

Prabhuji and anr. Vs. State of U.P. Thru Secy. Appointment and ors.

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Court : Allahabad

Decided On : Dec-16-2010

Judge : Devi Prasad Singh; Arun Tandon, JJ.

Appeal No. : SERVICE BENCH No. - 1283 of 2007

Appellant : Prabhuji and anr.

Respondent : State of U.P. Thru Secy. Appointment and ors.

Advocate for Def. : C.S.C. Adv

Advocate for Pet/Ap. : Abhishek Yadav; Ashwani Kumar; Shireesh Kumar, Advs

Judgement :

1. The dispute between the promotees and direct recruits in the cadre of Higher Judicial Service of the State of Uttar Pradesh, has been the unending process since decades. Either side being the member of same fraternity, has been approaching for judicial review of the action of the High Court on one or the other ground but it appears that for one or the other reasons may be, for some fault on the part of the High Court to adjudicate the controversy, justice has not been done. In pursuance of the order of Hon'ble Supreme Court to decide the dispute within six months, the present Division Bench has been constituted by Hon'ble the Chief Justice of this Court to settle the law on the question involved in the writ petition.

2. It is the irony of fate that those, who impart justice to citizens or litigants, are not satisfied for one or the other reason resulting in multiplicity of litigation with regard to seniority and consequential benefits in the cadre of Higher Judicial Service (in short HJS).

3. The petitioners were selected for the post of Munsif Magistrate in accordance with Rules and joined on the said post on 29. 8. 1978. According to petitioners' counsel, on 30. 4. 1987, the petitioners were promoted to the post of Civil and Assistant Sessions Judge. In the quota of promotees in HJS cadre, the petitioners became eligible for promotion against available vacancies in 1994. In accordance with Full Court Resolution of High Court as admitted by the respondent No. 2 in its affidavit dated 6. 12. 2007, the petitioners candidature was approved for promotion under Rule 20 of Uttar Pradesh Higher Judicial Service Rules, 1975 (in short 1975 Rules). In pursuance of sub-rule (3) of Rule 22 of 1975 Rules, the petitioners were promoted as Additional District and Sessions Judge on 15. 6. 1996. It shall be relevant to take note of the fact that Rule 22 was amended by 4th amendment on 15. 3. 1996. The promotional order dated 27. 5. 1996 (Annexure No. 3 to the writ petition), is of temporary nature. In pursuance of the order dated 5. 12. 1998, the petitioners were regularly promoted as Additional District Judge under Sub-rule (1) of Rule 22 of 1975 Rules and they were placed in the seniority list dated 24. 8. 2007 at serial No. 334 and 347 respectively. The petitioners were given seniority from December, 1998 from the date of their regular promotion though, they were shown to have been promoted in June, 1996. It has been submitted by the petitioners counsel that the original promotional order dated 27. 5. 1996 was passed in pursuance of Service Rule against the vacancies of 1992-94 within the quota of promotees. Submission is that the order dated 27. 5. 1996 (Annexure No. 3 to the writ petition) was passed in pursuance of Sub-rule (3) of Rule 22 of the 1975 Rules as a measure of temporary arrangement but it was passed within the promotees quota. It shall be appropriate to reproduce the relevant portion from the order dated 27. 5. 1996 (Annexure No. 3 to the writ petition) as under:

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4. It has not been disputed by the learned counsel for the respondents that the promotion was done within the quota prescribed for promotees in the HJS cadre. The petitioners promotion against the vacancy of 1992-94, done vide order dated 27. 5. 1996, seems to have been reiterated while making regular promotion by notification dated 5. 12. 1998 (Annexure No. 4 to the writ petitioner). Relevant portion of the notification dated 5. 12. 1998, is reproduced as under:

" GOVERNMENT OF UTTAR PRADESH

Appoint Section-4

No. 2989/2-4-98-32 (1)/98

Lucknow, dated 5 December, 1998

NOTIFICATION

APPOINTMENT

For the vacancies of the year 1992-94 in U. P. Higher Judicial Service, the Governor on the basis of advice/recommendation of Hon'ble High Court provide regular appointment under Rule 22 (2) of U. P. Higher Judicial Service Rules, 1975 to the following officers of U. P. Nyayik Sewa, against whose names the word "Promotion" has been used, at the place mentioned against their names from the date of their taking over charge and also appoint by direct

recruitment/selected from the Bar, against whose names the word "Direct Recruitment" has been used under Rule 22 (2) of the U. P. Higher Judicial Service Rules 1975 in the Districts mentioned against their names in the following table from the date of their taking over charge in the following manner:"

5. The dispute arose with the release of impugned seniority list dated 24. 8. 2007 (Annexure No. 1 to the writ petition) whereby the petitioners have been placed at serial No. 334 and 347 respectively by reckoning their seniority from December, 1998 which seems to have been done from the regular promotion order dated 5. 12. 1998 (Annexure No. 4 to the writ petition), ignoring the petitioners claim for the reckoning of seniority from the date of temporary promotion from 1996 though, it was done against the vacancy of 1992-94 or from the year 1992-94 when the vacancy originated from the promotees quota.

6. On the other hand, in the seniority list, the direct recruits of HJS cadre (respondent No. 3 to 13) who were 11 in number, joined service in the year 1994 and have been placed en bloc at serial No. 255 to 265. These direct recruits were selected within their quota against vacancies of the year 1988.

Five direct recruits (respondent No. 14 to 18) were selected against the vacancy of 1990 and in the year 1996. They joined in the HJS cadre in August, 1996 i. e. , two months after the petitioners promotion. They have been placed en bloc in the impugned seniority list at serial No. 28 to 287.

Four candidates (respondent No. 19 to 22) selected under SC/ST quota as direct recruits who joined in August, 1997, have been placed en bloc in the impugned seniority list at serial No. 285 to 288.

Nineteen direct recruits (respondent No. 23 to 41) against the quota/vacancies of 1992-94 selected and appointed in HJS cadre in the year 1998, joined service after two and half years than the petitioners but they have been further placed en bloc in the seniority list at serial No. 289 to 300 and 302 to 316 alternatively.

7. While assailing the impugned seniority list, Sri S. K. Kalia, learned senior counsel submits that since the petitioners who belong to PCS (J) cadre, were selected against the quota of 1992-94 and were officiating from 27. 5. 1996 as Additional District Judge may be, on temporary basis but their seniority shall relate back from the availability of vacancies under the promotees quota of 1992-94 and at least from the date of their officiation i. e. , 27. 5. 1996. The direct recruits cannot travel for the purpose of seniority anterior to their date of appointment coupled with their joining in service. Submission is that the direct recruits have no right to claim seniority from the earlier date when they were not members of service and have no right for reckoning their seniority prior to date of their joining.

The Registrar General in pursuance of the order passed by this Court, has filed an affidavit dated 13. 11. 2010. In para 4 of the affidavit, it has been admitted by the Registrar General that the petitioners were appointed against the vacancies of 1994 within their quota earmarked for promotees. The status of vacancies of various years, have also been given in the affidavit. For convenience, para 4 and 5 of the affidavit of the Registrar General is reproduced as under:

"4. That in pursuance of the order of this Hon'ble Court dated 28. 10. 2010 a Chart showing the vacancy position as well as Carry Forward and Additional Vacancies was submitted before this Hon'ble Court, which was also taken on record on 29. 10. 2010. However, on careful examination of the said Chart by the respondents, it was noticed that there were some errors in the vacancy position, showing Carry Forward and Additional Vacancies in the Higher Judicial Services and therefore another Chart is now being brought on record showing the vacancies and the allocations from the year 1984 (24. 05. 1984-31. 12. 1984) to the year end 2000 (31. 12. 2000). The chart is as follows:-

A

B

C

D

E

F

G

H

Year

Total Sanctioned Strength in HJS Permanent/Temporary as on 31st December

Total Vacancies

Nyayik Sewa

Direct Recruits

Judicial Officer

Total (C+D+E)

Carried over (B-F)

1984 (24. 5. 1984--31. 12. 1984) Existing vacancies--23

23

8

7

8

23

0

1985 Excess vacancies--0

Additional vacancies---40

312

127

34

32

2

1

35

-1

1986

Carried over vacancies-- (--1)

Additional vacancies---40

313

137

39

13

13

13

39

0

1987

Carried over vacancies-- (--0)

Additional vacancies---129

361

200

129

105

12

12

129

0

1988

Carried over vacancies-- (--0)

Additional vacancies---15

361

200

15

5

5

5

15

0

1989

Carried over vacancies-- (--0)

Additional vacancies---42

373

219

42

28

7

7

42

0

1990

Carried over vacancies-- (--0)

Additional vacancies---23

380

215

23

23

0

0

23

0

1991

Carried over vacancies-- (--0)

Additional vacancies---12

515

81

12

4

3

4

11

1

1992

Carried over vacancies-- (--1)

Additional vacancies---32

520

76

33

25

3

2

30

3

1993

Carried over vacancies-- (--3)

Additional vacancies---8

520

76

11

4

4

0

8

3

1994

Carried over vacancies-- (--3)

Additional vacancies---70

546

105

73

43

21

0

64

9

1995

Carried over vacancies-- (--9)

Additional vacancies---42

546

113

51

40

0

0

40

11

1996

Carried over vacancies-- (--11)

Additional vacancies---32

546

117

43

31

0

0

31

12

1997

Carried over vacancies-- (--12)

Additional vacancies---109

546

195

121

100

0

0

100

21

1998

Carried over vacancies-- (--21)

Additional vacancies---57

546

227

78

26

0

0

26

52

1999

Carried over vacancies-- (--52)

Additional vacancies---76

546

252

128

72

0

0

72

56

2000

Carried over vacancies-- (--56)

Additional vacancies---18

546

260

74

38

0

0

38

36

5. That it is further stated that the Petitioners who were promotees were appointed under Rule 22 (3) of U. P. Higher Judicial Services Rules, 1975 (hereinafter referred to as "the Rules of 1975) vide Notification dated 27. 05. 1996 and Court's notification dated 7. 6. 1996, within their quota. "

8. On behalf of the petitioners it has been submitted that the petitioners/ promotees who were eligible under old Rules, are entitled for seniority in accordance to provision contained in unamended old Rules. .

9. It is submitted that in view of the judgment in the case reported in (2001) 10 SCC 237: Sri Kant Tripathi and others. v. State of U. P. and others, direct recruits

appointed after the petitioners shall be pushed down and placed below the petitioners in the seniority list. They cannot be placed over and above the petitioner in the impugned seniority list. The direction No. 3 of Hon'ble Supreme Court in the case of S. K. Tripathi reported in 2001 (10) SCC 237, has not been followed which has been reiterated by Hon'ble Supreme Court in the recent judgment decided on 13. 9. 2010 in Civil Appeal No. 1312 of 2005 (Ashok Pal Singh & others. v. U. P. Judicial Services Association & others). Submission is that the amendment done and incorporated as Rule 22 (2) and (3) its proviso and rule 26 (1) that U. P. Higher Judicial Service Rules, 1975 as amended on 23. 2. 1996, be declared as ultra vires to Constitution.

10. Learned counsel for the petitioners to support his case, relied upon the the cases namely, AIR 1987 SC 2359 (Sonal Vsihimappa v. State of Karnataka and others; (1995) 2 SCC 745 R. K. Sabharwal and others. v. State of Punjab and others); (2002) 4 SCC 247 (All India Judges Association & others. v. Union of India & others); AIR 1975 SC 483 (A. K. Subraman and others. v. Union of India and others); (2000) 8 SCC 25 (Rudra Kumar Sain and others. v. Union of India and others); (2001) 10 SCC 237 (Sri Kant Tripathi and others. v. State of U. P. and others); W. P. No. 316 (S/B) of 2004 (U. P. Judicial Services Association. v. State of U. P. and another); 1991 Supp (2) SCC 51 (O. P. Garg and others. v. State of U. P. and others); 1999 All. L. J. , 472 (K. N. Singh and others. v. State of U. P. and others); (1983) 3 SCC 285 (State of Andhra Pradesh and others. v. J. Sreenivasa Rao and others); (1990) 3 SCC 157 (N. T. Devin Katti and others. v. Karnataka Public Service Commission and others); 1991 Supp (2) SCC 363 (Nirmal Chandra Bhattacharjee and others. v. Unio of India and others); (1998) 9 SCC 223 (B. L. Gupta and another. v. M. C. D.); (1977) 3 SCC 399 (S. B. Patwardhan and another. v. State of Maharashtra and others); (1976) 1 SCR 815 (V. B. Badami Etc. v. State of Mysore & others); AIR 1984 SC 1595 Shri O. P. Singla and another. v. Union of India and others); (1990) 2 SCC 715 Direct Recruit Class II Engineering Officers' Association. v. State of Maharashtra and others); AIR 1993 SCC 2260 (V. Bhasker Rao and others. v. State of Andhra Pradesh and others); (1999) 1 SCC 278 (U. P. Secretariat U. D. A. Association through its Joint Secretary, G. C. Srivastava and others. v. State of U. P. and others); (1999) 1 SCC 280 (Keshav Deo and another. v. State of U. P. and others); Appeal (civil)

4968 of 2007 Ashok Kumar Shrivastava and ors. v. Ram Lal and others with Civil Appeal Nos. 4969/07 and 4970/07.

11. On the other hand, learned counsel representing respondents submitted that Direct recruits have rightly been accorded seniority keeping in view the year of vacancy for which they were selected. Learned Senior Counsel Sri Raghvendra Kumar Singh representing High Court, stated that in pursuance of the judgment of Honble Supreme Court in the case of Ashok Pal Singh (supra), vacancies shall be determined afresh, hence impugned seniority list loses its sanctity. However, he declined to make a statement that impugned seniority list has been rescinded. Respondents counsel added that controversy requires adjudication in terms of judgment of Ashok Pal Singh (supra).

Statutory Provisions

12. The recruitment and appointment to the HJS cadre consisting of single cadre comprising the post of District and Sessions Judges and Additional District and Sessions Judges, are governed and regulated by U. P. Higher Judicial Service Rules, 1975 (in short original Rules) framed under Articles 309 read with Article 233 of the Constitution of India. Sub-rule (3) of Rule 4, deals with the cadre strength which provides that permanent strength of service shall unless varied by orders passed in this behalf, be as specified in Appendix-A. Sub-rule (4) of Rule 4 provides that Governor may, from time to time in consultation with the Court leave unfilled or hold in abeyance, any vacant post in the Service without entitling any person for compensation or create from time to time, Additional posts, temporary or permanent, as may be found necessary. Rule 5 deals with the source of recruitment. Rule 6 deals with the quota. Rule 8 deals with the number of appointments to be made by the High Court. Chapter IV of the 1975 Rules deals with the procedure for direct recruitment whereas, Chapter-V deals with the procedure for recruitment by promotion of the members of Nyayik Sewa (in short PCS-J). Rule 22 deals with the mode of appointment in the HJS cadre. Rule 23 relates to probation period whereas, Rule 26 deals with seniority. For convenience, Rule 4, 5, 6, 8, 20, 22, 23 and 26 of the 1975 Rules are reproduced as under:

4. Strength of the service. ---(1) The Service shall consist of a single cadre comprising the posts of--

(a) District and Sessions Judges, and

(b) Additional District and Sessions Judges:

Provided that against a post of Additional District and Sessions Judge a member of the Uttar Pradesh Judicial Officers Service may be appointed to exercise the powers of Additional Sessions Judge only as laid down in Notification No. 41-13/66-Apptt. -4, dated March 12, 1975 issued under Article 237 of the Constitution.

(2)The strength of the Service shall be such as may be determined from time to time by the Governor in consultation with the Court.

(3)The permanent strength of the Service, shall, unless varied by orders passed in this behalf, be as specified in Appendix 'A'.

(4)The Governor may, from time to time in consultation with the Court leave unfilled or hold in abeyance, any vacant post in the Service without entitling any person to compensation or create from time to time, Additional posts, temporary or permanent, as may be found necessary.

5. Sources of recruitment. -- The recruitment to the Service shall be made---

(a) by direct recruitment of pleaders and advocates of not less than seven years' standing on the first day of January next following year in which the notice inviting applications is published;

(b) by promotion of confirmed members of the Uttar Pradesh Nyayik Sewa (hereinafter referred to as the Nyayik Sewa), who have put in not less than seven years service to be computed on the first day of January next following the year in which the notice inviting application is published:

Provided that for so long as suitable officers are available from out of the dying cadre of the Judicial Magistrates confirmed officers who have put in not less than seven years service to be computed as aforesaid shall be eligible for appointment

as Additional Sessions Judges in the Service.

Explanation--When a person has been both a pleader and an advocate his total standing in both the capacities shall be taken into account in computing the period of seven years under clause (a).

6. Quota. ---Subject to the provisions of Rule 8, the quota for various sources of recruitment shall be---

(i)Direct recruits from the Bar 15%)

(ii)Uttar Pradesh Nyayik Sewa 70%)--- of the

(iii)Uttar Pradesh Judicial Officers Service 15%) vacancies.

(Judicial Magistrates) 15%)

Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one:

Provided further that when the strength in the cadre of the Judicial Magistrates gradually gets depleted or is completely exhausted and suitable candidates are not available in requisite numbers or no candidate remains available at all, the shortfall in the number of vacancies required to be filled from amongst Judicial Magistrates and in the long run all the vacancies, shall be filled by promotion from amongst the members of the Nyayik Sewa and their quota shall, in due course, become 85 per cent.

8. Number of appointments to be made. --- (1) The Court shall, from time to time, but not later than three years from the last recruitment, fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years.

Note---The limitation of three years mentioned in this sub-rule shall not apply to the first recruitment held after the enforcement of these rules.

(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa:

Provided that the number of vacancies filled in as aforesaid under this sub-rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly; so, however, that the percentage of direct recruits in the Service does not in any case exceed 15 per cent of the strength of the service:

Provided further that all the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date, if any when they are converted into permanent posts, shall be filled by promotion from amongst the members of the Nyayik Sewa; and only the remaining vacancies shall be shared between the three sources under these rules:

Provided also that the number of vacancies equal to 15 per cent of the vacancies referred to in the last preceding proviso shall be worked out for being allocated in future to the Judicial Magistrates in addition to their quota of 15 per cent prescribed in Rule 6, and thereupon, future recruitment (after the promotion from amongst the members of the Nyayik Sewa against vacancies referred to in the last preceding proviso) shall be so arranged that for so long as the additional 15 per cent vacancies worked out as above have not been filled up from out of the Judicial Magistrates, the allocation of vacancies shall be as follows---

(i) 15 per cent by direct recruitment;

(ii) 30 per cent from out of the Judicial Magistrate;

(iii) 55 per cent from out of the members of the Nyayik Sewa.

20. Promotion of members of Nyayik Sewa. --- (1) Recruitment by promotion of the members of the Nyayik Sewa shall be made by selection on the basis of seniority-cum-merit.

(2)The field of eligibility for recruitment by promotion shall be confined to four times the number of vacancies to be filled by promotion. The Selection Committee shall prepare a list in order of seniority of the officers eligible under rule 5 (b) of these rules.

(3)The Selection Committee shall, after examining the record of the officers included in the list prepared under sub-rule (2) of this rule make a preliminary selection of the officers who in its opinion are fit to be appointed on the basis of seniority-cum-merit. In assessing the merits of a candidate, the Selection Committee have due regard to his service record, ability, character and seniority. The list shall contain the name of officers twice the number of vacancies required to be filled by promotion of the members of the Nyayik Sewa.

(4)The Selection Committee shall forward the list of the candidates chosen at the preliminary selection to the Chief Justice along with the names of the officers who, if any, in the opinion of the Committee have been passed over for promotion to the service.

(5)The Court shall examine the recommendations of the Selection Committee and make a final selection for promotion and prepare a list in order of seniority of the candidates who are considered fit for promotion and forward the same to the Governor. The list shall remain operative only till the next recruitment.

22. Appointment- (1) Subject to the provisions of sub-rules (2) and (3), the Governor shall on receipt from the Court of the lists mentioned in Rules 18, 20 and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates from the lists in the order in which they stand in the respective lists.

(2)Appointments to the service shall be made on the rotational system, the first vacancy shall be filled from the list of officers of the Nayayik Sewa, the second vacancy shall be filled from the list of direct recruits (and so on), the remaining vacancies, shall thereafter be filled by promotion from the list of the officers of the Nyayayik Sewa.

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrates, appointments to the Service shall be made in such a way that the second fifth and eighth (and so on), vacancy shall be filled from the list of Judicial Magistrates.

(3) Appointment for temporary vacancies or in officiating capacity shall be made by the Governor in consultation with the Court from amongst the members of the Nyayik Sewa.

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrate, appointments on temporary vacancies or in officiating capacity shall be made in consultation with the Court from amongst the Judicial Magistrate according to the quota fixed for that source under these rules:

Provided further that for so long as such members of the Judicial Service as are considered suitable for appointments on temporary vacancies or in officiating capacity, are not available in sufficient number, the Governor in consultation with the Court may fill in not more than 50 per cent of such vacancies from amongst the officers of the cadre of Judicial Magistrates.

(4) The appointments shall be made on rotational system the first vacancy shall be filled from the list of officers of the Nyayik Sewa, the second vacancy shall be filled from the list of Judicial Magistrates (and so on).

23. Probation. - (1) All persons shall on appointment to the service in substantive vacancies be placed on probation. The period of probation shall in case be two years, provided that the period for which an officer has been continuously officiating immediately prior to his appointment may be taken into account for the purpose of computing the period of probation.

(2) (a) The Court may, in special cases, extend the period of probation upto a specified date;

Provided that the total period of probation shall not ordinarily exceed three years.

(b) An order sanctioning such extension of probation shall specify whether or not such extension shall count for increment in the time scale.

(3) If it appears to the court at any time during or at the end of the period of probation, or extended period of probation, as the case may be, that a probationer has not made sufficient use of his opportunities or has otherwise failed to give satisfaction, it may make recommendation to the appointing authority whereupon the appointing authority may revert the probationer to his substantive post, if any, or if he does not hold a lien on any post, his services may be dispensed with.

(4) A person whose services are dispensed with or who is reverted under sub-rule (3) shall not be entitled to any compensation.

26. Seniority. - (1) Except as provided in sub-rule (1), seniority of members of the service shall be determined as follows :

(a) Seniority of the officers promoted from the Nyayik Sewa vis-a-vis the officers recruited from the Bar shall be determined from the date of continuous officiation in the service in the case of promoted officers and from the date of their joining the service in the case of direct recruits. Where the date of continuous officiating in the case of an officer promoted from the Nyayik Sewa and the date of joining the service in the case of a direct recruit is the same, the promoted officer shall be treated as senior;

Provided that in the case of a promoted officer the maximum period of continuous officiation in the service shall not, for the purpose of determining seniority exceed three years immediately preceding the date of confirmation;

Provided that where any officer is not found fit for confirmation and is not confirmed in his turn, the officiating period or the probationary period, as the case may be, prior to the date of decision taken by the High Court in this behalf shall not be taken into account for purposes of computing the period of continuous officiation or for purposes of working out the date of joining of the service, as the case may be;

(b) Seniority inter se of the officers appointed from out of the Judicial Magistrates shall be determined from the date of continuous officiation, provided that in the case of officers appointed on the basis of one selection, their seniority shall be determined according to their seniority in the Uttar Pradesh Judicial Officers service;

Provided further that where an officer is not found fit for confirmation and is not confirmed in his turn, the officiating period prior to the date of decision taken by the High Court in this behalf shall not be taken into account for computing the period of continuous officiation.

(2) Seniority of members of the service who have been confirmed in the service prior to the commencement of these rules shall be as has been determined by the order of the Government as amended from time to time. "

13. The original Rule (supra) was amended by Notification dated 15. 3. 1996. Rule 8, 22 and 26 were amended. It shall be appropriate to reproduce Rule 8, 22 and 26 as amended by Notification dated 15. 3. 1996.

"2. Amendment of Rule 8. ---In the Uttar Pradesh Higher Judicial Service Rules, 1975, hereinafter referred to as the said rules, in Rule 8, for the existing sub-rule (2), the following sub-rule shall be substituted namely:--

"(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa:

Provided that the number of vacancies filled in as aforesaid under this sub-rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised

accordingly; so, however, that the percentage of direct recruits in the Service does not in any case exceed 15 per cent of the strength of the service:

Provided further that all the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date, if any when they are converted into permanent posts, shall be filled by promotion from amongst the members of the Nyayik Sewa; and only the remaining vacancies shall be shared between the three sources under these rules:

Provided also that the number of vacancies equal to 15 per cent of the vacancies referred to in the last preceding proviso shall be worked out for being allocated in future to the Judicial Magistrates in addition to their quota of 15 per cent prescribed in Rule 6, and thereupon, future recruitment (after the promotion from amongst the members of the Nyayik Sewa against vacancies referred to in the last preceding proviso) shall be so arranged that for so long as the additional 15 per cent vacancies worked out as above have not been filled up from out of the Judicial Magistrates, the allocation of vacancies shall as follows---

(i) 15 per cent by direct recruitment;

(ii) 30 per cent from out of the Judicial Magistrate;

(iii) 55 per cent from out of the members of the Nyayik Sewa. "

"3. Substitution of Rule 22. ---In the said rules, for the existing Rule 22, the following rule shall be substituted namely:---

"Appointment 22. - (1) Subject to the provisions of sub-rules (2) and (3), the Governor shall on receipt from the Court of the lists mentioned in Rules 18, 20 and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates

from the lists in the order in which they stand in the respective lists.

(2)Appointments to the service shall be made on the rotational system, the first vacancy shall be filled from the list of officers of the Nyayik Sewa. The second vacancy shall be filled from the list of direct recruits (and so on), the remaining vacancies, shall therefore be filled by promotion from the list of the officers of the Nyayayik Sewa.

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrates, appointments to the Service shall be made in such a way that the second fifth and eighth (and so on), vacancy shall be filled from the list of Judicial Magistrates.

(3)In the eventuality of delay in making appointment under sub-rule (1) and further if exigency of service so requires, the Governor may, in consultation with the Court, make short term appointment as a stop-gap arrangement from amongst the members of Nyayik Sewa in the vacancy in these services within the quota fixed by the Court till the appointment are made under sub-rules (1) and (2):

Provided that the period of service spent by a member of Nyayik Sewa on short term appointment to the service as a stop-gap arrangement shall not be computed for seniority under Rule 26. "

4. Amendment of Rule 26. --- In the said rules, in Rule 26 for the existing sub-rule (1) the following sub-rule shall be substituted, namely:---

"Seniority 26. ---(1). Seniority of the officers appointed in the Service shall be determined in accordance with the order of appointment in the Service under sub-rules (1) and (2) of Rule 22 of these rules. "

14. A combing reading of amended rules shows that officers of U. P. Judicial Service promoted in stop-gap arrangement against the cadre strength of HJS,

shall not be entitled for computation of seniority taking into account the short term appointment under the proviso to Rule 26. Under Rule 22 roster system has been provided where first vacancy goes to Nyayik Sewa and second to direct recruits and so on.

15. While assailing the impugned amendment, the main thrust of argument of petitioners' counsel is that under amended sub-rule (2) though the quota of direct recruits is only 15% till its amendment to 25% from June 25, 2007, the appointment of direct recruits goes in the ratio of 1:1.

16. Under unamended Rules, Rule 4 provides that the cadre of strength shall be determined by the Governor from time to time with consultation with Court and strength of service shall be as given in Appendix-A unless varied by the order of Court and under sub-rule (4) of Rule 4 of the unamended Rules, the Governor has been authorised to create posts from time to time i. e. , Additional posts, temporary or permanent, to meet out the exigency of services. Under Rule 8 of unamended Rules, the Court shall fix, from time to time but not later than three years from the last recruitment, the number of officers to be taken at the recruitment subject to number of existing vacancies likely to occur in next two years. Though, proviso of sub-rule (2) of Rule 8 provides that quota of direct recruit may be raised but shall not exceed 15% of total strength of the cadre service. It also deals with permanent vacancies existing prior to 10. 5. 1974 plus 31 temporary post.

Under Rule 20 it has been provided that promotion of member of Nyayik Sewa shall be made by selection on the basis of seniority-cum-merit. The decision of selection committee shall be examined by the Court and list shall be prepared in order of seniority of candidates who have been considered fit for promotion and then it shall be forwarded to the Governor. The list shall be operative till the next recruitment.

Rule 22 of unamended Rules (supra) deals with the appointment. Sub-rule (2) under the amended Rules also provides that appointment shall be done by Governor on rotational system. Sub-Rule (3) of unamended Rule 22 provides that appointment for temporary vacancies or in officiating capacity, shall be made in consultation with Court from amongst the members of Nyayik Sewa.

Sub-rule (3) of Rule 22 of unamended Rules, contains the provisions with regard to filling up temporary vacancies or in officiating capacity has been substituted in the amended Rules whereby, it has been provided that in the event of delay in making appointment under sub-Rule (1), to meet out the exigency of service, Governor may in consultation with Court, make short term appointment as a stop-gap arrangement from amongst the members of Nyayik Sewa in the vacancy in these services within the quota fixed by the Court till the appointment are made under sub-rules (1) and (2).

But under the proviso of amended sub-rule (3), the period of service spent by member of Nyayik Sewa on short term appointment service as stop gap arrangement, shall not be computed for seniority under Rule 26.

Thus, in the unamended Rule 22 specific provision has been made to the effect that promotion done in stop gap arrangement and service rendered therein shall not be counted for the purpose of seniority which seems to missing in unamended sub-rule (3) of Rule 22 meaning thereby, in case temporary appointment would have been done under old Rules, service rendered by member of Nyayik Sewa in higher Judicial Cadre, could have been counted in absence of any prohibition under Rule. Under Rule 4 while defining the cadre strength power has been conferred for appointment on additional post temporary and permanent.

A plain reading of Rule 23 shows that all persons appointed in service in substantive vacancy, shall be placed on probation. Only condition given in Rule 23 is, persons should have been appointed against substantive vacancy.

17. Under Rule 26 of unamended Rules, specific provision has been made with regard to promotees to the extent that maximum period of continuous of officiation in service for the purpose of determining seniority, shall not exceed three years immediately preceding the date of confirmation (Before O. P. Garg.).

However, while amending Rule 26, provisions with regard to reckoning seniority after counting of officiating service, has been deleted and it has been provided that seniority shall be determined in order of appointment under sub-Rule (1) and (2) of Rule 22. In view of the above, in case unamended Rule is applied, the

appointment made on temporary or officiating basis could have been counted for the purpose of seniority in HJS cadre confirmation in service under the proviso of sub-rule (1) of Rule 26 in view of O. P. Garg (supra).

18. It has been stated that in the case reported in (2002) 4 SCC 247: All India Judges' Association & others v. Union of India & others), direct recruits should get 7th, 14th, 20th, 27th, 34th, 40th 47th, 54th 60th and so on, placed in 100 vacancies but while appointing 103 officers by order dated 5. 12. 1998, the High Court has placed 20 direct recruits in first 40 position and rest 83 promotees were placed at much below them. It has also been submitted that since temporary appointment was done within the quota against vacancy of 1992 and 1994, hence those temporary appointment done against the quota, cannot be made redundant by the proviso to Rule as in case appointment is done after inordinate delay for no fault on the part of the promotees, they cannot be deprives of their rightful claim. It has been stated by the petitioners counsel that Rule 22 (2) and (3) are arbitrary and violative of Rule 20 itself which makes provision for appointment to meet out exigencies of service.

Litigation

19. Dispute between the promotees and direct recruits with regard to inter see seniority in the HJS cadre was firstly dealt with by Hon'ble Supreme Court at the instance of promotees in P. K. Dixit. v. State of Uttar Pradesh, reported in (1987) 4 SCC 621, wherein, Hon'bel Supreme Court has set aside the seniority list and directed to prepare fresh seniority list with following directions:

"(i) So far as the posts available on a particular dated i. e. May 10, 1974 are concerned the High Court will have to look into the matter afresh and decide the seniority in the light of the above position. But after the 1975 Rules came into force, the appointments to the Higher Judicial Service either on the basis of direct recruitment or on the basis of promotion must have been in accordance with these rules and it is expected that the probation, confirmation and seniority must have been looked into by the High Court strictly I n accordance with these Rules.

(ii) Under Rule 22 (3) appointment to temporary vacancies shall be made only from the Nyayik Sewa and as and when a substantive vacancy arises and the procedure for selection is to be followed, the officers who were appointed to fill in the temporary posts should be considered first and appointed on probation, if found fit. When appointment under Rule 22 is contemplated in the service of substantive vacancies, it may be both temporary or permanent but the vacancy must be in the cadre. A person could only be confirmed when a permanent post is available for him.

(iii) If a person is appointed to officiate in the Higher Judicial Service his case for confirmation normally will be considered within three years and either he will be confirmed or will be reverted. The High Court must examine the case of a promotee officer within three years and decide whether the officer deserves to be confirmed or deserves to be reverted. It is with this view that Rule 23 provides that period of probation shall not ordinarily exceed three years and Rule 26 provides that in case of promotee officer's continuous officiation even if it is for more than three years, only three years will be counted for purpose of seniority. This itself contemplates that such an occasion shall not arise when a person may be officiating for more than three years and still his case has not been considered for confirmation. "

20. In the case of P. K. Dixit (supra), tentative seniority list dated 11. 2. 1988 was issued and objections were invited. A committee of High Court consisting of Hon'ble five Judges had prepared final seniority list issued on 25. 8. 1988. Feeling aggrieved with the final seniority list, promotee Sri O. P. Garg and 4 others filed writ petition in the Hon'ble Supreme Court where P. K. Dixit was intervener. The direct recruits also filed writ petition challenging the final seniority list. Hon'ble Supreme Court by the judgment and order dated 23. 4. 1991, reported in 1991 (Supp) 2 SCC 51 (O. P. Garg. v. State of U. P. and others), had allowed the petition directing to decide the seniority afresh with the observation that High Court has failed to deal with the directions issued by Hon'ble Supreme court in the case of P. K. Dixit's case (supra). Their lordship had set aside the seniority list dated 25. 8. 1988 with direction to High Court to prepare and circulate a fresh seniority list inviting objections and thereafter finalise the seniority list. The observation and

direction of Hon'ble Supreme Court is reproduced as under:-

"32. When temporary posts under rule 4(4) of the 1975 Rule are created as addition to the cadre we see no justification to deny the direct recruits their share of the quota as provided under rule 6 of the said rules. Rules 5 of the 1975 rules specifically lays down that recruitment to the service shall be made from three sources including the direct recruits. Rule 6 fixes the quota for various sources of recruitment to the service and allocates 15 per cent of the posts in the service to the direct recruits. Rules 5 and 6 read with Rule 22(2) provide for appointments to the service in accordance with quota. These rules have to be read homogeneously and as a part of the same scheme. The service having comprised of three sources including the direct recruitment there is no justification to deprive the direct recruits of their share in the temporary posts in the service. Unless the direct recruits are given their due quota in the temporary posts the seniority rule cannot operate equitably. We see no justification whatsoever in having rule 22(3) and 22(4) of the 1975 rules which deprive one of the sources of recruitment the benefit of appointment to the temporary posts. The rules on the face of it are discriminatory. There is no nexus with the object sought to be achieved by framing the abovesaid rules. We, therefore, strike down rules 22(3) and 22(4) of the 1975 rules being discriminatory and violative of Articles 14 and 16 of the Constitution of India. We, however, direct that the appointments already made under these rules [22(3) and 22(4)] shall not be invalidated on this ground. We further direct that while selecting candidates under rule 18 the Committee shall prepare a merit list of candidates twice the number of vacancies and the said list shall remain operative till the next recruitment. We further direct that the appointments under rules 22(1) and 22(2) of the Rules shall be made to permanent as well as temporary posts from all the three sources in accordance with the quota provided under the 1975 rules.

33. Before parting with the judgment we make it clear that the findings and observations in Dixit-case to the extent those are contrary to this judgment, shall be deemed to have been over-ruled.

34. We allow the writ petitions and the Civil Miscellaneous petition, quash the final seniority-list dated August 25, 1988 and direct the High Court to prepare, circulate,

invite, objections and finalise the seniority list of the service in the light of the findings given and the observations made by us in this judgment. We reiterate our findings hereunder:

(1) All the 236 promotee officers against 236 posts (229 permanent plus 7 temporary) as Additional District and Sessions Judges on April 5, 1975 shall be deemed to be existing members of the Service as constituted under the 1975 rules and they shall en bloc senior to all other officers appointed to the service thereafter from three sources in accordance with their quota under the 1975 rules.

(2) We strike-down (first proviso to rule 26(1) of the 1975 rules and direct that the continuous officiation/ service by a promotee appointed under the Rules shall be counted for determining his seniority from the date when a substantive vacancy in permanent or temporary post is made available in his quota under the 1975 rules.

(3) We also strike-down rules 22(3) and 22(4) of the 1975 rules but the appointments already made under these rules shall not be invalidated. We further direct that while selecting candidates under rule 18 of the said Rule the committee shall prepare a merit of candidates twice the number of vacancies and the said list shall remain operative till the next recruitment. We further direct that the appointments under rules 22(1) and 22(2) of the 1975 rules shall be made to permanent as well as temporary posts from all the three sources in accordance with the quota provided under the said rules. "

21. In pursuance of the judgment of Honble Supreme Court in the case of O. P. Garg, (supra), High Court has calculated vacancies after considering different quota for recruitment and promotion with regard to different period. The manner in which the High Court has calculated the seniority of direct recruits and promotees was again the subject matter of dispute before the Hon'ble Supreme Court in the case reported in (2001) 10 SCC 237 (Srikant Tripathi & others. v. State of U. P. & others). In the case of Srikant Tripathi (supra), their lordship has issued following directions:

"(1) Appointments already made to the Higher Judicial Service, whether by direct recruitment or by promotion, need not be annulled and shall be continued.

(2)With effect from 1988 recruitment and in all subsequent recruitments which are the subject matter of challenge before us, the High Court shall determine the number of vacancies available as on the relevant year of recruitment in terms of Rule 8, as already explained by us and then, allocate the percentage to different sources of recruitment, contained in Rule 6, and after such determination is made, then find out whether the appointments of direct recruits already made for that recruitment year are in excess of the quota or within the quota. If it is found that any appointment has been made in excess of the quota, then the said appointee would be allowed to continue, but his or her seniority will have to be reckoned only when he or she is adjusted in the next recruitment.

(3)If in each recruitment year, posts were available in the quota of promotees and promotion has not been made, even though selection had been made under Rule 20, then the legitimate right of the promotees cannot be denied and promotion must be made with effect from the date they should have been appointed.

(4)This exercise has to be made for the recruitment of 1988 as well as for each subsequent recruitment that has been made.

(5)Since the determination under Rule 8 is being made now, pursuant to the directions of this Court, in respect of past recruitment years for which recruitment has been made, the expression "vacancies likely to occur" loses its importance and determination has to be made, on the basis of the actual vacancies available in any of such recruitment year.

(6) So far as the recruitment of 1998 is concerned, advertisements having been issued for 38 vacancies being filled up by direct recruitment and the process of selection being already over, but no appointment having been made, we think it appropriate to direct that the appointment of the selected candidates may be made against the quota available to direct recruits calculated in accordance with the Rules in the light of our decision.

(7) For all future appointments, the High Court must take steps to fill the vacancies of every recruitment year during that year itself. The High Court must determine the vacancies not only on the basis of the actual vacancies on the date of such determination but also take into account probable vacancies by reason of superannuation of officers in the next two years from that date. Once the vacancies are so determined, the percentage of the vacancies available for recruitment by direct recruitment and by promotion must be fixed and steps taken for filling up the same expeditiously. The number of vacancies available for the direct recruits quota must be advertised without any variation clause. The Select List prepared both for direct recruits as well as for promotees prepared by the High Court will be operative only till the next recruitment commences with the fixation of the vacancies for the next recruitment year. "

22. The Administrative Committee of the High Court in pursuance of the order of Chief Justice, constituted a three-members sub-committee to examine the judgment of Hon'ble Supreme Court in the case of Srikant Tripathi (supra) and submitted a report dated 24. 8. 2002 after determining the actual number of vacancies available for the year 1988, 1990, 1992, 1994 and 1998 (initiated in 2000) and the actual recruitment made.

23. The report of the committee was accepted by the Full Court. However, promotees were aggrieved from the report on the ground that calculation made by the sub-committee and conclusion arrived at by it, that actual number of direct recruits made for the respective year, was not in excess of quota available for

direct recruits, were erroneous. According to promotees the post available in the quota of promotees (Nyayik Sewa Officers) was 475 in 1998 recruits and not 334. The promotees also disputed the finding that 38 vacancies are available for direct recruits in 1998. The U. P. Higher Judicial Service Association filed W. P. No. 316 of 2004. It was allowed by a Division Bench of this Court by judgment and order dated 25. 8. 2004 whereby, the resolution of Full Court dated 1. 2. 2004 was quashed accepting the recommendations of three-member committee dated 24. 8. 2002 and directed for fresh exercise. The Division Bench of High Court while allowing writ petition, issued following guidelines:

(1)The number of the officers of Nyayik Sewa and Judicial Service who were already promoted and appointed against temporary posts under Rule 22(3) or 22(4) of the Rules and whose appointments have been protected in O P Garg would be taken into consideration and the number of vacancies equal to the number of such officers shall be excluded from computation.

(2)While applying the ratio of judgment in O P Garg and distributing temporary as well as permanent vacancies, allocation of 15% vacancies of the quota of direct recruits under rule 6 of the Rules, has further to be subject to ceiling of 15% of the permanent strength of service, till the amendment in the rules came into effect i. e. 25th February, 1996.

(3)While making an exercise to find out (in accordance with direction no. 2) as to whether the direct recruits taken into service are in excess of the quota or not, simultaneous exercise has to be done for compliance of direction no. 3 in S. K. Tripathi and vacancies of the quota of promotees shall be deemed to have been filled up from the date they are entitled to promotion.

(4)Thirty one posts of the service which have been transferred to Uttaranchal with effect from 30. 9. 2001 shall be excluded while determining the strength of the service in order to work out 15% of the quota of direct recruits.

(5)Out of 13 unnoticed vacancies, found by the office in the year 1988 only two vacancies equal to 15% of the quota of direct recruits be given to them instead of adjusting five appointments en bloc and again giving one out of eight vacancies to

them applying 15% quota rule.

(6)The second proviso to Rule 6 be also given effect to as and when the occasion arises. "

24. Feeling aggrieved with the aforesaid judgment of this Hon'ble Court, the direct recruits and promotees as well as selectees of U. P. Higher Judicial Service Examination, 2000, approached the Hon'ble Supreme Court. Their lordships of Hon'ble Supreme Court had set aside the direction No. 1 and 2 of the Division Bench Judgment of this Court (supra) and restricted the direction No. 3 to the extent of the case of Srikant Tripathi (supra). However, maintained other directions vide judgment dated 13. 9. 2010. in Civil Appeal No. 1312 of 2005 (Ashok Pal Singh & others. v. U. P. Judicial Services Association & others) and other connected appeals.

25. While deciding the case of Ashok Pal Singh (supra), Hon'ble Supreme Court observed that Rule only provides embargo that under no circumstances direct recruit would exceed 15% of cadre strength. Rule does not compel the High Court to recruit 15% vacancy by direct recruit at every recruitment year. Hon'ble Supreme Court observed that first proviso of Rule 8 (2) ensures that the shortfall in 15% quota for direct recruits in any recruitment does not get permanently converted to promotee quota, by providing that the shortfall shall be made good at the next recruitment. The word "does not in any case exceed 15%" are used to further ensure that while making good the shortfall of direct recruits at the next recruitment, the direct recruits do not encroach upon the quota of promotees. Their lordship held that no direct recruit can claim seniority earlier to the date of attending the service. Though the quota of direct recruit is fixed but there is flexibility in fixing vacancies to fill up direct recruitment and vacancies to be filled up by promotions. High Court may make adjustment but in any case, direct recruitment should not exceed 15% of total strength of service. It shall be appropriate to reproduce relevant portion from the case of Ashok Pal Singh (supra) as under:

"20. Rule 8 clarifies that direct recruits are entitled to 15% quota not only in the vacancies to be filled, but also 15% in the strength of the service. The Rules also make it clear that when a shortfall in a particular recruitment is made up at the next recruitment, there is no question of the direct recruits appointed to the shortfall vacancies claiming seniority over the promotees who filled the shortfall post of direct recruits at the previous recruitment. Though the shortfall is made good at the next recruitment, the question of seniority will be governed by Rule 26. No direct recruit at a subsequent recruitment can claim that as he is being appointed against a direct recruitment vacancy of previous recruitment, his seniority should not be reckoned from any date earlier to the date of his joining the service.

21. Thus though the quota of direct recruits is fixed, there is flexibility in fixing the vacancies to be filled by direct recruitment and vacancies to be filled by promotion. The High Court can make adjustments in fixing the number of officers to be appointed by promotion and direct recruitment as shown in Rule 8(2) and the provisos thereto ensuring that the number of direct recruits does not exceed 15% of the total strength of the service. "

26. The effect of case of Srikant Tripathi (supra) has been dealt with in para-29 and the finding has been recorded in para 31 of the judgment of Ashok Pal Singh (supra) which are reproduced as under:

29. We may illustrate the effect of the directions in Srikant Tripathi with reference to the figures arrived at in the Report of the Sub-Committee, abstract of which is given in the Table in paragraph 6 above (by assuming that the figures specified are correct). For 1988 recruitment, the vacancies are shown as 314, the actual recruitment is shown as 24+3 by direct recruitment and 191 by promotion and

the carried forward unfilled vacancies as 96. If there were 314 vacancies and what is filled by direct recruitment was 27, the remaining 287 vacancies should be filled up by promotions instead of 191 having regard to Rule 8(2). There is no question of any vacancies being carried forward for 1990 recruitment, unless sufficient numbers of candidates are not available for filling the posts even by promotion also. Therefore the vacancies to be filled in 1990 (with the expected vacancies up to 31. 12. 1992) should be treated as only 44 of which promotees' share would be 37 and share of direct recruits would be 7. As only 5 were appointed by direct recruitment, the remaining 39 ought to be filled by promotion. In regard to 1998 recruitment, if 15% of strength of the service is 120 and the number of direct recruits actually working were only 82, there is nothing wrong in directly recruiting 38 out of the actual vacancies of 176. We have given these examples with reference to the figures given by the Sub-Committee in its Report and it should not be assumed that the figures given by the sub-committee have been accepted by us to be correct. In fact the figures may have to be re-worked with reference to the other directions of the High Court which have been upheld by us. Be that as it may.

CONCLUSION

30. In view of our aforesaid findings, we allow these appeals in part as follows :

(i) Direction Nos. (1) and (2) in para 55 of the impugned order dated 25. 8. 2004 are set aside;

(ii) Direction No. (3) in para 55 of the impugned order dated 25. 8. 2004 is restricted to reiteration of direction No. 3 issued in *Srikant Tripathi* (2001 (10) SCC 237); and

(iii) Direction Nos. (4), (5) and (6) in the impugned order dated 25. 8. 2004 are upheld.

(iv) The consequential exercise directed by the High Court should be restricted to the directions which have been upheld.

None of the appointments already made to the Higher Judicial Service, whether by direct recruitment or by promotion, shall be annulled, but shall be continued, even if the appointment is found to be in excess of the quota, subject to the condition that the seniority of such excess appointee will be reckoned from the date on which he becomes entitled to be adjusted at the subsequent recruitment/s. Any elevation to the High Court on the basis of seniority already given shall also not be affected.

We request the High Court to give a quietus to the long-drawn dispute, by giving effect to direction nos. (4) to (6) of the impugned order and direction no. (3) in Srikant Tripathi, without any delay.

All pending applications stand disposed of. "

27. The controversy in question and argument advanced by the parties counsel should be looked into subject to aforesaid pronouncement of Hon'ble Supreme Court dealing with the case of promotees and direct recruits.

Prospectivity of New Rules

28. The question cropped up is with regard to reckoning the seniority of the petitioners as well as similarly situated persons. In case, their seniority is reckoned under old Rule, then they may be entitled for counting seniority from their original appointment on temporary basis in pursuance of the order passed in the year 1996.

29. A perusal of amended Rules notified on 15. 3. 1996 in pursuance of powers conferred by Article 309 read with 233 of the Constitution of India, shows that it has been made effective with immediate effect.

30. Hon'ble Supreme Court in the case reported in 1994 Supp (1) SCC 44 (K Narayanan and others. v. State of Karnataka and others), observed that Rules operate prospectively. Retrospectivity is an exception. Relevant portion of para 7 of aforesaid judgment is reproduced as under:

"7. Rules operate prospectively. Retrospectivity is an exception. Even where the statute permits framing of rule with retrospective effect the exercise of power must not operate discriminately or in violation of any constitutional right so as to affect vested right. The rule-making authority should not be permitted normally to act in the part. The impugned rule made in 1985 permitting appointment by transfer and making it operative from 1976 subject to availability of vacancy in effect results in appointing a Junior Engineer in 1986 with effect from 1976. Retrospectivity of the rules is a camouflage for appointment of Junior Engineers from a back date. In our opinion the rule operates viciously against all those Assistant Engineers who were appointed between 1976 to 1985. In Ex-Capt. K. C. Arora. v. State of Haryana and P. D. Aggarwal v. State of U. P. , it was held b this Court that the President or Governor cannot make such retrospective rules under Article 309 of the Constitution as contravene Articles 14, 16 or 311 and affect vested right of an employee. Even in B. S. Yadav. vs. State of Haryana where the power to frame rules retrospectively was upheld it was observed: (SCC p 557, para 76)

"Since the Governor exercises a legislative power under the proviso to Article 309 of the constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the date of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case. "

Their lordship further observed in para 7 of the aforesaid judgment that in case retrospective rule affects vested rights of an employee to disturb the system, it will be violative of Articles 14 and 16, then such rule may be struck down.

31. The aforesaid proposition has been reiterated by the Hon'ble Supreme court in the case reported in (2007) 10 SCC 137 (State of T. N. v. Seshachalam), (2008) 3 SCC 641 (A. Manoharan and others. v. Union of India and others); (1997) 10 SCC 419 (State of Rajasthan. v. R. Dayal and others);

32. In AIR 1972 SC 1556 (State of Haryana. v. Shamsher Jang Shukla), their lordship Hon'ble Supreme Court held that employees cannot be deprived of their rights available under Rules by administrative instructions. The Government is not competent to alter, by means of executive instructions, the condition of services prescribed under Rules. Same proposition has been reiterated in the case of 1993 Supp (2) SCC 415, (Himachal Pradesh State of Electricity Board v. Somdutt Uppal and another).

33. In the case of Y. V. Rangaih (supra) Hon'ble Supreme Court held that with regard to vacancies occurred prior to amended Rules, would be governed by old Rules and not by amended Rules. Relevant portion of para 9 of aforesaid judgment, is reproduced as under:

"9. . . . The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade-II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules. "

34. The aforesaid proposition has been reiterated by Hon'ble Supreme Court in the case of N. T. Devin Katti, Nirmal Chandra Bhattacharjee, and B. L. Gupta (supra).

35. In the case of R. Dayal (supra), apart from holding the prospective application of old Rule, their lordships of Hon'ble Supreme Court held that vacancies which occurred prior to amendment of Rules, would be governed by original Rules and not by the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the rules are required to be filled up in accordance with the law existing as on the date when the vacancies arose (para 8).

36. In the case of A. Manoharan and others (supra), again, the long standing settled proposition of law has been reiterated by Hon'ble Supreme Court holding that vacancy existing prior to amendment of Rules, should be filled up under the old Rules. To reproduce para 25 and 26 as under:

"25. Furthermore, the Regulations have been amended only with effect from 11. 8. 2004. It would have a prospective effect. It cannot be applied retrospectively. Any vacancy which has arisen prior to coming into force of the said amended Regulations must be filled up in terms of the law as was existing prior thereto. (State of Rajasthan v. R. Dayal, SCC para 8.)

26. The High Court, therefore, committed a serious error in issuing the impugned directions. It also committed a serious error in holding that the review petition was not maintainable at the instance of the appellants. "

37. Admittedly, the quota of promotees of the year 1992-94 was not filled up within the calendar year or within a period of three years. By the order dated 27. 5. 1996, the petitioners were given temporary promotion in HJS cadre. In case regular promotions would have been done to fill up the vacancies of 1992-94, the petitioners would have been entitled for benefit available under old Rules.

38. Now, by catena of judgments, their lordships of Hon'ble Supreme Court, settled that right to be considered for promotion, is fundamental right vide, Raghunath Prasad Singh v. Secretary, Home (Police Department), Government of Bihar & Ors reported in A. I. R. 1988 SC, 1033; Council of Scientific & Industrial Research & Anr. Vs K. G. S. Bhatt & Anr. reported in AIR 1989 SC 1972; 2000 (7) SCC 210 Delhi Jal Board vs. Mahinder Singh; 1998 (5) SCC 87, Secretary cum Chief Engineer v. Hari Om Sharma; T. R. Kothandaraman & Ors v. Tamil Nadu Water Supply and Drainage Board & Ors reported in (1994) 6 SCC 282.

39. In the case reported in (2010) 1 SCC 417 (Amarjit Singh and others. v. Devi Ratan and others), their lordships held that persons promoted against the vacancies of earlier recruitment year, were to ranked senior to those promoted against the vacancies of subsequent recruitment year.

40. In the case reported in (2010) 4 SCC 290 (Union of India and another. v. Hemraj Singh Chauhan and others), Hon'ble Supreme Court ruled that right to be considered for promotional avenues in time, is necessary. In a welfare state right of an eligible employee to be considered for promotion is virtually a part of the fundamental right under Article 16 of the Constitution of India. The delay deprives an employee to be considered fairly. Their lordships while expanding proposition with regard to right to be considered as fundamental right, observed that right of eligible employee to be considered for promotion, is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution of India. The guarantee flows from Article 14. Relevant portion of paras 36 and 37 of the aforesaid judgment, is reproduced as under:

"36. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution.

37. In Govt. Branch Press v. D. B. Belliappa a three-Judge Bench of this Court in relation to service dispute, may be in a different context, held that the essence of guarantee epitomised under Articles 14 and 16 is "fairness founded on reasons"

(SCC p. 486, para 24). "

Since Hon'ble Supreme Court has correlated the promotional avenues with fundamental rights conferred by Articles 14 and 16, the right of promotees under old Rules with regard to vacancies existing prior to 15. 3. 1996, shall not extinguish.

41. In view of the above, the right of the promotees with regard to seniority is not only secured under the fundamental rights to be considered for promotion but also because of the fact that promotional avenues are civil rights hence an employee cannot be deprived from it unless barred by statutory provisions.

42. Needless to say that in the case of O. P. Garg (supra), Hon'ble Supreme Court had extended the benefit of unamended Rules while deciding the rights of promotees and direct recruits on the basis of old Rules.

43. As observed, vacancies of the year 1992-94 for which the petitioners were entitled for selection under unamended Rules, in view of the aforesaid proposition of law, the petitioners and other similarly situated persons are entitled to be considered for promotion and consequential seniority under the old Rules.

Whether Officiating Service of the

Promotees should be counted?

44. As observed (supra), all the vacancies arisen prior to amendment of Rules i. e. , 15. 3. 1996, should be filled up under old Rules. Meaning thereby, judicial officers eligible within quota, shall be entitled for benefit of unamended Rules with regard to reckoning of their service for the purpose of seniority. Rule 26 of unamended Rules has been considered by Hon'ble Supreme Court in the case of O. P. Garg (supra), which provides that in the case of promotee officers, the period of officiation in service, shall be counted for the purpose of determination of seniority immediately preceding the date of confirmation.

45. The petitioners were promoted against the vacancies of 1992-94, in pursuance of powers conferred by sub-rule (3) of Rule 22. Later on, regular appointments

were done along with direct recruitment on 5. 12. 1998.

In case, their case is considered under new Rule, then they shall be entitled for counting of their service rendered on officiating basis from 27. 5. 1996. Though the appointment order was issued in pursuance of sub-rule (3) of Rule 23 of amended Rules but since it was issued against the vacancies of 1992-94, the provisions contained in Rule 26 of unamended Rules shall be attracted. Apart from this, their lordships of Hon'ble Supreme Court in the case of O. P. Garg (supra) had extended the seniority with regard to promotees after counting officiating service. Accordingly, the petitioners seem to be entitled for seniority from 27. 5. 1996.

46. We have already discussed various pronouncement of Hon'ble Supreme court with regard to applicability of old Rules for old vacancies call for no repetition.

47. In the case of S. B. Patwardhan (supra), their lordship held that seniority cannot be made to depend on the fortuitous circumstances of confirmation of promotees. Their lordships further held that quota under Rules, applied for recruitment, cannot be extended for the purposes of confirmation. Their lordships held that where all factors being equal, continuous officiation ought to receive due recognition in determining Rules of seniority.

48. In the case of V. B. Badami (supra), Hon'ble Supreme Court held that a promotee temporarily appointed against direct recruitment vacancy, shall be entitled for seniority as and when the vacancies within the quota, arose and not earlier to it. The persons appointed in excess to quota, have to be accommodated in promotional vacancies during subsequent period.

However, in the present case, admittedly, the petitioners were promoted against the substantive vacancies of the year 1992-1994.

49. The case of O. P. Singla (supra) relates to issue between promotees and direct recruits in Delhi Higher Judicial Service. Their lordships of Hon'ble Supreme Court has re-affirmed the dictum of the case of S. B. Patwardhan (supra) and observed that where some of the promotees were appointed on temporary basis earlier to regular appointment constituting a different class and in case

appointment is done within respective quota, the date of officiation may be relevant factor. To reproduce relevant portion of para 34 as under:

"34. . . . Since the rule of 'quota and rota' ceases to apply when appointments are made under Rr. 16 and 17, the seniority of direct recruits and promotees appointed under those Rules must be determined according to the dates on which direct recruits were appointed to their respective posts and the dates from which the promotees have been officiating continuously either in temporary posts created in the Service or in substantive vacancies to which they were appointed in a temporary capacity. "

50. In the case of Director Recruit Class II Engineering Officers' Association (supra), it has been held that even temporary Government servant may be entitled for counting of their service in case the appointments are done in accordance with Rules and against the regular vacancies. The case of O. P. Garg (supra) relates to dispute between the promotees and direct recruits of Judicial Service. Hon'ble Supreme Court had considered the unamended Rules and formulated the questions (supra). Hon'ble Supreme Court held that seniority shall be counted from the date when a substantive vacancy against permanent and temporary post is available within quota but the seniority of direct recruitment shall be determined from the date of joining in service. It has been held that seniority in service is consequential and dependent on appointment. Relevant portion of para 27 and 29 of the O. P. Garg's case (supra) are reproduced as under:

"27. Keeping in view the scheme of the 1975 Rules, we are of the view that first proviso to Rule 26 (1) (a) of the 1975 Rules which links the seniority with the date of confirmation is on the face of it arbitrary and as such violative of Article 16 of the Constitution of India. Since the recruitment to the service is from three sources the existence of a vacancy either permanent or temporary is the sine qua non for claiming benefit of continuous length of service towards seniority. The period of officiation/service which is not against a substantive vacancy (permanent or temporary) cannot be counted towards seniority. While striking down first proviso to Rule 26 (1) (a) of the 1975 Rules we hold that the continuous officiation/service by a promotee shall be counted for determining his seniority only from the date

when a substantive vacancy against a permanent or temporary post is made available in his quota under the 1974 rules.

29. Recruitment to the service under the 1975 Rules is from three sources and is based on quota as provided therein. The cadre consists of permanent as well as temporary posts. We have already interpreted the seniority rule to mean that the seniority of the direct recruit is to be determined from the date of his joining the service and that of promotee on the basis of continuous officiation/service from the date when a vacancy whether permanent or temporary, becomes available in his quota. With these characteristics of the service it is obligatory that there should be equality of opportunity to enter the service for all the three sources of recruitment. The seniority in the service is consequential and dependent on appointment. If the recruitment rule gives unjustifiable preference to one source of recruitment the seniority rule is bound to become unworkable. The object of having recruitment from different sources is to have a blended service to create healthy competition and in the process achieve efficiency. If one of the sources of recruitment is dealt with unevenly under the Service Rules the said objective cannot be fulfilled. "

51. In V. Bhasker Rao (supra), their lordships Hon'ble Supreme Court held that under Rules the seniority in both the categories i. e. , temporary and permanent, should be counted on the basis of length in service including service against temporary basis (para 11 and 12).

The aforesaid proposition, has been reiterated in U. P. Secretariat, U. P. Association's case (supra).

52. In the case of Keshav Deo (supra), where the ad hoc service of promotees Assistant Engineers was counted and set aside by the High Court, Hon'ble Supreme Court has shows its deep concern with the state of affairs where State has taken a different view before the Apex Court. Their lordships observed as under:

"27. We have no hesitation to hold that the impugned seniority list of 1995 prepared by the Government pursuant to the directions contained in D. N. Saksena and V. K. Yadav is in accordance with the Rules and cannot be interfered

with on the ground that the promotees have been given the benefit of their service in officiating capacity. The question is answered in favour of the appellants. "

In the case of Rudra Kumar Sain (*supra*), decided by Constitution bench of Hon'ble Supreme Court, their lordships observed that in case promotees officiate within their quota in accordance with Rules, then such appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". To reproduce relevant portion of para 19 and 20 as under:

"19. The meaning to be assigned to these terms while interpreting provisions of a Service Rule will depend on the provisions of that Rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter-se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as ad hoc or stop-gap. If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as fortuitous in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a stop-gap arrangement and appointment in the post as ad hoc appointment. It is not possible to lay down any straight-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stop-gap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the question of inter se seniority of officers in the cadre.

20. In the Service Jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such appointment cannot be held to be stop-gap or fortuitous or purely ad hoc. In this view of the matter, the reasoning and basis on which, the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be fortuitous/ad hoc/stop-gap are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous. "

53. In the case reported in (2008) 10 SCC 271 (B. S. Mathur and another. v. Union of India and others), where it was founded that roster could not be implemented in view of the case of R. K. Sabharwal (supra), their lordships of Hon'ble Supreme Court observed that till fortifying roster considered, principle of continuous length of service i. e. , the date of appointment should be applied for determining inter se seniority of officers of Delhi Judicial Service. In view of the above, the promotees may be given seniority from the date of temporary appointment not only in terms of unamended Rule 23 but also keeping in view their continuous officiation on the post since 1996 and direct recruits be given seniority from the date of their joining in service.

54. Accordingly, placement of Direct Recruit in en-block, over and above the promotees appointment against the vacancies of 1992-94 in the impugned seniority list suffers from substantial illegality and is against the settled proposition of law.

Quota and Rota

55. In service jurisprudence, the provisions with regard to quota of promotees and direct recruits are meant to extend due right to promotees and direct recruits with aim not only to strengthen the efficiency of service but also to balance the old and new incumbents to serve the people with their experience and knowledge to meet out exigency of service. The Government for needs of public service and efficient administration, promotes persons in the higher cadre by making temporary and ad hoc promotions. In case the promotees are not given due benefit of their service

rendered on ad hoc or temporary basis subject to promotion done within their quota, it may have demoralising effect. Needless to say, a promotee discharging duty against the vacancy, acquires certain rights and experience and the society should not be deprived of such experience and knowledge. On the other hand, direct recruits acquire experience only from the date of resumption on duty of a post. Accordingly, direct recruits cannot secure a march over and above the promotees anterior to their date of resumption of duty. This situation and contingency has been noted by Hon'ble Supreme Court in the leading judgment reported in (1983) 3 SCC 6012 (A. Janardhana. v. Union of India and others). To reproduce relevant portion as under:

"38. Shorn of all service jurisprudence jargon let us bluntly notice the situation that a primary school student when the promotee was a member of the service, barged in and claimed and got seniority over and promotee. If this has not a demoralising effect on service we fail to see what other inequitous approach would be more damaging. It is therefore, time to clearly initiate a proposition that a direct recruit who comes into service after the promotee was already unconditionally and without reservation promoted and whose promotion is not shown to be invalid or illegal according to relevant statutory or non-statutory rules should not be permitted by any principle of seniority to score a march over a promotee because that itself being arbitrary would be violative of Articles 14 and 16. "

56. In AIR 1986 SC 1859 (Shitala Prasad Shukla. v. State of U. P. and others, their lordships of Hon'ble Supreme Court reiterated aforesaid principle and held that late comers to the regular stream cannot steal a march over the early arrivals in the regular queue (para 9).

57. In AIR 1991 SC 1244 (State of Bihar and others. v. Sri Akhouri Sachindra Nath and others, their lordships of Hon'ble Supreme Court held that no person can be promoted with retrospective effect from a date when he was not born in cadre so as to adversely affect others. Seniority amongst members of same grade should be reckoned from the date of their initial entry into service. Meaning thereby, promotees may be given seniority from the date of their entry into service and within their respective quota available for the purpose.

58. In R. K. Sabharwal (supra), the issue before the Constitution Bench of Hon'ble Supreme Court, was to decide as to which one shall prevail between "quota" and "rota" in the event of conflict.

Their lordship held that where total number of post in the cadre can be filled up by operation of roster, then the running account shall operate only till quota is satisfied and not thereafter. The expression, "post" and "vacancies" used in the executive instructions providing for reservations, are rather problematical. The word, "post" means an appointment, job, office or employment; a position to which a person is appointed. "Vacancy" means an unoccupied post or office. A plain reading of the two expressions makes it clear that there must be a "post" in existence to enable the "vacancy" to occur. Right to be considered for appointment can only be claimed in respect of a post in a cadre. Their lordships further observed that when the State Government provides certain reservation to the SC/ST/OBC, (in the present case, the promotees and direct recruits), no candidate can be appointed to other slot. The roster is implemented in the form of running account from year to year. The purpose of running account is to ensure appointment in terms of reservation. Their lordship held that numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. To reproduce relevant portion of para 5 of R. K. Sabharwal case as under:

"5. . . . The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. "

59. In view of the R. K. Sabharwal case (supra), while preparing roster, the promotees and direct recruits shall be entitled for placement against the vacancy of respective year. In case no direct recruitment is done in a particular year and

promotees are available, then they shall be entitled to be placed en block within their quota. Subsequently appointed direct recruits may not be entitled to form roster with earlier appointed promotees since they have not born in service in the year concerned in view of the case of A. Janardhana (supra).

60. The Constitution Bench of Hon'ble Supreme Court in the case reported in (1999) 7 SCC 209 (Ajit Singh and others (II). v. State of Punjab and others), held that the employment includes promotional avenues and right to be considered for promotion is a fundamental right. While applying roster, a person cannot be promoted in excess to quota Their lordship held that in case promotion is made wrongly in excess to quota, then it shall be treated as ad promotion and such promotees shall be entitled for reckoning seniority from the year the vacancy is available. This apply to promotees and direct recruits both. To reproduce relevant portion as under:

"89. . . . Thus, while promotions in excess of roster made before 10. 2. 1995 are protected, such promotees cannot claim seniority. Seniority in the promotional cadre of such excess roster-point promotees shall have to be reviewed after 10. 2. 1995 and will count only from the date on which they would have otherwise got normal promotion in any future vacancy arising I n a post previously occupied by a reserved candidate. That disposes of the "prospectivity" point in relation to Sabharwal. "

From Ajit Singh (supra), analogy may be drawn that while preparing roster, in case promotees join service earlier to direct recruits may be, on temporary post in a particular year within their quota then, they will not form roster with direct recruits of subsequent year who join service at later stage.

61. In (2006) 10 SCC 346 (Uttaranchal Forest Rangers' Assn. (District Recruit) and others. v. State of U. P. and others, Hon'ble Supreme Court ruled that seniority cannot be given from the date when the employee was not born in the cadre and protection given in excess of quota, should be treated as ad hoc. Hon'ble Supreme Court has re-affirmed aforesaid proposition, following earlier judgment reported in (2004) I SCC 245 (P. N. Premachandran. v. State of Kerala), where Hon'ble Supreme Court observed as under:

"We do not find any irregularity in the matter of grant to promote the respondents with effect from 1964 onwards. . . in view of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their part. It is also not disputed, that in ordinary course they were entitled to be promoted to the post of Assistant Director, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time, although on a temporary basis, but were qualified at the time when they were to be promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect.

Such exercise of power on the part of the State is not unknown in service jurisprudence. Even assuming that such a power did not exist in Rule 31 of the Rules, the same can be traced to Rule 39 of the Rules, as noted hereinbefore. "

Sometimes, it happens that quota of promotees are not filled up for years to come and appointment of direct recruits are also sometimes delayed. The direct recruits under the well settled proposition of law are entitled to claim seniority from the date of their resumption of duty or appointment. While preparing seniority list in case roster is applied on 1:1 basis between promotees and direct recruits and vacancies of promotees are of much earlier year then it creates anomaly and may amount to placement in the seniority list over and above the selectees of earlier year vacancies. To remove this anomaly R. K. Sabharwal case (supra) provides 40-point roster which has been affirmed by Hon'ble Supreme Court in All India Judges Association case (supra). Their lordship in the case of All India Judges Association (supra) has provided 40-point roster strictly keeping in view the quota of promotees and direct recruits. The observations made by Hon'ble Supreme Court in the case of All India Judges Association (supra) case in para 29, are reproduced as under:

"29. . . . The 40-point roster has been considered and approved by this Court in R. K. Sabharwal v. State of Punjab. One of the methods of avoiding any litigation and

bringing about certainty in this regard is by specifying quotas in relation to posts and not in relation to the vacancies. This is the basic principle on the basis of which the 40-point roster works. We direct the High Courts to suitably amend and promulgate seniority rules on the basis of the roster principle as approved by this Court in R. K. Sabharwal case as early as possible. We hope that as a result thereof there would be no further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the High Judicial Service has to be protected but the roster has to be evolved for the future. Appropriate rules and methods will be adopted by the High Courts and approved by the States, whenever necessary by 31. 3. 2003. "

62. In (2006) 6 SCC 673 (Arbinder Singh Bains. v. State of Punjab and others), Hon'ble Supreme Court held that where promotees and direct recruits are appointed on the same day, then there is no escape to determine the seniority in terms of rota prescribed under Rules.

63. In (2008) 3 SCC 331 (AFHQ/ISOs Sos (DP) Association and others. v. Union of India and others), Hon'ble Supreme Court relying upon earlier judgment in (2000) 7 SCC 561 (Suraj Parkash Gupta. v. State of J. & K.), held that direct recruits cannot claim appointment from the date of vacancy in quota before their selection. It has further been held that seniority is to be reckoned not from the date when the vacancy arose but from the date on which appointment is made to the post. While relying upon the case reported in (1977) 1 SCC 308 (N. K. Chauhan. v. State of Gujarat); A. Janardhana (supra), 1987 Supp SCC 763 (A. N. Pathak. v. Secy. To the Govt. , Ministry of Defence), and (2007) 1 SCC 683 (State of Uttaranchal. v. Dinesh Kumar Sharma), Hon'ble Supreme Court observed that direct recruit can claim seniority only from the date of his appointment. He or she cannot claim seniority from the date when he was not born in service. It has further been held that slots cannot be kept reserved for direct recruits for respective appointments. Meaning thereby, while preparing roster, direct recruits cannot be clubbed together in slots with promotees who were promoted against the vacancy of earlier years.

64. In (2008) 7 SCC 728 (Balwant Singh Narwal and others. v. State of Haryana and others), the issue before the Apex Court was with regard to delayed appointment. The vacancy was of the year 1992-93. After making first 16 appointment on 2. 6. 1994, the process of appointment was halted due to intervening litigation and pending cases and recommenced on 26. 5. 2000, when the matter was finally decided by Hon'ble Supreme Court upholding the entire list of 30 candidates. Their lordships of Hon'ble Supreme Court approved the protection of seniority of all those persons who were appointed belatedly. Hon'ble Supreme Court relied upon its earlier judgment reported in (1998) 5 SCC 246 (Surendra Narain Singh. v. State of Bihar) whereby, candidates selected against the earlier vacancies were given seniority over and above subsequent appointees. (para 9).

65. Hon'ble Supreme Court in the case of B. S. Mathur (supra), had relied upon the directions issued in the All India Judges Association (supra) with regard to 40-point roster, as held in R. K. Sabharwal case (supra). Their lordship had provided 40-point roster keeping in view the reservation made for direct recruits and promotes within their respective quota. While directing to amend the Delhi High Judicial Service Rules, in consonance with the directions issued by the Hon'ble Supreme Court in All India Judges Association II (supra), provided that till Rules are amended, the principle of "continuous length of service" shall be applied to determine seniority of the officers of Delhi Higher Judicial Service.

In Delhi Higher Judicial Service, minimum 1/3 post, has been reserved for direct recruits. The claim of promotes was that appointment done even to temporary post/vacancies under Rule, is similarly substantive appointment to service and accordingly, incumbents appointed under Rules, are entitled to get seniority from the date of their appointment. (para 7). The promotees' have installed their rights on the basis of Apex Court judgment in O. P. Singla (supra). The 14 temporary posts were existing since 1986 against which, the promotes claimed their rights. The Rules were amended on 17. 3. 1987. The promotees claimed their benefit under the old Rules.

66. On administrative side, the majority view was that Rota Quota Rule for determining seniority is workable only if simultaneous recruitment is resorted to failing which they "break down". Since no simultaneous recruitments took place hence, there was need to search for an equitable and reasonable principle. The High Court took view that after amendment, the promotes contention with regard to equitable principle after amendment of Rules, the principles of continuous officiation, is not feasible hence, writ petition was dismissed. Their lordships of Hon'ble Supreme Court had granted seniority on the basis of continuous length of service from the date of appointment determining the inter se seniority of officers of Delhi Judicial Service. The aforesaid principle seems to have been reiterated by the Hon'ble Supreme Court in the case of Amarjit Singh Singh (supra), where persons appointed against vacancies of earlier year, were directed to be placed over the subsequent appointees.

67. In the present case, admittedly, the regular vacancies of promotes with regard to the year 1992-94 was filled up in the year 1996 in pursuance to which, the promotes resumed duty in the same year. Regular appointment of promotees and the direct recruits were done in the year 1998. Accordingly, there appears to be breakage of principle of "quota and rota". In case the appointments is not done within the same year, then roster of 1:1 basis shall make direct recruit senior to promotees appointed against the vacancy of earlier year (1992-94), which does not seem to be intention of legislature while providing roster system. The roster can very well apply in case the promotes and direct recruits are appointed in the same recruitment year against their respective vacancies but in case promotes are officiating on temporary post against their promotional post within their quota and join earlier to direct recruits, then seniority may not be prepared by applying the roster. Various pronouncements of Hon'ble Supreme Court (supra) are to remove such anomalies. That is why, their lordships of Hon'ble Supreme Court in the case of Judges Association (supra), directed to amend the Rules throughout the country with regard to promotes and direct recruits providing 40-point roster relying upon R. K. Sabharwal case (supra).

68. The law is very well settled that in the event of conflict between quota and rota, the quota shall prevail. Meaning thereby, under the garb of roster, subsequent

appointees cannot be given seniority over and above the promotees appointed within their quota against the vacancy of earlier year. The candidates selected and appointed against the vacancies of direct recruit may be for earlier vacancy year, the seniority shall be reckoned from the date of resumption of duty. Principle of quota and rota should be made applicable only in case the promotes and direct recruits are appointed in same recruitment year within their respective quota.

69. We have been informed that the Rules had been amended in 2007 and 40-point roster has been provided in the light of directions issued by the Hon'ble Supreme Court in the case of All India Judges Association (supra), to review the said anomaly. Accordingly, keeping in view the finding recorded (supra), the old vacancy should be filled up under old Rule and seniority should be determined accordingly and judgment of Hon'ble Supreme Court in the case of B. S. Mathur (supra), with regard to Delhi Higher Judicial Service matter (supra). The appellant and other similarly situated persons shall be entitled for seniority from the date of their initial appointment on temporary basis and the direct recruits shall be entitled for seniority from the date of joining the service.

Validity of Rules

70. Roster proving in the impugned seniority list suffers from substantial illegality from proving seniority to the direct recruit from the period when they were not born in service or anterior to the date of their appointment of joining of service.

71. While assailing the amended Rules, learned counsel for the petitioners submits that the amendment incorporated deprived the promotees from their right to claim seniority against the year of vacancy to whom they have been promoted.

72. The case of Sonal Vs himappa (supra), relates to Karnataka Administrative Service Recruitment Rules. While admitting the accepted principle of law i. e. , recruitment from two sources of service, the quota, may be applied fixing the limit of recruitment from two sources. Their lordships of Hon'ble Supreme Court observed as under:

"8. . . . We are of the opinion that having fixed the quota in service of their power under R. 4 between the two sources of recruitment there is no discretion left with the Government of India to alter that quota according to the exigencies of the situation or to deviate from the quota, in any particular year, at its own will and pleasure. As we have already indicated, the quota rule is linked up with the seniority rule and unless the quota rule is strictly observed in practice, it will be difficult to hold that the seniority rule i. e. , rule 1 (f) (iii) and (iv), is not unreasonable and does not offend Art. 16 of the Constitution.

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Two principles are established in the decision referred to. One is that quotas which are fixed are unalterable according to exigencies of situation. Quotas which are fixed can only be altered by fresh determination of quotas under the relevant rules. The other is that on the ground one group cannot claim the quota fixed for the other group either on the ground that the quotas are not filled up or on the ground that because there has been a number in excess of quota the same should be absorbed depriving the other group of quota.

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11. The scheme in force relating to the services for fixing inter se seniority takes into account the filling up of the vacancies in the service from the two sources on the basis of the quota and, therefore, fixation of inter se seniority in the Gradation List has to be worked out on the basis of quota. "

73. The principles flows from the case of Sonal (supra), has been affirmed by Constitution Bench of Hon'ble Supreme Court in R. K. Sabharwal case (supra). As observed, principle of quota and rota may be applied in case selection and appointment of direct recruits and promotees are done in the same recruitment year. In the event of belated promotion of promotees or selection of direct recruits and appointment thereon, shall amount to breakage of quota and rota system. In such situation, the only option would be to extend the date of seniority from the date of appointment/resumption of duty. While doing so, in case promotees are selected against the vacancies of earlier year, then in the seniority list, they shall

be placed over and above the direct recruits.

In case the principle is applied to promotees with regard to reckoning of seniority, then there appears to be no infirmity in the amended Rules. It is settled law that statutory provisions shall be deemed to be constitutionally valid unless established otherwise, vide JT 2008 (2) SC 639, Government of Andhra Pradesh and others v. Smt. P. Laxmi Devi,

74. Since by 2007 amendments done in the service Rules, in pursuance of the case of R. K. Sabharwal (supra) followed by All India Judges Association and others (supra;), the anomaly in the roster has been removed, hence while interpreting the impugned amendment particularly sub-Rule (2) of Rule 22, the principle of reading down may be applied.

75. In view of the above, we apply the principle of reading down and provide that persons selected against earlier year of vacancies shall be placed over and above the persons selected against later year of vacancy subject to rider that direct recruit shall be entitled for seniority from the date of joining the service. The roster of 1:1, may be applied only in case, the selection of direct recruits and promotees is done in the same recruitment.

76. Needless to say that the courts are not precluded to supply *causis omissus* in the statutory provisions in case a plain reading of the statute result into absurdity, anomaly and loss or injury to public exchequer or public at large.

In AIR 1959 SC 422 (at page 427, 428) *Viluswami Thevar versus G. Raja Nainar*, their Lordships of Hon'ble Supreme Court held that a construction which gives rise to anomalies should be avoided.

77. In AIR 1955 SC 830(p. 833) *Tirath Singh versus Bachittar Singh*, Hon'ble Supreme Court observed, to quote :

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the

meaning of the words, and even the structure of the sentence. "

Their Lordships have approved the interpretation of statute as done by Maxwell (11th Edn. Page 221).

78. Tirath Singh's case(supra) has been affirmed by the Hon'ble Supreme Court in State of Madhya Pradesh versus Azad Bharat Finance Co. AIR 1967 SC 276 (p. 278), Union of India versus Sankalchand AIR 1977 SC 2328 (pp. 2337, 2358, 2373, CIT versus National Taj Traders AIR 1980 SC 485 (p. 490), R. Rudraiah versus State of Karnataka AIR 1998 SC 1070, Molar Mal versus Kay Iron Works(P.) Limited AIR 2000 SC 1261, AIR 2002 SC 1334 (pp. 1340, 1341) Padmasundara Rao versus State of T. N. and Modern School versus Union of India AIR 2004 SC 2236 (p. 2257).

79. In AIR 1958 SC 341(p. 346) Central India Spinning, Weaving and Manufacturing Company Limited, Empress Mills, Nagpur versus Municipal Committee, Wardha while construing Section (66)¹ of the Central Provinces and Berar Municipalities Act, 1922 which authorized imposition of "a terminal tax on goods or animals imported into or exported from the limits of a municipality", their Lordships of Hon'ble supreme Court while reversing the judgment of High Court observed that the effect of construction of word, "import' or "export' in the manner insisted upon by the municipal committee would make railborne goods passing through a railway station within the limits of a municipality liable to the imposition of the tax on their arrival at the railway station or departure therefrom or both which would not only lead to inconvenience but confusion, and would also result in inordinate delays and unbearable burden on trade both inter-State and intra-State. Such an interpretation would lead to absurdity which according to rules of interpretation to be avoided.

80. Similarly in AIR 2002 SC 2004 (p. 2012) Rakesh Wadhawan versus Jagadamba Industrial Corporation, Hon'ble Supreme Court while interpreting Section 13(2)(i) of the East Punjab Urban Rent Restriction Act, 1949 held that the qualifying expression "assessed by the controller' in the proviso qualified also "the arrears of rent' and not merely "cost of application.

81. In (1990) 2 All ER 170 R. versus Registrar General, ex parte, Smith while holding that a prima facie absolute statutory obligation may be construed subject to an implied limitation that its performance can be refused on grounds of public policy, i. e. when the performance may give rise to a real risk of a serious crime.

82. In AIR 1993 SC 361 A. A. Hajee Muniuddin versus Indian Railways, their Lordships of Hon'ble Supreme Court in spite of the fact that under Railway Claims Tribunal Act, 1987, there is no specific mention of power under Order 33 to entertain claims of indigent persons ruled that the tribunal must be held to have the implied power of invoking the provisions of Order 33 of the Code.

83. However, in the words of LORD MOULTON, while construing a statute on the ground of hardship, injustice or absurdity, a great care should be taken. The argument ab inconvenient, LORD MOULTON observed requires to be used with great caution (1913)AC 107 Vacher & Sons versus London Society of Compositors.

84. In (1966)3 All ER 265 (page 268(PC) IRC versus Mutual Investment Co. while affirming the construction on the basis of absurdity, it has been observed that in case of ambiguity, that construction which better serves the ends of fairness and justice will be accepted, but otherwise it is for the Legislature in forming its policy to consider these elements.

85. It was Lord Denning, L. J. in his of quoted judgment, reported in (1949)2 All ER 155 , p. 164(CA) Seaford Court Estates Limited versus Asher had given his landmark verdict with regard to principle of reading down or supply of cassus omissus. . Denning L. J. Opined :

"When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can

and should iron out the creases. "

86. DENNIN, L. J. followed the aforesaid principle in another case reported in (1950)2 All ER 1226, p. 1236 *Magor & St. Mellons Rural District Council versus Newport Corporation* and observed, "We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis".

87. The observation of Denning L. J. was seriously criticized by House of Lords but Hon'ble Supreme Court in a case reported in 1977(4)SCC 193 *Bangalore Water Supply versus A. Rajappa* had approved the rule of construction as stated by Denning, L. J. while dealing with the definition of industry under the Industrial Disputes Act, 1947.

88. Special Bench of Hon'ble Supreme Court in a case reported in AIR 1955 SC 661 *Bengal Immunity Co. Limited versus State of Bihar and others*, while considering the mode of interpretation considered certain ingredients required to be taken into account with regard to statutory interpretations. One of the modes of interpretation propounded by Hon'ble Supreme Court is always to make such construction as shall suppress the mischief, and advance the remedy. Relevant portion is reproduced as under :

"22. It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case ; was decided that -

". for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered :-

1st. What was the common law before the making of the Act. ,

2nd. What was the mischief and defect for which the common law did not provide.

,

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Common wealth. , and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico".

89. Though in subsequent judgment reported in AIR 2002 SC 1334, p. 1340 Padmasundara Rao versus State of T. N. , a Constitution Bench of Hon'ble supreme Court observed that casus omissus cannot be supplied by the court except in the case of clear necessity but maintained the right of Court to do so in exceptional circumstances in the event of clear necessity and when reason for it is found in the four corners of the statute itself without any inference drawn for the purpose.

90. In (2005)3 SCC 551 Pratap Singh versus State of Jharkhand while interpreting Juvenile Justice Act, 1986, their Lordships applied the principle of reading down and held that being a beneficial legislation, interpretation should be done to achieve the object of the Act.

91. While referring the aforesaid case(supra) in interpretation of statutes by Dr. Vepa P. Sarathi, learned author observed as under :

"My respectful submission is that interpretation should always be to achieve the object and for finding this object all material, including international conventions and treaties should be and could be considered, as the Honourable Court did in this case, for holding that the reckoning date for determining the age of the juvenile is the date of the offence. "

92. The aforesaid rule of interpretation has been applied by Hon'ble supreme Court in the case reported in (2006)12 SCC 583 ISPAT Industries Limited versus Commr. Of Customs.

93. The rights and duties of higher judiciary is also reflected from the observations made by Constitution Bench of Hon'ble Supreme Court in the case of *Carew and Company Limited versus Union of India* AIR 1975 SC 2260. To reproduce relevant portion, to quote :

"20. The law is not 'a brooding omnipotence in the sky' but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad master to dictate. Notwithstanding the traditional view that grammatical construction is the golden rule, Justice Frank further used words of practical wisdom when he observed (*Massachusetts S & Insurance. Co. v. U. S.* (1956) 352 U. S. 128 at p. 138):

There is no surer way to misread a document than to read it literally. "

94. Lord Denning in his famous treatise, "Discipline of Law" has observed that the Judges should not be mute spectator to ground realities and may proceed with ideas to remedy the mischief. The observation of Lord Denning in the "Discipline of Law" is reproduced as under :

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges' trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsmen. He must set to work on the constructive task of finding the intention of Parliament. "

"15. And it is clear that when one has to look to the intention of the Legislature, one has to look to the circumstances under which the law was enacted. The Preamble of the law, the mischief which was intended to be remedied by the enactment of the statute and in this context, Lord Denning, in the same book at Page No. 10, observed as under:

"At one time the Judges used to limit themselves to the bare reading of the Statute itself-to go simply by the words, giving them their grammatical meaning and that was all. That view was prevalent in the 19th century and still has some supporters today. But it is wrong in principle. The Statute as it appears to those who have to obey it-and to those who have to advise them what to do about it; in short, to lawyers like yourselves. Now the eccentrics cut off from all that is happening around them. The Statute comes to them as men of affairs-who have their own feeling for the meaning of the words and know the reason why the Act was passed-just as if it had been fully set out in a preamble. So it has been held very rightly that you can enquire into the mischief which gave rise to the Statute-to see what was the evil which it was sought to remedy. "

95. The aforesaid observation of Lord Denning(supra) has been affirmed and accepted by their Lordships of Hon'ble Supreme Court in the case reported in AIR 1988 SC 2239 U. P. Bhoodan Yagna Samiti, U. P. Versus Braj Kishore and others

96. While interpreting Rule 89 Order 21 CPC, a Constitution Bench of Hon'ble Supreme Court while overruling earlier judgment in a case reported in AIR 2001 SC 2699 : (2001)7 SCC 71 Dadi Jagannadham versus Jammulu Ramulu observed that though the Court cannot make up deficiencies left by the legislature, but Court must try to harmonize the conflicting provisions. On this reasoning it was held that Rule 89 does not provide any limitation.

97. In AIR 1990 SC 123 Tinsukhia Electric Supply Co. Limited versus State of Assam and others, Hon'ble Supreme Court observed that the Courts should strongly lean against any construction which tends to reduce a Statute to a futility(para 49).

98. In (2004)5 SCC 385 Deepal Girishbhai Son and others versus United India Insurance Co. Limited, Baroda, Hon'ble Supreme Court held that while interpreting the statute, it shall be read in its entirety. The purport and object of the Act must be given its full effect by applying the principle of purposive interpretation.

99. In (2009)7 SCC 1 N. Kannadasan versus Ajoy Khose and others, their Lordships of Hon'ble Supreme Court have applied purposive interpretation while ascertaining the intention of the Legislature.

100. In Manu/SC/0619/2010 Bhakra Beas Management Board versus Krishan Kumar Vij and another, Hon'ble Supreme Court held that a statute should be made workable and the interpretation thereof by a Court should be to secure that object. A construction should be rejected which is likely to defeat the plain intention of the Legislature. For convenience, relevant portion from the case of Bhakra Beas Management Board(supra) is reproduced as under :

"34. It has been stated by Lord Dunedin, in the case of Murray v. IRC that, 'it is our duty to make what we can of statutes, knowing that they are meant to be operative and not inept and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable'. The principle was reiterated by him in a later judgment in the case of Whitney v. IRC , where he observed, 'a statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable.

35. The aforesaid observations make it abundantly clear that the courts will, therefore, reject the construction which is likely to defeat the plain intention of the legislature even though there may be some inexactitude in the language used. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. "

101. The principle of reading down has been applied by the Hon'ble Supreme Court again in a recent case, reported in (2009)5 SCC 625 M. Rathinaswamy and others versus State of Tamilnadu. Their Lordships held that while construing a statute, interpretation should be in favour of constitutionality of statute and to

remove anomaly.

102. Thus, while interpreting the provisions with regard to applicability of roster between the promotees and direct recruits, it may be inferred that the purpose of roster is to create a balance between promotees and direct recruits so that the experience earned by the promotees and intellectual energy possessed by the direct recruits while entering into service, may be diverted for the good of the society. But it does not mean that direct recruits who joined service later, may be placed over and above the promotees as has been done while preparing the impugned seniority list. It is settled law that what cannot be done directly, it cannot be done indirectly vide, (2003) 2 Supreme Court Cases, 593- Dayal Singh and Others Vs Union of India and Others.

In case direct recruits joined service much after the promotees, may be, with regard to earlier year of vacancy, are placed over and above the promotees in the seniority list, it shall deprive the promotees of their claim to avail seniority and benefit of service which they gain because of their long tenure of service rendered in the cadre.

103. This apart, on the ground of constitutionally recognised principle of equal treatment, roster may be applied only in case, vacancies to which, promotees and direct recruits are selected against the vacancy of the same recruitment year and join the service accordingly. The law is very well settled that equals cannot be treated unequally and vice versa, unequals cannot be treated equally.

104. In the case reported in AIR 1964 SC 179: T. Devadasan v. Union of India and another, Hon'ble Supreme Court held that State shall not deny to any person the equality before law or equal protection before laws within the territory of India. The equality provided by Article 14 is equal among equals. The aim of Article 14 is to ensure that individual distinction or arbitrary discrimination shall not be made by the State between a citizen and a citizen who answer the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law, reasonable classification is permissible.

105. In (1971) 2 SCC 188: Mohd. Usman and others v. State of Andhra Pradesh, their lordships held that equality is attracted not only when equals are treated as unequals but also where unequals are treated as equals. In case Statutes oblige every person extending certain benefit then one cannot be denied from the benefit available under the Statutes.

106. In (1974) 4 SCC 3: E. P. Royappa. v. State of Tamil Nadu and another, the everlasting observation of Hon'ble Supreme Court shall regulate the society for all times to come. The Hon'ble Supreme Court observed that Article 14 is the genus while Article 16 is a species. Equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. It shall be appropriate to reproduce relevant portion from Royappa case (supra) as under:

"85. . . . Art.16 embodies the fundamental guarantee that Arts. 14 as there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Art. 16 is only an instance of the application of the concept of equality enshrined in Art. 14. In other words, Art. 14 is the genus while Art 16 is a species, Art. 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose J. , "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any; attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is

implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of Power and arbitrariness are different lethal radiations emanating from the same vice : in fact the matter comprehends the former. Both are inhibited by Arts. 14 and 16. "

107. In (1974) 4 SCC 335: The General Manager South Central Railway Secunderabad and another. v. A. V. R. Siddhantti and others, Hon'ble Supreme Court reiterated the Royappa's case (supra) and held that fundamental right and equality means that persons in like situation under like circumstances, are entitled to be treated alike. So long as employees similarly circumstanced in the same class of service are treated alike, the question of hostile discrimination does not arise.

108. To remove such anomaly with regard to roster (where quota and rota breaks), their lordship of 'Hon'ble Supreme Court particularly with regard to higher judicial service has directed to reckon the seniority by applying the principle of continuous length of service. It shall be appropriate to reproduce relevant portion from B. S. Mathur case (supra) as under:

"53. As far as the inter se seniority of the officers to the appointed in DHJS after the year 2006 is concerned, this Court in its judgment in All India Judges Assn. (III) v. Union of India 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 R. K. Sabharwal v. State of Punjab. 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 abovementioned 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 the Delhi Higher Judicial Service. "

Finding and Discussion

109. Subject to aforesaid finding with regard to proposition of law, the perusal of impugned seniority list reveals that all the promotees who join service upto May, 1994 i. e. , from Sri Ashok Kumar Agarwal serial No. 5 to Sri Jamiruddin who joined in May, 1985, 1994 has been extended seniority on the basis of length of service under unamended old Rules. They have been placed "en block".

Thereafter, right from Sri Vinai Kumar Mathur, to Lalta Prasad-III, serial No. 242 to 265 direct recruits were appointed in May, 1994 and joined service, have been placed "en block" immediately after the promotees. Thus, promotees and direct recruits appointed against the vacancy of earlier year, have been placed en block in the impugned seniority list from the date of resumption of duty and that seems to have been rightly done.

110. Thereafter promotees from Sri Surendra Pratap Singh to Km. Manju Rani Gupta resumed duty on 10. 6. 1996, have been placed en block.

However, anomaly or irregularity seems to start from Sri Desh Bhushan Jain a direct recruit along with others, resumed duty in August, 1996. From Sri Desh Bhushan Jain to Sri Ali Jamin, all direct recruits who resumed duty from August, 1996 to December, 1998, have been placed en block reckoning seniority from the date of resumption of duty placing them over and above the petitioners, who resumed duty on 15. 6. 1996 and 13. 6. 1996. Thus, promotees who were appointed and resumed duty in 1996, have been placed "en block" below the direct recruits who were appointed and resumed duty subsequent to petitioners and similarly situated persons. From the seniority list, it is evident that earlier seniority of promotees was counted under old Rules on the basis of the length of their service and similarly direct recruits were also accorded seniority from the date of resumption of duty but it appears that at later stage, this practice has been

deviated for some reason may be under the amended Rule and direct recruits who resumed duty at later period, have been placed over and above the promotees who were promoted against the earlier year of vacancies and also officiating on the post of Additional District and Sessions Judge.

111. The author of the impugned seniority list seems to be aware with the principle that there is "breakage of quota and rota" hence roster of 1:1 cannot be applied, therefore, promotees and direct recruits have been placed "en block" in the impugned seniority list. However, while doing so, High Court does not seem to justify on administrative side to place direct recruits over and above the promotees extending them seniority from the period when they were not born in service and some of them even would not have done their LL. B. Course. Such action on the part of the author of the impugned seniority list, does not seem to be sustainable under law (*supra*).

112. Submission of petitioners counsel that placement of respondents "en block" in the seniority list over and above the promotees depriving the benefit of officiating service to the petitioners under the garb of new Rules, does not seem to be correct. Even if direct recruits were selected against the quota of 1992-94, they cannot be placed over and above the promotees in the impugned seniority list since they joined service only in the year 1998.

The direct recruits (respondent No. 14 to 18 to the writ petition) appointed against the vacancy of 1990, shall be entitled for seniority from the date of resumption of duty and they could not have been placed "en block" in the impugned seniority list over and above the promotees who were officiating in the cadre after resumption of duty earlier to them. The perusal of the impugned seniority list also reveals that even inter se seniority of promotees has not been decided correctly. For example, Sri Ashok Kumar Agarwal resumed duty on 30. 6. 1996 as promotee whereas, the petitioner No. 1 resumed duty on 15. 6. 1996. Some of the promotees have resumed duty on 10. 6. 1996 but while preparing seniority list, the promotees who resumed duty at later period, have been placed over and above the promotees who resumed duty during earlier period. Thus, even with regard to promotees, the seniority list has not been correctly prepared.

113. However, in case this has been done on the ground that persons who resumed duty at later period and the promotees were senior in the feeding cadre, then this aspect of the matter should have been indicated in the impugned seniority list to remove any doubt or suspicion.

114. In the case of Ashok Pal Singh (supra), their lordship of Hon'ble Supreme Court has reiterated the applicability of direction No. 3 given in Sri Kant Tripathi (supra), as well as earlier judgments with regard to allocation of seniority with regard to promotees. Their lordships in the case of S. K. Tripathi (supra) categorically held that vacancy of quota of promotees should have been deemed to have been filled up from the date they were entitled for promotion within their quota whereas with regard to direct recruits the seniority should be reckoned from the date they resumed duty. The impugned seniority list seems to have been prepared without taking note of direction No. 3 in the case of S. K. Tripathi (supra) which has been affirmed by the Hon'ble Supreme Court in the case of Ashok Pal Singh (supra).

115. The direction No. 3 of their lordships of Hon'ble Supreme Court in the case of S. K. Tripathi (supra) provides that in case in each recruitment year, posts are available in the quota of promotees and promotion has not been made, even though selection had been made under Rule 20, then the legitimate right of the promotees cannot be denied and promotion must be made with effect from the date they should have been appointed. Their lordships of Hon'ble Supreme Court further provided under direction No. 4 in case of S. K. Tripathi (supra), that exercise should be made for recruitment year 1988 as well as for each subsequent recruitment.

116. While challenging the proviso to sub-rule (3) of Rule 22, in one of the writ petitions namely, W. P. No. 1646 (S/B) of 2010, it is argued that promotee petitioner shall not be entitled for reckoning of seniority from the date of initial promotional cadre. The proviso provide that in case the stop gap arrangement is done for a short period, then promotee may not be entitled for seniority for the period in question. Thus, provisions is for the situation when quota and rota is maintained but in case, the quota and rota breaks, promotions are not done for

years to come, and promotees have been placed within their quota, then direction issued by their lordships of Hon'ble Supreme Court in the case of S. K. Tripathi (supra), shall be binding. The observations made by Hon'ble Supreme Court in para-19 of the judgment of S. K. Tripathi (supra) should be read after taking into account the directions issued in para-38 of the judgment (supra).

The direction No. 3 issued by their lordships of Hon'ble Supreme Court as observed (supra), has been reiterated in the case of Ashok Pal Singh (supra). Meaning thereby, in case quota and rota breaks, the promotion is done within quota against the vacancy of a recruitment year for which promotee is entitled then, the seniority shall be reckoned with regard to promotees, from the year in which he or she was qualified. The Full Bench Judgment relied upon by the learned counsel for the petitioners reported in 1999 ALJ 472: K. N. Singh. v. State of U. P. and others, (para-18) virtually, lays down the same principle.

117. In the case of Ashok Pal Singh (supra), while reiterating and reaffirming the Direction No. 3 of the case of S. K. Tripathi (supra), their lordships of Hon'ble Supreme Court observed that none of the appointments already made to the Higher Judicial Service, whether by direct recruitment or by promotion, shall be annulled, but shall be continued, even if the appointment is found to be in excess of the quota, subject to the condition that the seniority of such excess appointee will be reckoned from the date on which he or she becomes entitled to be adjusted at the subsequent recruitments. Any elevation to the High Court on the basis of seniority already given shall also not be affected. Meaning thereby, the seniority of promotees shall be reckoned keeping in view the recruitment year for which he or she becomes entitled for promotion within the promotees quota. However, so far as the direct recruits are concerned, their seniority shall be reckoned from the date of joining of service and not anterior to it.

118. Subject to above, to sum up:-

(i) Subject to observations made hereinabove, seniority of all the promotees with regard to vacancies existing prior to 15. 3. 1996 shall be determined on the basis of old unamended Rules (supra) and for the vacancies arisen thereafter, the seniority shall be determined on the basis of amended Rules notified on 15. 3.

1996 (supra) subject to S. K. Tripathi & Ashok Pal Singh (supra).

(ii)The roster of 1:1 may be prepared while finalising seniority list only in case the promotees and direct recruits are appointed and resume duty in the same recruitment year.

(iii)In view of judgment of Hon'ble Supreme Court in the case of B. S. Mathur (supra) the seniority of promotees and direct recruits should be tested on the basis of continuous officiation of service without applying roster in case there is breakage of quota and rota system. Promotees shall be placed in the seniority against the year of vacancy for which they have been selected whereas, direct recruits shall be given seniority from the date of resumption of duty. Petitioners shall be entitled for seniority with effect from 27. 5. 1996.

(iv)The impugned seniority list has been prepared against the settled principles of law (supra) hence suffers from inherent weakness and substantial illegality, therefore, shall not survive.

119. In view of the above, the writ petition deserves to be allowed. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned seniority list dated 24. 8. 2007 contained in Annexure No. 1 to the writ petition with consequential benefits. A writ in the nature of mandamus is issued directing the respondents to prepare a fresh seniority list keeping in view the observations made by their lordships of Hon'ble Supreme Court in the case of Ashok Pal Singh (supra) read with findings recorded in the body of the present judgment expeditiously.

No Costs.

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