B. N. NAGARAJAN AND ORS.

v.

STATE OF KARNATAKA AND ORS. ETC.

May 3, 1959

[V. R. KRISHNA IYER, P. S. KAILASAM AND A. D. KOSHAL, JJ.]

Mysore Government Servants (Seniority) Rules 1957 *Rule* 2 *read with Rule* 2 *of the Mysore Government Servants (Probation) Rules* 1957—*Scope of.*

Constitution of India, Art. 226—*Whether the scope of the Writ Petition be limited to the prayer portion alone*?

In the new State of Mysore (Now Karnataka) which came into existence on 1-11-56 as a result of integration of the areas which formed part of erstwhile States of Mysore, Madras, Coorg, Bombay and Hyderabad, the Government on 6-2-58, 7-2-58 and 2-12-60 respectively promulgated the following Rules (all framed under Article 309 of the Constitution) namely, "The Mysore Government Servants (Probation) Rules 1957, "The Mysore Government Servants (Seniority) Rules 1957 and "The Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960" The recruitment Rules envisaged appointment of Assistant Engineers in the Public Works Department by direct recruitment to the extent of 40% and by promotion for the rest viz. 50% from the cadre of Junior Engineers and 10% from the cadre of supervisors. The cadre of Assistant Engineers was to consist of 344 permanent and 345 temporary posts.

Prior to 1-11-56 in the merged States, there was a non gazetted class designated as graduate supervisors in Mysore State, as Junior Engineers in the Madras State and as supervisors in the States of Bombay and Hyderabad. The claim of the graduate supervisors who were given charge of sub-divisions prior to 1-11-56 and continued to hold the same even thereafter, for equation of their posts with those of Assistant Engineers, was rejected by the Central Government. However, on 15-11-58, 167 of them (including 107 graduate supervisors from Mysore) and between the period 2nd Dec. 1958 and 13th October '60, 299 more persons of the same class were promoted as officiating Assistant Engineers. With reference to three notifications of the Mysore Public Service Commission dt. 1-10-58, 4-5-59 and 1-4-61, eighty eight candidates were appointed on 31st Oct.' 61, i.e. 8 days after the amendment of the Recruitment Rules giving them retrospective effect from 1st March 1958, as Probationary Assistant Engineers by direct recruitment. The challenge to their appointment was ultimately rejected by this Court in *B. N. Nagarajan* v. *State of Mysore & Ors.*, [1966] 3 S.C.R. p. 682 holding that their appointment although made after the Recruitment Rules had come into force, were valid, as the process of direct recruitment had been set in motion by the State Government in exercise of its executive power under Article 162 of the Constitution of India well before the Recruitment Rules were promulgated and that these appointments were therefore, "outside the Recruitment Rules".

In the year 1971 various orders were passed promoting some of the direct recruits to the posts of Executive Engineers and those orders were challenged by

A the promotees on the ground that they had been given promotions "on regular basis" which amounted to substantive appointments and that therefore they should rank senior to the direct recruits. Subsequent to the issue on 4-9-73 of a revised seniority list superseding the list (G) prepared on 28-9-72 further writ petitions were filed by the promotees. All the petitions were heard together by the High Court and allowed with the following directions :

B (i) Promotees other than those covered by direction (ii) and direct recruits, would not be governed by the quota system as envisaged in the Recruitment Rules.

(ii) Promotees who were appointed to posts of Assistant Engineers with effect from Ist of March 1958, or later dates, would be governed by the quota system as envisaged in the Recruitment Rules.

C (iii) Promotees appointed as Assistant Engineers prior to 31st October 1961 would rank senior to the direct recruits whose appointments were made on that date.

(iv) The claim of each of the promotees to the next higher post shall be considered with effect from a day prior to that on which any officer found junior to him was promoted.

D

Allowing the appeals by special leave, the Court

HELD :

1. The scope of the writ petition was not limited to the question of promotion of Assistant Engineers as Executive Engineers. The attack on the seniority list dated 4th Sept. 1973 was inherent in the case set up by the promotees, of E which it formed an integral part. Though no prayer had been made by the promotees to quash or rectify the seniority list dated 4th September 1973, their whole case was based on the contention that they had been promoted to the posts of Assistant Engineers in a substantive capacity prior to the appointment of direct recruits, that they would take precedence over direct recruits in the matter of seniority and regular absorption in the cadre of Assistant Engineers and that it was on that account that the promoion of F direct recruits to the posts of Executive Engineers without consideration of the case of the promotees for such promotion was illegal. [946E-G]

2. No exception is or can be taken on behalf of the promotees to the finding arrived at by the High Court that the appointment of direct recruits to the posts of Assistant Engineers was in order, in view of the judgment of this Court in *B. N. Nagarajan* v. *State of Mysore*, [1966] 3 SCR p. 682. Nor can it be urged G with any plausibility on behalf of direct recruits that the appointment of the promotees as Assistant Engineers prior to the enforcement of the Recruitment Rules lay outside the powers of the Government or was otherwise illegal. [946G-H, 947A]

V. B. Badami and Ors. v. *State of Mysore and Ors.*, [1976] 1 SCR 815 and *B. N. Nagarajan* v. *State of Mysore and Ors.*, [1966] 3 SCR 682; followed.

H 3. A combined reading of Rule 2 of the Seniority Rules and the definition of the words "appointed on probation" and "Probationer" in Rule 2 of the Probation Rules, makes it clear that the direct recruits were appointed as Assistant

Engineers, "substantively in clear vacancies" as envisaged by clause (a) of rule 2 of the Seniority Rules. If any of the promotees also satisfied that requirement at any time earlier to the 31st of October 1961, he would be bracketed with the direct recruits under that clause and his seniority vis-a-vis those recruits would then be governed by clause (b) of the rule i.e., on the basis of his and their respective dates of confirmation. If, on the other hand, none of the promotees can be said to have been appointed substantively in a clear vacancy, clause (a) aforesaid would have no application to them and all direct recruits would rank senior to them. [947G-H, 948A-B]

4. In the instant case, all through the relevant period the promotees held appointments as Assistant Engineers in non-substantive capacity, i.e., either on an officiating or a temporary basis. This being the position, they would all rank junior to the direct recruits who, from the very start, held appointments made "substantively in clear vacancies". [950H, 951A]

(a) The language employed in the first order dated 15th November 1958 (Ex.A) appointing promotees as Assistant Engineers makes it clear that the promotion of the 167 officers was not substantively made, the tenure being specifically stated to be either "officiating" or "purely temporary" and "subject to review after the finalisation of the *inter se* seniority list of supervisors and the Recruitment Rules", which expressions clearly militate against a substantive appointment. [948E-G]

(b) Orders made by the State Government later on right upto the 31st October, 1961 when the direct recruits were appointed as Assistant Engineers did not improve the position of any of the promotees in any manner. These orders were either silent on the point of the nature of the tenure of the promotees as Assistant Engineers, or stated in no uncertain terms that the promotees would hold the posts of Assistant Engineers on a temporary or officiating basis. [948G-H, 949A]

(c) The two Notifications dated 27th February 1962, and order Exhibit (D), dated 6th October 1962—the combined effect of which was to promote the said 107 officers as Assistant Engineers with effect from 1st of November 1956 "on a regular basis" do not give it the colour of permanence to the appointments of the promotees as Assistant Engineers which cannot therefore be deemed to have been made substantively right from the 1st of November 1956 for two reasons; Firstly, the words "regular" or "regularisation" do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments. Secondly, when rules framed under Article 309 of the Constitution of India are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 thereof in contravention of the Rules. The regularisation order was made long after the Probation Rules, the Seniority Rules and the Recruitment Rules were promulgated and could not therefore direct something which would do violence to any of the provisions thereof. Regularisation in the present case, if it meant permanence operative from the 1st of November, 1956 would have the effect of giving seniority to promotees over the direct recruits who, in the absence of such regularisation, would rank senior to the former because of the Seniority Rules read with the Probation Rules and may in consequence also confer on the promotees a right of priority in the matter of sharing the quota under the Recruitment Rules. In

other words, the regularisation order, in colouring the appointments of promotees as Assistant Engineers with permanence would run counter to the rules framed under Article 309 of the Constitution of India. What could not be done under the three sets of Rules as they stood, would thus be achieved by an executive fiat. And such a course is not permissible because an act done in the exercise of the executive power of the Government, cannot override rules framed under Article 309 of the Constitution. [949B-D, 950D-G]

State of Mysore and Anr. v. *S. V. Narayanaswami*, [1967] 1 SCR 128 and *R. N. Nanjundappa* v. *T. Thimmiah*, [1972] 2 SCR 799; applied.

[The Court made it clear (a) "that this order does not cover such officers as were holding the posts of Assistant Engineers on a substantive basis prior to the 1st of November, 1956 when the new State of Mysore now known as Karnataka came into being, and the case of any Assistant Engineer who acquired a substantive status prior to the promulgation of the Recruitment Rules and the appointment of the direct recruits; (b) that persons falling within these two categories will first have to be accommodated in the clear vacancies available and only the remaining vacancies will have to be utilised for fitting in the direct recruits and the Assistant Engineers who have disputed their claim in these proceedings; and (c) that the quota rule will not stand in the way of the Government giving effect to this arrangement which has been taken care of in the amendment (promulgated on the 23rd of October 1961) to the Recruitment Rules"].

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2329 of 1977.

Appeal by Special Leave from the Judgment and Order dated 30-11-1976 of the Karnataka High Court in W.P. No 2307/71.

CIVIL APPEAL NOS. 2330-2350/77

Appeals by Special Leave from the Judgment and Order dated 30-11-1976 of the Karnataka High Court in W.P. Nos. 2307/71, 796/72, and 462-467, 553-560, 943, 944, 1033, 1027 and 1032/73; and

CIVIL APPEAL NOS. 2351-2370/77

Appeals by Special Leave from the Judgment and Order dated 30-11-1976 of the Karnataka High Court in W.P. Nos. 462-467, 553-560, 796, 943, 944. 1027, 1033/73.

P. Ram Reddy and *S. S. Javali* for the Appellant in CA 2329/77.

F. S. Nariman, B. P. Singh and *A. K. Srivastava* for the Appellants in C.A. Nos. 2351-2370/77.

L. N. Sinha and *Narayan Nettar* for the Appellants in C.A. 2330 to 2370/77.

A. K. Sen, Muralidhar Rao and *P. R. Ramasesh* for RR. 2, 3, 5, and 7 in C.A. 2329/77.

P. R. Ramasesh for RR/Promotees in CA 2330-2350/77 and RR in C.A. 2352-2370/77.

Y. S. Chitale, M. Muralidhar Rao, P. R. Ramasesh and *S. S. Khanduja,* for the RR in C.A. 2351/77. A

The Judgment of the Court was delivered by

KOSHAL, J.—By this judgment we shall dispose of 42 appeals by special leave, namely, Civil Appeals Nos. 2329 to 2370 of 1977, all of which are directed against a judgment dated the 30th November, 1976 of a Division Bench of the High Court of Karnataka. Civil Appeals Nos. 2329 and 2351 to 2370 of 1977 have been filed by different persons who were appointed Assistant Engineers in the Karnataka State on 31st October, 1961, by way of direct recruitment while the other 21 appeals have been filed by that State. B C

2. The facts giving rise to the impugned judgment may be set down in some detail. A new State came into existence on the 1st of November, 1956 as a result of integration of the areas which formed part of the erstwhile States of Mysore, Madras, Coorg, Bombay and Hyderabad (hereinafter referred to as the Merged States). It was then given the name of one of its constituents, namely, the State of Mysore, which was later changed to that of the Karnataka State. In the Public Works Departments of the Merged States there was a class of non-gazetted officers ranking below Assistant Engineers. The class was designated as Graduate Supervisors in the Merged State of Mysore, as Junior Engineers in the Merged State of Madras and as Supervisors in the Merged States of Hyderabad and Bombay. The Graduate Supervisors were paid a fixed salary of Rs. 225/- per mensem which was lower by Rs. 25/- per mensem as compared to the starting salary of Assistant Engineers, who, in the normal course, were expected to head sub-divisions. To the post of Assistant Engineer a Graduate Supervisor was appointed only on promotion. D E F

Prior to the 1st of November, 1956, quite a few Graduate Supervisors were given charge of sub-divisions and designated as Sub-Divisional Officers in order to meet the exigencies of service and they continued to act as such after the merger when they claimed equation of their posts with those of Assistant Engineers in the matter of integration of services. To begin with their claim was turned down by the Central Government who equated the posts of Graduate Supervisors with the posts of Junior Engineers of the Merged State of Madras and the posts of Supervisors of the Merged States of Hyderabad and Bombay. G H

By a notification dated the 6th of February, 1958, the Government of Karnataka (then known as the Government of Mysore)

promulgated the Mysore Government Servants (Probation) Rules, 1957 (hereinafter called the Probation Rules) and on the next day came into force the Mysore Government Servants (Seniority) Rules, 1957 (hereinafter referred to as the Seniority Rules), both having been framed under Article 309 of the Constitution of India.

On the 1st of October, 1958, the Karnataka Public Service Commission invited applications from candidates for appointment to the posts of Assistant Engineers by direct recruitment.

In the meantime Graduate Supervisors and Government employees holding equivalent posts had continued to press their claim for the equation of their posts with the posts of Assistant Engineers and they succeeded partially when, on the 15th of November, 1958, the Karnataka Government promoted 167 of them (including 107 Graduate Supervisors who had been working as such in the Merged State of Mysore) as officiating Assistant Engineers with immediate effect. The promotion was notified in the State Gazette dated the 20th of November, 1958 (Exhibit A) the relevant portion whereof may be reproduced for facility of reference :

> ".....The following supervisors of Public Works Department are promoted as officiating Assistant Engineers with immediate effect and until further orders against the existing vacancies subject to review after the finalisation of the Inter-Se Seniority List of Supervisors and the Cadre and Recruitment Rules of Public Works Department. The promotion of officers from Sl. No. 74 to 167 against existing vacancies will be purely on a temporary basis pending filling up of the vacancies by Direct Recruitment as per rules. The Seniority *inter se* of the Promotees will be provisional according to the order given below : .....".

299 more persons of the same class were promoted to the posts of Assistant Engineers by eight notifications published during the period from 22nd of December, 1958 to the 13th of October, 1960.

On the 21st (31st ?) of August, 1960, the State Government passed an order in regard to the 107 Graduate Supervisors from the Merged State of Mysore and mentioned above, directing that they be treated as Assistant Engineers and be paid the pre-revision scale of pay of Rs. 250—25—450 from the 1st of November, 1956 to the 31st of December, 1956 and the revised scale of pay of Rs. 250—25—450—30—600 from the 1st of January, 1957 onwards. The order further directed that the said 107 officers shall be placed in the *inter-se* seniority list below the Assistant Engineers.

On the 3rd of December, 1960, the Karnataka Government promulgated the Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960 (hereinafter referred to as the Recruitment Rules) under Article 309 of the Constitution of India, which envisaged appointment of Assistant Engineers in the Public Works Department by direct recruitment to the extent of 40 per cent and by promotion for the rest, viz., 50 per cent from the cadre of Junior Engineers and 10 per cent from the cadre of Supervisors. The cadre of Assistant Engineers was stated in the Rules to consist of 344 permanent and 345 temporary posts.

On the 23rd of October, 1961, the Recruitment Rules were amended so as to be operative retrospectively i.e., with effect from the 1st of March, 1958.

On the 31st of October, 1961, 88 candidates were appointed as Probationary Assistant Engineers by direct recruitment.

Two notifications were issued by the State Government on the 27th of February, 1962. By each one of them 231 Junior Engineers were given "regular promotions" as Assistant Engineers with effect from specified dates falling within the period 15th of November, 1958 to the 10th of November, 1960. The first of these notifications stated *inter alia* :

> "....However, the promotions are subject to review after finalisation of the *interse* Seniority List of Junior Engineers....".

The second of the notifications issued on the 27th of February, 1962, mentioned that the officers named therein would be deemed to be temporarily promoted and permitted to continue to officiate as Assistant Engineers on a provisional basis and until further orders.

The case of the said 107 officers received further consideration at the hands of the State Government, who, on the 6th of October, 1962, issued another order (Exhibit D) superseding the one dated the 31st of August, 1960, and promoting them as Assistant Engineers with effect from the 1st of November, 1956.

By the 24th of September, 1966, the number of Probationary Assistant Engineers appointed through direct recruitment (hereinafter called direct recruits) had fallen to 85 for reasons which need not be stated. On that day the State Government passed an order that they had all completed their period of probation satisfactorily and stood absorbed against substantive vacancies with effect from the 1st of November, 1962.

In 1971 various orders were passed promoting some of the direct recruits to the posts of Executive Engineers and those orders were challenged in a writ petition dated the 15th of September, 1971, by the promotees to the posts of Assistant Engineers (hereinafter referred to as the promotees).

On the 28th of September, 1972, a list (Exhibit G) of Assistant Engineers indicating their seniority *inter se* as on the 1st of November, 1959, was prepared by the State Government. In that list the promotees were accorded seniority to their satisfaction. However, that list was superseded by another list dated the 4th of September, 1973, in which the seniority *inter se* of all Assistant Engineers functioning in the State Public Works Department as on 1st of January, 1973 was declared. The new list purported to have been framed in accordance with the Recruitment Rules. Objections to the list were invited and were submitted by various officers.

During the year 1973 more writ petitions challenging the promotion of direct recruits to the posts of Executive Engineers were instituted by the promotees on whose behalf two claims were made before the High Court, namely :

(1) that they had been regularly promoted as Assistant Engineers against substantive vacancies with retrospective effect and rightly so; and

(2) that in the case of those of them whose promotion was made effective from a date prior to the 1st of March, 1958, the Recruitment Rules, especially the quota rule, could not affect them adversely.

Both these claims were accepted by the High Court, the first on the basis of the decision of this Court in *Ram Prakash Khanna & Others* v. *S. A. F. Abbas*(1) coupled with the pleadings of the parties and the various orders issued by the State Government and mentioned above, and the second on the authority of another decision of this Court in *V. B. Badami & Others* v. *State of Mysore & Others*(2). The High Court accordingly held that the quota rule would not be attracted to the case of those promotees who had been appointed to the posts of Assistant Engineers with effect from a date prior to the 1st of March, 1958. By way of a 'clarification' the High Court further ruled that the promotion of the 107 officers working in the Merged State of

(1) A. I. R. 1972 S. C. 2350.
(2) [1976] 1 S. C. R. 815.

Mysore was made to substantive posts of Assistant Engineers with effect from the 1st of November, 1956, and that the State Government or the direct recruits could not be allowed to urge to the contrary. According to the High Court such promotion was subject to review only if the course was warranted and necessitated by the final *inter se* seniority list of Junior Engineers, the right to review having been reserved by the Government in its orders dated the 27th of February, 1962. In relation to the direct recruits the High Court made a reference to the judgment of this Court in *B. N. Nagarajan* v. *State of Mysore & Others*(1) wherein it was held that their appointments, although made after the Recruitment Rules had come into force, were valid, as the process of direct recruitment had been set in motion by the State Government in exercise of its executive powers under article 162 of the Constitution of India well before the Recruitment Rules were promulgated and that those appointments were therefore "outside the Recruitment Rules". The High Court consequently held that the direct recruits were also not subject to the quota rule which could not, according to it, affect them adversely.

Summing up, the High Court gave the following directions :

(1) Promotees other than those covered by direction (2) and direct recruits would not be governed by the quota system as envisaged in the Recruitment Rules.

(2) Promotees who were appointed to posts of Assistant Engineers with effect from the 1st of March, 1958, or later dates, would be governed by the quota system as envisaged in the Recruitment Rules.

(3) Promotees appointed Assistant Engineers prior to the 31st of October, 1961, would rank senior to the direct recruits whose appointments were made on that date.

(4) The claim of each of the promotees to the next higher post shall be considered with effect from a day prior to that on which any officer found junior to him was promoted.

3. The first contention we would like to deal with is one raised by Mr. F. S. Nariman appearing for the direct recruits. He argued that the scope of the writ petitions instituted by the promotees was limited to the question of promotion of Assistant Engineers as Executive Engineers and that no challenge to the seniority list dated the 4th of September, 1973 could be entertained. In this connection

(1) [1966] 3 S. C. R. 682.

reference was made to the prayer clause appearing in Writ Petition No. 462 of 1973 which is in the following terms :

> "In this writ petition, it is prayed that this Court may be pleased to :
>
> (1) quash the promotion of respondents 2 to 31 to the cadre of Executive Engineers made as per order dated 3-2-1973;
>
> (2) direct the respondent 1 to consider the case of the petitioner for promotion to the cadre of Executive Engineers with effect from 3-2-1973 on which date respondents 2 to 31 were promoted; and
>
> (3) pass an interim order, restraining the respondent 1 from making further promotion to the cadre of Executive Engineers without considering the case of the petitioner for such promotion, pending disposal of this writ petition."

(It was assumed at the hearing of the appeals that the prayer made in the other writ petitions is to a similar effect).

It is true that no prayer has been made by the promotees to quash or rectify the seniority list dated the 4th of September, 1973, but then their whole case is based on the contention that they had been promoted to the posts of Assistant Engineers in a substantive capacity prior to the appointment of the direct recruits, that they would take precedence over direct recruits in the matter of seniority and regular absorption in the cadre of Assistant Engineers and that it was on that account that the promotion of direct recruits to the posts of Executive Engineers without consideraion of the case of the promotees for such promotion was illegal. The attack on the said seniority list therefore is inherent in the case set up by the promotees, of which it forms an integral part. In this view of the matter we cannot agree with Mr. Nariman that the scope of the writ petitions is limited as stated by him.

4. No exception is or can be taken on behalf of the promotees to the finding arrived at by the High Court that the appointment of direct recruits to the posts of Assistant Engineers was in order, in view of the judgment of this Court in *B. N. Nagarajan* v. *State of Mysore* (supra). Nor can it be urged with any plausibility on behalf of direct recruits that the appointment of the promotees as Assistant

Engineers prior to the enforcement of the Recruitment Rules lay outside the powers of the Government or was otherwise illegal. The real dispute between the direct recruits and the promotees revolves round the quality of the tenure held by the latter immediately prior to the enforcement of the Recruitment Rules and that is so because of the language employed in rule 2 of the Seniority Rules. The relevant portion of that rule is extracted below :

> "2. Subject to the provisions hereinafter contained, the seniority of a person in a particular cadre of service or class of post shall be determined as follows :
>
> (a) Officers appointed substantively in clear vacancies shall be senior to all persons appointed on officiating or any other basis in the same cadre of service or class of post;
>
> (b) The seniority *inter se* of officers who are confirmed shall be determined according to dates of confirmation, but where the date of confirmation of any two officers is the same, their relative seniority will be determined by their seniority *inter se* while officiating in the same post and if not, by their seniority *inter se* in the lower cadre;
>
> (c) Seniority *inter se* of persons appointed on temporary basis will be determined by the dates of their continuous officiation in that grade and where the period of officiation is the same the seniority *inter se* in the lower grade shall prevail.
>
> Explanation . . . . . .
>
> (d) . . . . . ."

Now in so far as the direct recruits are concerned they were appointed as Probationary Assistant Engineers, i.e., Assistant Engineers "appointed on probation" which term is defined in rule 2 of the Probation Rules. That rule states :

> "2. For the purpose of these rules :—
>
> (1) "Appointed on Probation" means appointed on trial in or against a substantive vacancy.
>
> (2) "Probationer" means a Government servant appointed on probation. A Government servant so appointed (and continuing in service) remain a probationer until he is confirmed."

A In view of these definitions it cannot be gainsaid that the direct recruits were appointed Assistant Engineers "substantively in clear vacancies" as envisaged by clause (a) of rule 2 of the Seniority Rules. If any of the promotees also satisfied that requirement at any time earlier to the 31st of October, 1961, he would be bracketed with the direct recruits under that clause and his seniority *vis-a-vis* B those recruits would then be governed by clause (b) of the rule, i.e., on the basis of his and their respective dates of confirmation. If, on the other hand, none of the promotees can be said to have been appointed substantively in a clear vacancy, clause (a) aforesaid would have no application to them and all direct recruits would C rank senior to them; and it is in the light of the said clauses (a) and (b) therefore that learned counsel for the State and the direct recruits have challenged the finding of the High Court that the promotion of the 107 officers working in the Merged State of Mysore was made to substantive posts of Assistant Engineers with effect from the 1st of November, 1956 and that the State Government or the D direct recruits could not be allowed to urge to the contrary. The controversy has to be resolved in the light of the orders passed by the State Government from time to time in relation to those officers and others similarly situated.

5. The first order appointing promotees as Assistant Engineers is E dated the 15th of November, 1958 (Exhibit A). That order made it clear that all the promotees covered by it were appointed *officiating* Assistant Engineers and were to hold office until further orders. The promotion was also made subject to review after the finalisation of the *inter se* seniority list of Supervisors and the Recruitment Rules. The notification went on to state that in the case of 94 of the officers F promoted under it, their appointment as Assistant Engineers was being made on a *purely temporary basis* inasmuch as they would have to vacate the posts against which they were being fitted, as soon as candidates were available through a process of direct recruitment. The language employed leaves no doubt that the promotion of the 167 officers was not substantively made, the tenure being specifically G stated to be either "officiating" or "purely temporary" which expressions clearly militate against a substantive appointment.

Orders made by the State Government later on and right upto the 31st of October, 1961 when the direct recruits were appointed Assis- H tant Engineers did not improve the position of any of the promotees in any manner. Those orders were either silent on the point of the nature of the tenure of the promotees as Assistant Engineers, or stated

in no uncertain terms that the promotees would hold the posts of Assistant Engineers on a temporary or officiating basis. That is why Dr. Chitaley and Mr. Sen, learned counsel for the promotees, mainly placed their reliance on the two notifications dated the 27th of February, 1962, and order exhibit D dated the 6th of October, 1962, the combined effect of which was to promote the said 107 officers as Assistant Engineers with effect from the 1st of November, 1956 "on a regular basis". It was argued that the regularisation of the promotion gave it the colour of permanence and the appointments of the promotees as Assistant Engineers must therefore be deemed to have been made substantively right from the 1st of November, 1956. The argument however is unacceptable to us for two reasons. Firstly the words "regular" or "regularisation" do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments. They cannot be construed so as to convey an idea of the nature of tenure of the appointments. In this connection reference may with advantage be made to *State of Mysore and Another* v. *S. V. Narayanappa*(1) and *R. N. Nanjundappa* v. *T. Thimmiah and Another*(2). In the former this Court observed :

> "Before we proceed to consider the construction placed by the High Court on the provisions of the said order we may mention that in the High Court both the parties appear to have proceeded on an assumption that regularisation meant permanence. Consequently it was never contended before the High Court that the effect of the application of the said order would mean only regularising the appointment and no more and that regularisation would not mean that the appointment would have to be considered to be permanent as an appointment to be permanent would still require confirmation. It seems that on account of this assumption on the part of both the parties the High Court equated regularisation with permanence."

In *Nanjundappa's* case also the question of regularisation of an appointment arose and this Court dealt with it thus :

> ".....Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf

(1) [1967] 1 S. C. R. 128.
(2) [1972] 2 S. C. R. 799.

A of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. It the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is B possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would C be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

Apart from repelling the contention that regularisation connotes permanence, these observations furnish the second reason for rejection of the argument advanced on behalf of the promotees and that D reason is that when rules framed under article 309 of the Constitution of India are in force, no regularisation is permissible in exercise of the executive powers of the Government under article 162 thereof in contravention of the rules. The regularisation order was made long after the Probation Rules, the Seniority Rules and the Recruitment Rules were promulgated and could not therefore direct something E which would do violence to any of the provisions thereof. Regularisation in the present case, if it meant permanence operative from the 1st of November, 1956, would have the effect of giving seniority to promotees over the direct recruits who, in the absence of such regularisation, would rank senior to the former because of the Seniority Rules read with the Probation Rules and may in consequence also F confer on the promotees a right of priority in the matter of sharing the quota under the Recruitment Rules. In other words, the regularisation order, in colouring the appointments of promotees as Assistant Engineers with permanence would run counter to the rules framed under article 309 of the Constitution of India. What could not be done under the three sets of Rules as they stood, would thus be achieved by an executive fiat. And such a course is not permissible because an act done in the exercise of the executive power of the Government as already stated, cannot override rules framed under Article 309 of the Constitution.

The case has, for both the above reasons, to be decided on the H footing that all through the relevant period the promotees held appointments as Assistant Engineers in a non-substantive capacity, i.e., either on an officiating or a temporary basis. This being the position,

they would all rank junior to the direct recruits who, from the very start, held appointments made "substantively in clear vacancies." A

6. We may here make it clear that this order does not cover such officers as were holding the posts of Assistant Engineers on a substantive basis prior to the 1st of November, 1956 when the new State of Mysore now known as Karnataka came into being. Nor would it B adversely affect the case of any Assistant Engineer who acquired a substantive status prior to the promulgation of the Recruitment Rules and the appointment of the direct recruits. Persons falling within these two categories will first have to be accommodated in the clear vacancies available and only the remaining vacancies will have to be C utilised for fitting in the direct recruits and the Assistant Engineers who have disputed their claim in these proceedings. It may also be mentioned that the quota rule will not stand in the way of the Government giving effect to this arrangement which has been taken care of in the amendment (promulgated on the 23rd of October, 1961) to the Recruitment Rules. The relevant portion of that amendment is D contained in item 3 thereof which is reproduced below :

> "3. To rule 2 of the following proviso shall be added and shall be deemed always to have been added, namely—
>
> "Provided that in respect of direct recruitment of Assistant Engineers for the first time under these rules the percentages relating to direct recruitment and recruitment by promotion specified in column 2 of the Schedule shall not be applicable and the minimum qualifications and the period of production shall be the following, namely— E
>
> "Qualifications : . . . . . ".

F

It is common ground between the parties that the posts comprised in the cadre of Assistant Engineers constituted by the Recruitment Rules have yet to be filled in for the first time. The proviso extracted above therefore will apply fully to the utilization of those vacancies as stated above. It goes without saying that all questions of seniority shall be decided in accordance with the Seniority Rules and that the G Recruitment Rules, as amended from time to time, shall be fully implemented as from the date of their enforcement, i.e., 1st of March, 1958.

7. In the result we accept the appeals, set aside the judgment of the High Court and decide the dispute between the parties in accordance with the observations made in paragraphs 5 and 6 hereof. H

V.D.K. *Appeals allowed.*