

# PUNJAB AND HARYANA HIGH COURT

M.S. Miglani, Executive Engineer

Vs

State of Haryana

C.W. P. No. 3366 of 1982

(Prem Chand Jain and D.S. Tewatia, JJ.)

02.02.1983

## JUDGMENT

### **D. S. Tewatia, J.**

1. These three Civil Writ Petitions No. 2859, 3119 and 3366 of 1982 involve common questions of law and facts and therefore, a common judgement is proposed , Wherever quoting of facts becomes necessary, the reference shall be made to the facts of Civil Writ Petition No. 3266 of 1982.
2. The petitioners alleging to have been promoted to Haryana Service of Engineers Class I, P. W. D. Public Health Branch (hereinafter referred to as Class I Service) from Haryana Service of Engineers Class II Public Health Branch (hereinafter referred to as Class II Service) and claiming seniority in the rank of Executive Engineers over respondent No. 2 have impugned the order Annexure P. 7 promoting respondent No 2 to the rank of Superintending Engineer, inter alia, on the ground that respondent No. 2 being junior to all the petitioners in Class I Service had no right to be so promoted in preference to them.
3. The respondents have by way of preliminary objection questioned the locus standt of the petitioners to main the petition as the latter according to the former were not even the Executive Engineers much less being in that rank to respondent Mr.B.D Sardana.
4. Petitioners, (except Shri R S. Sharma in C.W.P, N. 3119 of 1982) including some others of their class, were appointed Executive Engineers by the Government after relaxing the requirement of statutory period of experience in' Class II Service'. Their appointments were challenged in this Court through C.W.P. No. 3594 of 1973. While the appointments were sustained by the learned tingle Judge, the same, however, were held to be invalid in L.P.A. No. 592 of 1975 decided on 15th January, 1980, The Bench held that the relaxation of statutory period of experience enmasse was invalid and, therefore, it quashed the appointments of the petitioners herein to the post of Executive Engineers. It is, however, averred that the said decision

is under appeal vide S.L.P. No 4481/1980 in the Supreme Court and their Lordships have stayed the reversion of the petitioners.

5. It has been urged on behalf of the petitioners that since their reversion from the post of Executive Engineers has been stayed, so it shall have to be held that they continued to be the Executive Engineers and, therefore, entitled to stake their claim to any future promotion on the strength of their seniority as Executive Engineers. This claim, in our view, is untenable. So long as the L.P.A. decision of this Court is not set aside and holds the field, the petitioners cannot be regarded to be belonging to the category of Executive Engineers. As a result of the order of their lordships, they have been merely permitted to function as Executive Engineers.

6. In view of the above finding one is left with no option but to hold that the petitioners not being even entitled to be Executive Engineers, much less being the members of Class 1 Service, are, therefore not entitled to maintain one petition against the promotion of respondent No. 2, who is admittedly a member of Class I Service and was holding the rank of Executive Engineer before being promoted to the post of Superintending Engineer. However, since Bench decision in question quashing the appointments of the petitioners herein as Executive Engineers is under challenge in the Supreme Court and it cannot be predicated that it would be sustained and the respondents having also taken a stand in the written statement that even if the petitioners' appointment is Executive Engineers, for the sake of argument is assumed to be valid, then too by virtue of their appointments as Executive Engineers, they do not become members of Class I Service unless the appointment was substantively made to a cadre post which admittedly is not the petitioner's case and thus there arises no question of any co petition for seniority between them on the one hand and respondent B.D. Sardana, on the other hand who admittedly is the member of Class 1 service, so in order to avoid the possibility of the case being remanded to this Court for the determination of the aforementioned question in the event of the appeal of the petitioners succeeding against the L.P.A. Bench decision, we consider it desirable that within this jurisdiction the aforementioned controversy between the parties may be settled.

7. The aforementioned controversy is to be examined in the light of the relevant Class 1 service Rules termed as the Punjab Service of Engineers, Class I P.W.D.) (Public Health Branch) Rules, 1961 : - Clause (1) of Rule 2 defines appointment cut to the service, which is in the following terms :-

"appointment to the service" includes an appointment made according to the terms and provisions of these rules, to an officiating vacancy or an ex-cadre post :

Provided that an officer so appointed shall not be deemed to have become a member of the Service" as defined in Clause (12) of this rule "

According to rule 2(3) a cadre post means a permanent post in Service and according to Rule 2(10) an Ex-cadre post' means a temporary post of the same rank as a cadre post. Rule 2(5) defines Class II Service'.

Clause ( 12) of Rule 2 identifies the member of the Service, in the following terms

(12 "member of the Service" means an officer appointed substantively to a cadre post

and includes :-

(a) in the case of a direct appointment at, officer on probation, or such an officer who, having successfully completed his probation, awaits appointment to a cadre post;

(b) in the case of an appointment by transfer, an officer, who is on probation or who having successfully completed his probation awaits appointment to a cadre post, provided such officer does not have lien on a substantive post in any Government Department.

Clause (14) of Rule 2 defines 'Service' as the Punjab (now Haryana) Service of Engineers, Class I Public Works Department, (Public Health Branch).

Rule 3, which is in the following terms mentions the strength of service

3. Strength of Service-(1) The Service shall comprise of such number of posts of Assistant Executive engineers, Executive Engineers, Superintending Engineers and Chief Engineers as may be specified by government from time to time.

(2) Without prejudice to the generality of the provisions of sub-rule (1) the strength of the Service for the first five years after the commencement of these rules shall be determined each year on the 1st day of January, or as on thereafter as may be practicable according to the provisions of Appendix A. The strength so determined shall remain in force till it is revised.

(3) Notwithstanding anything contained in sub-rule (1) and (2), Government may appoint an officer to an ex-cadre post not included in the service in accordance with the provisions of these rules, provide. such post has been sanctioned."

8. Recruitment to the said service is dealt with by Rule 5 which reads as under :

5. Recruitment to service. (1) Recruitment to the service shall be made by Government by any one or more of the following methods :-

(a) by direct appointment;

(b) by transfer of an officer already in the service of a State Government, or of the Union;

(c) by promotion from Class II Service.

(2) Recruitment to the service shall be so regulated that the number of posts filled by promotion from Class II. Service shall not exceed fifty per cent of the number of posts in the Service, excluding the posts of Assistant Executive Engineer; Provided that till such time as an adequate number of Assistant Executive Engineers, who are eligible and considered fit for promotion, are available, the actual percentage of officers promoted from Class II Service may be larger than fifty per cent.

(3) In the Service as constituted immediately after the commencement of these rules, it shall be assumed that the number recruited by promotion from Class II Service is fifty per cent of the senior posts in the Service, and future recruitment shall be based on this assumption.

(4) All first direct appointments to the Service shall be to the posts of Assistant Executive Engineers : Provided that a direct appointment may, in exceptional circumstances, for reasons to be recorded in writing be made to the post of Executive Engineer;

(5) An Officer promoted from Class II Service shall be recruited to the post of Executive Engineer.

(6) Appointment by transfer of an officer will normally be made to the rank of Executive Engineer except that specialists may be recruited to any rank;

(7) No person

(a) who is not a substantive member of the P. W. D. (Public Health Branch), Class I Service on the date of enforcement of these rules; or

(b) who is not considered suitable for appointment to the Service as provided in rule 23 read with Appendix F; shall hold the post of Executive Engineer or above, even in officiating capacity unless he is declared, within a period of three months from the date of enforcement of these rules, as suitable for appointment to the Service under the provisions of these rules.

9. Rule 8 deals with the appointment by promotion which reads :

(8). Appointment by promotion (1)- A Committee consisting of the Chairman of the Public Service Commission or where the Chairman is unable to attend, any other member of the Commission representing it, the Secretary, P.W.D. (Public Health Branch) and the Chief Engineer, Punjab, P.W.H. Public Health Branch, shall be constituted.

(2) The Chairman or the member of the Commission, as the case may be, shall preside over the meeting of the Committee.

(3) The committee shall meet at intervals, ordinarily not exceeding one year and consider the cases of all eligible officers for promotion to the senior scale of the Service as on the first day of January of that year.

(4) The Committee shall prepare a list of officers suitable for promotion to the senior scale of the Service. The selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority.

(5) The names of the officers included in this list shall be arranged in order of seniority in Class II Services : Provided that any junior officer, who in the opinion of the Committee is of exceptional merit and suitability may be assigned a place in list higher than that of officers senior to him.

(6) The list so prepared shall be revised every year.

(7) If in the process of preparing the list or its revision, it is proposed to supersede any eligible candidate, the Committee shall draw up a list of such officers and may record its reasons for the proposed supersession.

(8) The list prepared or revised in accordance with sub-rules (4), (5) and (6) shall then be forwarded to Commission by Government alongwith :-

(i) the records of all officers included in the list

(ii) records of all officers proposed to be selected as a result of the recommendations made by the Committee ;

(iii) the reasons, if any, recorded by the Committee for the proposed supersession of any officer ;

(iv) the observations, if any of the State Government on recommendations of the Committee ;

(9) The Commission shall consider the list prepared by Committee alongwith other

documents received from the State Government and unless it considers any change necessary, approve the list.

(10) If the Commission considers it necessary to make any changes in the list received from Government, the Commissioner shall make changes it propose and forward the list it considers suitable to the State Government.

(11) Appointments to the service shall be n ads by Government from this list in the order in which names have been placed by the Commission.

(12) Appointment by promotion may be made to an ex-cadre post, or to any post in the cadre in an officiating capacity from the list prepared under this rule."

10. Rule 11 provides the period of probation and the consequence of completing or not completing the same successfully and reads as under :-

(11) Probation (1)-Officers appointed to the Service shall remain on probation for period of two years, if recruited by direct appointment and one year if recruited otherwise. Provided that ;

(a) any period, after appoint..lent to the Service, spent on deputation on a correspondent e.r a higher post shall count towards the period of probation fixed under this rule;

(b) in the case of an appointment by transfer, any period of work in the rank of Executive Engineer or above, prior to appointment to the Service way, at the discretion of Government, be allowed to count towards the period of probation fixed under this rule ; and

(c) an officiating appointment in the Service shall be reckoned as a period spent on probation but no member who has thus officiated shall, on the completion of the prescribed period of probation, be entitled to be confirmed, unless he is appointed against a cadre post.

(2) If the work or conduct of an officer appointed to the Service during the period of probation is in the opinion of Government, not satisfactory, it may-

(a) dispense with his services, it recruited by direct appointment or

(b) if recruited otherwise

(i) revert him to his former post ; or

(ii) deal with him in such other manner as the terms and conditions of his previous appointment permit.

(3) On the completion of the period of probation an officer, the Government may --

(a) confirm such officer in his appointment : or

(b) if no cadre pest is vacant for him, declare that he has completed his probation satisfactorily ; or

(c) if his work or conduct has, its opinion, not been satisfactory, dispense with his services if recruited by direct appointment; or

(d) if recruited otherwise

(i) revert him, to his former post ; or

(ii) deal with him within the terms and conditions of his previous appointment cut ; or

(e) extend his period of probation and there, after pass such orders as it could have passed

on the expiry of the first period of probation.

Provided that the total period of probation, including extension, if any shall not exceed three years.

(4) On the satisfactory completion of the period of probation. Government shall confirm such officer in a cadre post, if one is available for him.'

11. Rule 12 provides for arrangement of fixation of seniority, relevant portions whereof are in the following terms :-

12. Seniority-(1) Except as provided in sub-rules (8) and (10) of this rule relating to officers appointed by transfer, and except to the extent provided in this rules, no member of the Service shall, for purpose of determining seniority in the Service enjoy the benefit of any period of service rendered by him any other employment prior to his appointment to the service.

(2) The seniority of a member of this Service shall be determined by an "year of allotment" officers with an earlier year of allotment being senior to those of a later year.

(3) Assistant Executive Engineer-The year of allotment of a member appointed to the Service as Assistant Executive Engineer shall be the calendar year in which the order of appointment has been issued by Government :

XX XX XX XX

(5) Executive Engineer and above - The year of appointment of a member of the Service promoted to the post of Executive Engineer from that of Assistant Engineer in the Service shall continue to be the year allotted to him as Assistant Executive, Engineer under the provisions of Fun-rule (3) above.

(6) Subject to the provisions of sub rules (7) and (8) below, the year of a allotment of an officer who is initially appointed to the service as Executive Engineer, shall be the same as that of the junior-most officer in the Service whether officiating or confirmed as Executive Engineer before the former's appointment."

12. The first question that falls for consideration is as to whether (the petitioners are or not members of Class I Service. if it transpires that they are not members of Class I Service, then they remain outside of Class I Service and can lay no claim to seniority in Class I Service with any member of that Service.

13. Petitioners' case is that petitioners No. 1 and 3 in C. W. P. No. 2859 of 1982, became members of the Class I Service after completing the probationary period of one year in 1973 and petitioner No. 2 become a member of the Service in the years 1974. after completing similar period of probation. It is also their case that even if their initial appointment: as Executive Engineers is not held to be on account of the fact that when they were so appointed, they had not completed the statutory period of eight years in the service, then they must be held to have become members of Class I Service well before respondent No. 2 they having completed eight years service as Class II officers well before the recruitment of Shri Sardana to Class I Service.

14. Petitioner maintain that they had successfully completed the period of probation and were

appointed to Class I Service by virtue of notification dated 3rd May, 1973, Annexure P. 4.

15. On the other hand, it has been argued on behalf of the respondents that mere appointment to the post of Executive Engineer of a Class II Service Officer does not make him ipso facto member of Class I Service unless he is appointed substantively to a cadre post.

16. It has been contended on behalf of the petitioners that the definition of member of the Service given in Rule 2(12) (a) is an inclusive definition and it not only takes within its purview a person appointed substantively to a cadre post but also a person who having successfully completed his probation -waits appointment to a cadre post. That the petitioners had successfully completed the Period of probation was sought to be justified from Annexure P.

4. which reads as under

"PUBLIC HEALTH BRANCH

The 3rd May, 1973.

No. 4235-PW111 (1)-73/18670- In pursuance of R. 8(a)(i) to (ii) of the Punjab Service of Engineers Class 1 Public Works Department (Public Health branch) Rules 1961 the Governor of Haryana, in consultation with the Haryana Public Service Commission, is pleased to declare the following officers as suitable for promotion to Haryana Service of Engineers. Class 1, P.W.D. (Public Health Branch) :

1. Shri Y. C. Yadav
2. Shri B. R. Matra
3. Shri K. C. Jain
4. Shri O. P. Juneja
5. Shri S. L. Chopra
6. Shri M. S. Miglani
7. Shri C. P. Taneja.
8. Shri Surjit Singh
9. Shri V. P. Gulati

2. The seniority of the officers will be notified later. Mr. Anand Swaroop, counsel for the petitioners, sought to sustain the aforementioned contention on the basis of a single Bench decision of this Court rendered in (*Shri M. L. Sehgal and others v. The State of Punjab and others*) decided on 26-5-1980.

17. We find no merit in the contention advanced on behalf of the petitioners. Mere appointment to an es-cadre post or an officiating appointment against a cadre post does not ; in view of the proviso to Clause (1) of R. 2, entitle such appointees to be considered to be member of Class I Service in terms clause 12) of Rule 2 (which clause defines member of the Service) as would be presently shown.

18. At this stage Rule 5 dealing with recruitment to the Service would require noticing. While Clause (1) of Rule 5 indicates the three sources, which could be drawn upon individually or collectively. clause (2) in emphatic terms commands the State Government to so regulate the recruitment that recruitment of promotees does not exceed 50 per cent that means so far as the

promotees are concerned, their share cannot exceed 50 per cent of the strength of the service. It can however, be less than that: Rule 5, however, does not put any such restriction in regard to the other two sources of recruitment i.e. direct recruitment and recruitment by transfer i.e. direct recruits or recruitment by transfer collectively or individually can exceed 50 per cent. However, if for one reason or the other, the two sources other than the promotee source had not been tapped in time or could not be activated and vacancy exists even after the promoters had already reached outside limit of their strength permitted by clause 2 and the administrative exigencies of the situation require more officer than already manning the service, then the Government could appoint from Class II Service to man such vacancies beyond their quota till such time eligible Assistant Executive Engineer, who is considered fit for promotion becomes available to fill the vacancy

Proviso to clause (2) of the said rule, in our view, cannot be read to mean that if at any given time the vacancies are available in the service after the promotees had manned up to 50 per cent of the service strength, then the promotees could be appointed to such vacancies in the cadre on substantive basis.

19. The respondent- State has taken the stand that the quota of the promotees was already full i.e. promotees already occupied upto 50 per cent of the cadre posts in the service and, therefore when the petitioners and their like were appointed as Executive Engineers, they were appointed in an officiating capacity. They were not appointed substantively to such posts as they were not entitled to in view of clause (2) of Rule 5. Para 3 of Annexure P. 3, notification regarding their promotion, which is in the following terms clearly indicates that their promotions were only provisional :-

"These promotions are provisional for a period of six months and the same will not establish any right for the promotion of the concerned officers to H. S. E. Class I."

Notification Annexure P. 4 declaring the officers mentioned, therein including the petitioners, as suitable for promotion has to be read in the spirit of transitory clause (7) of the said Rule 5, according to which, if a person is neither substantive member of Class I Service nor declared suitable for appointment to Class I Service, then such officer was not entitled to hold his Class I post, even in an officiating capacity unless within 3 months from the enforcement of the rules, such officers were declared to be suitable for appointment in Class I Service.

20. What clause (7) of Rule 5 at the eve of constitution of Service sought to achieve i.e. the appointing of only an officer suitable for Class I post even in an officiating capacity to a post in that service, the same objective was sought to be achieved after the Service came into being in regard to the promotees from Class II Service by Rule 8 which provided for a constitution of a Committee which would meet at intervals not exceeding one year, consider the cases of all eligible officers for promotion to the senior scale of the Service, as on the first day of January of that year, prepare a list of officer suitable for promotion to the senior scale of the Service on the basis of merit and suitability in all respects with due regards to seniority and arrange the names of such officers in order of seniority in Class I Service unless an officer though junior was

considered of exceptional merit entitled to be placed higher than his seniority in Class II Service justified. The list so prepared is required to be revised every year. The list so revised and prepared from year to year is to be forwarded to the Public Service Commission by the Government and the former would send back to the Government the list of such persons it considers suitable and then as per Rule 8(11) the Government was to draw upon such a list for appointment to the Class II Service in the order in which names had been placed by the Commission. That means by the time the stage for appointment to service was to arrive the suitability of Class II officer for appointment to Class I Service had already been gone into and declared as such. Notification Annexure P. 4 represents step in that procedure. While clause 7 of Rule 5 puts a time limit of three months from the enforcement of the Rules to declare a person holding an officiating appointment as suitable and none who was holding an officiating appointment as Executive Engineer could continue to function as such beyond three months of the constitution of the Service (i.e. enforcement of these Rules), no such limit perhaps is now enforceable.

21. Mr. Anand Swaroop, learned counsel for the petitioners, drew attention to proviso to sub-clause (a) of clause (3) of Rule 9, which deals with promotion within service and is in the following terms :-

9. Promotion within Service

(3) A member of the Service shall not be eligible for promotion to the rank of (a) Executive Engineer, unless he has rendered five years service as an Assistant Executive Engineer :

Provided that an officer who has rendered six years or more service as an Assistant Executive Engineer shall unless he is considered unsuitable for promotion, be given preference for such promotion over an eligible Class II Officer."

In order to show that Rule 5 in fact did not fix rigidly any quota either for promotees or for direct recruits and officers appointed by transfer because by virtue of the said proviso if some of direct recruits having rendered six or more years service as an Assistant Executive Engineer and considered suitable were available and direct recruits and transferees together already occupied 50%, of the cadre post, then such direct recruits could make inroads in the 50 per cent quota allegedly earmarked for promotees by clause (2) of Rule 5 if vacancies excised thereby superseding the claim of eligible Class II officers.

22. While the above interpretation of proviso to sub-clause (a) of clause (3) of Rule 9 is correct, the inference drawn therefrom, that it would be indicative of the fact that Rule 5 did not fix quota of seats in the service from the Sources mentioned in sub-clause (1) is, however, not correct. Mr. Anand Swaroop appears to have lost sight of the fact that clause (2) of Rule 5 fixed maximum or an outside list for promotees in the Service when it is stated that their percentage would not exceed 50 per cent. That means that in a given situation, it could be less and that situation could obtain if a large number of suitable direct recruits with experience of six years or more as Assistant Executive Engineers were to be available, who had to be promoted in preference to eligible Class

II officers even, though percentage of Class II Officers in the Service was less than 50 per cent.

23. The framers of rules were alive to the necessity that administrative exigencies may require creation of ex cadre posts may also require posting of promotees in officiating capacity against cadre posts or appointment against ex-cadre posts but they nevertheless envisaged that such appointments should not automatically confer on them the membership of the service which they ensured through proviso to clause (1) of Rule 2.

Perusal of proviso to clause (1) of Rule 2 leaves no manner of doubt that a person merely by virtue of his appointment against an ex cadre post or an officiating appointment against cadre post cannot stake a right to the membership of service in terms of clause (12) of Rule 2.

24. Clause (12) of Rule 2 confers membership of the Service upon officers who are appointed substantively to a cadre post unless he happens to be a direct recruit or person appointed by transfer in whose cases an exception is made and as a result of that exception they become member of the Service while holding an appointment on probation and after successful completion of the period of probation while awaiting appointment to a cadre post.

25. Mr. Anand Swaroop argued that sub-clause of clause (12) of Rule 2 referred not only to the direct appointees, on probation on but also to the promotees who had successfully completed their period of probation and awaited appointment to a cadre post and drew sustenance for the said view from the following observations from the single Bench judgment of this Court in M L Sehgal's case (supra) :-

"According to rule 11(1), a direct recruit has to remain on probation for a period of two years, whereas the period of probation for a promotee is one year. Under sub-rule (2) of rule 11, if during the period of probation, the work and conduct of an officer, whether a direct recruit or a promotee, is found to be unsatisfactory, the service of a direct recruit can be terminated and in case of a promotee, the consequence is his reversion to his former post. According to sub-rule (3) (a), on satisfactory completion of the probationary period, both the direct recruit as well as the promotee can be confirmed in their appointments and under sub-clause (b) of sub-rule (3) of the said rule, if no cadre post is available against which the officer can be confirmed on successful completion of his probationary period, the Government may declare that such an officer has completed his probation satisfactorily. This sub-clause is applicable both to the direct recruits as well as the promotees, and the second part of rule 2(12)(a) has a direct link with rule 11(3). b) as the situation contemplated under both the rules is identical. A combined reading of both the rules leaves no manner of doubt that in case of both a direct recruit and a promotee, completion of probationary period can result in his confirmation only if a cadre post is vacant against which he can be confirmed. In case such post is not available, but a particular officer irrespective of the fact whether he is a direct recruit or a promotee, has completed his probationary period satisfactorily, then he is entitled to a lesser alternative, that is, to a declaration of satisfactory completion of his probationary period. This

declaration is intended for a purpose which is clearly discernible in rule 2(12)(a). Both the direct recruit and the promotee will be considered as a member of the Service under this Rule on a declaration by the Government that such officer or officers have completed their probationary period satisfactorily though it may not be possible to confirm them against a cadre post as the same is not available and thus, they have to await appointment to a cadre post. If sub-clause (a) of rule 2(12) is to be confined only to a direct recruit, as it is argued by the learned counsel for the petitioners, the second part of this sub-rule will be rendered redundant as according to the first part of this sub-clause, a direct recruit becomes a member of the Service immediately on his appointment on probation and he has not to wait for the successful completion of his probationary period. As long as he continues to be on probation and his services are not terminated on account of unsatisfactory record of service, he is deemed to be a member of the Service irrespective of the grant of declaration by the Government regarding the satisfactory completion of his probationary period. The first part of this sub-clause is intended to give a direct recruit an edge over a promotee inasmuch as a promotee is entitled to the status of a member of the Service not from the date of his promotion; but only on getting a declaration from the Government that he has completed his probationary period satisfactorily, whereas a direct recruit has to be considered as a member of the Service from the very date of his appointment on probation. In fact, the learned counsel for the petitioners, wanted to place emphatic reliance on sub-clause (b) of rule 11(3) in support of his interpretation of the scope of rule 2(12)(a). However, after careful perusal, I find that sub-clause (h) of rule 11(3) is applicable to both the direct recruits as well as the promotees and it is in this light that a wider connotation has to be given to sub-clause (a) of rule 2(12).

10. The matter can be looked from another angle also. According to the definition of cadre post in rule 2(3), the cadre post means a permanent post in the Service and according to The Explanation under rule 2(12), an officer can be treated to have acquired the status of a member of Service though he may not be actually doing the work on a cadre post and may be working on an ex-cadre post on account of administrative exigencies. Ex-cadre post, according to rule 2(10) means a temporary post of the same rank as a cadre post. It is not denied and it is nobody's case that the number of cadre posts is fixed under the Rules by the Government from time to time and there are a number of posts which though are not permanent posts and as such are not included in the category of cadre posts yet are manned by a number of officers for considerable periods even after probationary period has been completed satisfactorily. To deny such officers the status of a member of the Service though they have withstood the test of undergoing the probationary period satisfactorily, will smack of injustice and undue hardship. In order to remove the same, sub-clause (a) of rule 2(12) has been worded so as to confer the status of a member of the Service on those who may not be confirmed against permanent posts on account of there being not adequate number of cadre posts for some period though the officer concerned may deserve to acquire that status on account of satisfactory completion of probationary period. The Explanation is also intended to remove all doubts in this

regard".

26. The view expressed by the learned single Judge of this Court, no doubt, sustains the submission of Mr. Anand Swaroop but with great respect, we find ourselves unable to subscribe to the said view.

27. The effect of provisions of rule 5 fixing the upper limit of 50 per cent for the promoters in the service and the proviso to clause (1) of Rule 2 expressly making it clear that officiating appointment against a cadre post or an appointment against an ex-cadre post would not entitle an officer to become member of Service in terms of clause (12) of Rule 2, was perhaps not projected before the learned single Judge. Because a combined reading of the aforesaid two provisions left no option but to hold that if the promotees already occupied upto 50 per cent seats in the Service, then thereafter the promotees if appointed to the Service could not but he holding the post in an officiating capacity which in view of the proviso to clause (1) of Rule 2 would not entitle them to become member of service and therefore, in their case it would be immaterial as to for what length of time they had held the officiating. appointment and during that period had also successfully completed the period of probation.

28. Rule 2 (12) (a), in our view, is totally and exclusively confined to the case of a direct recruit just as sub-clause (b) is confined to the officer appointed on transfer. Clause (12), in the first instance, ;provides that all officers appointed substantively to a cadre post shall become ipso facto member of Service. By sun-clause (a), it, however, extends that entitlement to direct appointee from the date he is appointed on probation and also enable him to possess that entitlement after he had successfully completed probation and awaited appointment to a cadre post. If sub-clause (a) would have merely read, "in the case of a direct appointment an officer on probation", then the result would have been that after completion of the probationary period a direct appointee if he had not been appointed to a cadre post would neither have qualified to acquire the title to 'the member of Service' on account of substantive appointment to a cadre post nor would have held that title on account of being on probation as probationary status would come to an end after he had successfully completed the same, hence it was for that reason that in his case it became necessary to add the rest of the clause i. e. "or such an officer who, having successfully completed his probation, awaits appointment to a cadre post".

29. The respondent-State has taken a categorical stand in its written statement that the petitioners had not been confirmed against any cadre post. In fact, it is the stand of the respondents that respondent No. 2 is the only direct recruit in the service.

30. In the light of the view that we have been taken that a promotee does snot become member of the Service unless he is (substantively appointed to a cadre post and none of the petitioners having been substantively appointed to a cadre post, so none of them, in our view, is a member of Class I Service and therefore, they cannot compete with respondent No. 2, admittedly a member of the Service, for seniority in class I Service and hence have no locus standi to maintain the present petition.

31. In view of the above, we are not called upon to go into the question as to whether respondent No 2 was eligible for promotion to the post of XEN or that of S. E., as the petitioners have not asked for a writ of quo warranto. Nevertheless in the passing, we may observe that respondent no. 2's promotion to the post of Executive Engineer was impugned in Civil Writ Petition No 1192 of 1980 and the motion Bench dismissed the same in limine by a speaking order dated 11th August, 1980, by observing that Shri Sardana respondent herein was eligible for promotion as statutory requirement in regard to period of experience as Assistant Executive Engineer and passing of departmental examination stood duly relaxed in his case by the Government in public interest. We are informed this decision has already been challenged in the Supreme Court and therefore, even though we entertain some doubt as to the correctness of this decision, yet we refrain from going into the eligibility of respondent Shri Sardana to a promotion either to the post of Executive Engineer or to that of Superintending Engineer because a positive view contrary to the judgement of the motion Bench would have necessitated a reference to the larger Bench and would have delayed the decision of the present writ petition, when in view of the desire expressed by their Lordships for a very early decision of this petition; this petition calls for an expeditious decision.

32. For the reasons aforementioned, we find these petitions as not maintainable and dismiss the same as such. In the circumstances of this case we leave the parties to bear their own costs in each petition.

**Prem Chand Jain, J.**

33. I agree.

Petition dismissed.

Cases Referred.

1C.W.P. No. 836 of 1980