Secretary to the Government* that slots cannot be kept reserved for the direct recruits for retrospective appointments."

45. In conclusion I would say that in the facts of this case the issue of seniority between the appellants and respondent no. 1 must be decided on the basis of the aforesaid principle and there is no need to refer to rule 8 of the 1991 Rules. By this way I also hold that respondent no.1 cannot claim seniority over the appellants and the appellants would rank senior to respondent no.1.

46. In the result, the appeals are allowed. The judgment of the High Court is set aside and the writ petition filed by respondent no. 1 in the High Court is directed to be dismissed.

47. There shall be no order as to costs.

## **ORDER**

48. In view of the two separate judgments (which are concurrent in nature) pronounced by us in these appeals today, the appeals are allowed. There shall be no order as to costs.

<sup>1</sup>(1998) 4 SCC 0456

<sup>2</sup>(1999) 9 SCC 0596

<sup>3</sup>(2006) 10 SCC 0346

<sup>4</sup>(2007) 1 SCC 0683

<sup>5</sup>(1997) 3 SCC 0261

<sup>6</sup>(1990) 2 SCC 0669

<sup>7</sup>(1987) Suppl. SCC 0401

<sup>8</sup>(1998) 5 SCC 0246

<sup>9</sup>(2008) 7 SCC 0728

<sup>10</sup>(1994) 2 SCC 0622

<sup>11</sup>(1991 (suppl.) 1 SCC 0334

<sup>12</sup>(1990) 2 SCC 0715

<sup>13</sup>(1994) 2 SCC 0622

<sup>14</sup>(2006) 10 SCC 0346

<sup>15</sup>(1991) Suppl. 1 SCC 0334

<sup>16</sup>(2000) 7 SCC 0561