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BALESHWAR DASS & ORS. ETC.

v.

STATE OF U. P. & ORS. ETC.

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August 19, 1980

[V. R. KRISHNA IYER AND R. S. PATHAK, JJ.]

Service matter—Duly qualified persons appointed as Assistant Engineers in temporary posts—Officiating service—Whether could count for seniority—Seniority, how counted—Appointment in a substantive capacity, whether should be to a permanent post—Substantive capacity—Meaning of.

C

Under rule 3(b) of the U. P. Service of Engineers (Junior and Senior Scales) Irrigation Branch Rules a member of the service means a government servant *appointed in a substantive capacity* under the provisions of the rules to a post in the cadre of the service. Rule 4 empowers the State Government to increase the cadre *by creating permanent or temporary posts* from time to time according to the exigencies. Rules 5 and 6 contemplate recruitment (i) by direct appointment from amongst engineer students of the Thomson Civil Engineering College, Roorkee, (ii) by direct appointment, (iii) by appointment of officers in the temporary service of the United Provinces, Public Works Department (Irrigation Branch), (the selection in all these three categories was to be after consulting a permanent Board of Selection) and (iv) by promotion of members of the Subordinate Engineering Service, who have, in the opinion of the Government, shown exceptional merit. The proviso to rule 5 states that it would not be necessary to consult the Commission in the case of appointment of a temporary Officer to a permanent vacancy, if he has already been appointed to a temporary post in the cadre of service after consultation with the Commission. In 1950 recruitment through Thomson College was stopped and in 1961 direct recruitment was made through the Public Service Commission. Rule 6 empowers the Government to fix quotas for members of the Subordinate Engineering Service. Rule 17 stipulates a period of probation in regard to all candidates who were not in the permanent employment of the Irrigation Branch. Rule 19 provides the mode of confirmation of a probationer in his appointment. Rule 23 regulating the *inter se* seniority of the officers states that seniority in the service shall be determined according to the date of the order of appointment to it.

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In 1948 by combining class I and class II officers into one service the Government constituted the U. P. Service of Engineers (Junior and Senior Scales) but since the rules regulating their recruitment, conditions and classifications could not be made, the Government followed the 1936 Rules which were modified from time to time by Government orders. The High Court struck down the seniority list of engineers prepared by the State Government in 1965 and gave directions to the Government to re-determine the seniority in accordance with Rules 23 of the Rules. Purporting to act on these directions a fresh seniority list was drawn up by the Government in May, 1969 but that too was struck down by the High Court.

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A In appeal to this Court it was contended that it was not correct to say that the temporary Assistant Engineers were not members of the service on the ground that their appointment was not in a substantive capacity in permanent posts since they had fulfilled all the requirements of the rules for being appointed on a regular basis viz. possessing the requisite qualifications, selection by the State Service Commission etc. irrespective of whether their appointments were to temporary posts or not, the long service they had put in must weigh B in reckoning the seniority.

Allowing the appeal in part

HELD: The G. O. of December 1961 in so far as it fixes the proportion of permanent vacancies to be filled from the various sources had statutory force being under rule 6. So much so, the various groups can claim permanency C only in terms of that proportion, although not being holder of a permanent post neither debars membership of the Service nor earning the benefit of officiating service for purposes of seniority. [470 B-C]

While temporary and permanent posts have great relevancy in regard to the career of the government servants, keeping posts temporary for long, sometimes by annual renewals for several years and denying the claims of the incumbents on the score that their posts are temporary, makes no sense D and is arbitrary especially when both temporary and permanent appointees are functionally identified. If, in the normal course, a post is temporary in the real sense and the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricious in clothing him with no right. Not so, if the post is, for certain departmental or like purposes, declared temporary, but it is within the ken of both the government and the appointee that the temporary posts are virtually long-lived. It is irrational E to reject the claim of the temporary appointee on the nominal score of the terminology of the post. [462 D-F]

Officiating service in a post is for all practical purposes of seniority as good as service on a regular basis. It may be permissible, within limits, for government to ignore officiating service and count only regular service when claims of seniroity come before it, provided the rules in that regard are clear and F categoric and do not admit of any ambiguity and an arbitrary cut off of long years of service does not take place. While rules regulating conditions of service are within the executive power of the State or its legislative power under proviso to Article 309, such rules have to be reasonable, fair and not grossly unjust if they are to survive the test of articles 14 and 16. [462 G-H]

For purposes of seniority, one has to go by the order of appointment to G the Service in a substantive capacity. But no fixed connotations can be attributed to expressions like 'substantive capacity', 'service', 'cadre' and the like because probation even for temporary appointees is provided for in the rules which means that even temporary appointments can be substantive. For there cannot be probation for a government servant who is not to be absorbed substantively in the Service on completion thereof.

Permanency carries with it other rights than mere seniority and promotion. H Permanent posts and temporary posts are in official terminology sharply different but in the historical context of the U.P. service of Engineers there is no difference because recruitment of even temporary engineers requires consultation with the Public Service Commission, undergoing physical fitness tests, probation and

departmental tests. The temporary appointees, whose appointments have received the approval of the Public Service Commission and who have run out the two years of probation must be deemed to be appointed in a substantive capacity. [465 D-E] A

It is not correct to say that when Engineers are appointed to temporary posts but after fulfilling all the tests for regular appointment they are not appointed in a substantive capacity. It was conceded by the State in its counter-affidavit that all the persons appointed to the service who are not already in the permanent employment of the Irrigation Department shall be placed on probation for four years (since reduced to two years), which means that persons who were not permanently appointed but only temporarily appointed are also placed on probation and officers are not put on probation unless they are on their way to membership in the Service on completion of probation. That is to say although they are temporary appointees, if their probation was completed and other formalities fulfilled, they become members of the service. Merely because the person is a temporary appointee it cannot be said that he is not substantively appointed if he fulfils the necessary conditions for regular appointment such as probation and consultation with the Public Service Commission. [466 A-D] B C

Rule 23 is the relevant rule when a question of seniority arises. The order of appointment in a substantive capacity is the significant starting point for reckoning seniority. The appointment in a substantive capacity need not necessarily be to a permanent post. It is sufficient even if it is to a temporary post of long duration. [467 E-G] D

An appointee to a permanent post acquires certain rights which one who fills a temporary post cannot claim. Nevertheless, when the post is not purely temporary or *ad hoc* or of short duration or of an adventitious nature, the holder of such temporary post cannot be degraded to the position of one, who, by accident of circumstance or for a fugitive tenure occupies the temporary post for a fleeting term. [468 F] E

A person is said to hold a post in a substantive capacity when he holds it for an indefinite period, especially of long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation. If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity. [469 D-E] F

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1317-1318 of 1976. G

Appeals by Special Leave from the Judgment and Order, dated 13-9-1973 of the Allahabad High Court in Civil Misc. Writ Petition Nos. 2719/69 & 4034/69.

AND H

WRIT PETITION NOS. 864/79 and 251/80
(Under Article 32 of the Constitution)

A *R. K. Garg, V. J. Francis; D. K. Garg* and *Sunil Kumar Jain* for the Appellants in CA No. 1317/76 and Petitioner in WP 251/80.

K. K. Singhvi, Anil Kumar Gupta, Brij Bhushan, Virendra Singh, N. P. Mahendra, A. M. Tripathi and *S. S. Khanduja* for the Appellant in CA 1318/76.

B

Yogeshwar Prasad, Ashok K. Srivastava and *Mrs. Rani Chhabra* for the Petitioners in WP No. 864/79.

D. V. Patel, Anil Kumar Gupta, Brij Bhushan, Virendra Singh, N. P. Mahendra and *A. M. Tripathi* for the Intervener in CA No. 1317/76.

C

G. N. Dikist and O. P. Rana for Respondent No. 1 in both the appeals.

Shanti Bhushan and *M. C. Bhandare* for the Respondents Nos. 2-3 in CA No. 1317/76 & R-21 in CA No. 1318/76.

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S. Markandaya and *U. P. Singh* for R. 9 in CA No. 1318/76.

The Judgment of the Court was delivered by

KRISHNA IYER, J.—This case illustrates the thesis that unlimited E jurisdiction under Art. 136 self-defeatingly attracts unlimited litigation which, in turn, clogs up and slows down to zero-speed the flow of ultimate decisions, what with the lengthy orality and legal nicety of lawyers' advocacy. This bunch of appeals, affecting the fortunes of a large number of engineers, is evidence of the flood of 'service' litigation which overwhelms the courts, F paralyses public offices and demands of our pyramidal Justice System basic changes, jurisdictional and processual. The perennial problems of Service Justice, which currently crowd the dockets of the higher courts, *save in cases of basic breaches of the fundamental law,* may well be made over to expert bodies, high-powered and final but presided over by top judicial personnel. Service Jurisprudence is a specialised branch best administered by Special tribunals, not routinely under Art. 226. We do not pontificate but share thoughts.

We are concerned mainly with the competitive claims to seniority mainly as between three groups of engineers belonging to H the U. P. Service of Engineers (Irrigation Branch) — Graduate engineers directly recruited by the Public Service Commission by competitive examination, graduate engineers once appointed in

numbers but later absorbed after consultation with the Public Commission and diploma-holders later promoted as Assistant Engineers. Brushing aside the hoary history of the Service when the British were hardly concerned with the development of India's natural resources, we may start the story with the U. P. Public Works Department of which the Irrigation Wing was a part, the other branch being Buildings and Roads. Later on, separate departments for Buildings and Roads and for Irrigation were formed in 1946 as a developmental imperative of the State. Recruitment to the Service—we are here concerned only with the Irrigation Department —was governed by vintage Rules framed under s. 96B of the Govt. of India Act, 1919, which had a confused course, and that factor *i.e.* lack of comprehensive structural engineering of the Engineering Service Rules—is largely responsible for frequent group clashes among the broad brotherhood of engineers whose whole-hearted service, now distracted by litigation, is needed for national reconstruction. But national dedication, so vital to poverty eradication, is subject to one rider in our society viz. charity begins at home. And so, for their own justice oriented survival, the groups are fighting in courts while the demands of developmental justice to the people need their presence in the countryside.

There were, to begin with, Class I and Class II officers, but in 1948, the two were fused into one, viz. the U. P. Service of Engineers (Junior and Senior Scales). The Service came into being but fresh rules of recruitment were not made. Thus, a Service was born but then the rules regulating recruitment, conditions and classifications were unborn. So, Government relied on the old Rules of 1936 for these purposes with some G. O. or other issued under pressure of exigencies. The past projected into the present with *ad hoc* changes—a process which, not being scientific nor systematic, was bound to produce injustice, as it has, in this Service. The dialectics of Justice to Public Services lead to conflicts between the thesis (the old conditions) and anti-thesis (the new expectations until a synthesis realist equilibrium without discrimination) is reached by enlightened governmental policy-making. Had Rules for the Service, in tune with the Constitution and the updated facts of life been made by Government, instead of flirting with the past and improving for the present, things would have been different. Court litigation is not designed for the end, but judges cannot but make-do with what fossil Service Rules with engrafted mutations survive. To dig into the past is our lot in this case. We do not blame Government for failure to make a whole scheme of post-Constitution Rules of Service, pre-occupied as it may well be with other priorities.

A The struggle between the various groups is for seniority, in some cases even for retention of regular appointment. The State had prepared a list of seniority first in December 1965. This list was attacked as bad in law and the High Court by its judgment of October 1967 in Civil Misc. Writ No. 4416 of 1966 ordered:

B "The petition, therefore, succeeds and is allowed. The respondents are directed not to give effect or act in virtue of the seniority list announced on December 30, 1965. They are further directed to redetermine the seniority *inter se* of the petitioner and respondents 2 to 49 in accordance with rule 23."

C Purporting to act on this direction a fresh seniority list was drawn up by Government in May 1969, and this, in turn was challenged by many as violative of Art. 14 and the High Court allowed some of the writ petitions and held:

"For the reasons set out above, Civil Misc. Writ Petition No. 2719 of 1969 is allowed. The orders of appointment in the D substantive capacity of respondents Nos. 2 to 169 and the seniority list, dated 13-5-1969 (Annexure 'K' to the petition) are quashed. The State Government is directed to make fresh appointments and draw seniority list in accordance with law keeping in view the office Memorandum. dated 7-12-1961".

E The broad perspective we must adopt is plain enough in the light of this Court's decision (see the concluding observations of Chandrachud, J. in the *State of Jammu and Kashmir* v. *Shri Triloki Nath Khosa and Ors.*(1) The goal of an egalitarian society must be reflected in the process of classification of services, equalisation being the essential direction and perpetration of divisions and proli- F feration of classes being reduced to the minimum. Humanism-cum-equalism, as a way of life, is integral to our constitutional order and slow though the process be, sure shall our steps be towards fusion, not fission in the various Departments of Public Service. Unfortunately, this constitutional ethos has yet to be imprinted upon the genetic code of the "United Provinces Service of Engineers G Class II Irrigation Branch Rules" framed under s. 96B of the Government of India Act, 1919 and continued under Art. 313 of the Constitution. The result is micro-classifications *ad hoc* amendments, uncertain service conditions, litigative excursions, and indefinite postponement of even a Seniority List.

H The ancient year extant 1936 Rules relating to Class II service, framed under different conditions, still govern the Service with such

(1) [1974] 1 S.C.C. 19.

patch-work modifications through Government Memoranda as were made by the State from time to time. A garment of seams and stitches to-day drapes this developmentally strategic department despite Reports by two expert Committees, and this anachronistic set of Rules must be adapted by the Court now to fit the over-grown anatomy of Irrigation Engineers (Junior Division).

The fury of the controversy rages round seniority in service among the triple categories of Assistant Engineers which we will presently describe. Before that, the basic rules of 1936. Rule 23 regulates *inter se* seniority and reads thus:

> "Seniority in the service shall be determined *according to the date of the order of appointment to it,* provided that if the order of the appointment of two or more candidates bears the same date, their seniority *inter se* shall be determined according to the order in which their appointment has been notified".
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> (emphasis added)

So, the order of *appointment to the Service* is decisive of seniority and the service horoscope of each Assistant Engineer has to be cast with reference to his appointment order. The next question then, is, when is an engineer appointed to the Service? When, under the Rules, he becomes a member of the Service. For, until he gains entry into the Service he cannot claim to be appointed to it. To hover around with prospects of entry is not the same as actual entry. Therefore, we have to examine when an engineer becomes a member of the Service under the Rules. Clause (b) of Rule 3 defines 'Member of the Service' to mean a government servant '*appointed in a substantive capacity* under the provisions of these rules.....to a post in the cadre of the Service.' What, then, is the cadre of the Service? What do we mean by appointment in a *substantive capacity* to a post in the cadre? Can there be a temporary post included in the cadre? Here, r. 4 becomes relevant. Rule 4 prescribes the sanctioned strength of the cadre. It provides that the government may, subject to the provisions of r. 40 of the Civil Services (Classification, Control and Appeal) Rules, 1930 'increase the cadre *by creating permanent or temporary posts* from time to time as may be found necessary.' So a cadre post can be *permanent or temporary* and if an engineer were appointed *substantively* to a temporary or permanent post he becomes a member of the Service. The touchstone then, is the *substantive capacity* of the appointment. Here we get into service jargon with slippery semantics and flavoured officialese.

A Now, we must go to the plural sources of recruitment, the arrangement of the ratio among the sources and the requirements for them to get into the Service. Rules 5 and 6 relate to this branch of enquiry. The sources of recruitment are set out thus:

Sources of Recruitment:

B (i) by direct appointment from amongst engineer students who have passed out of the Thomson Civil Engineering College. Roorkee, and who have completed a course of training in the Irrigation Branch as engineer students, after consulting a permanent Board of Selection;

(ii) by direct appointment after advertisement and after C consulting a permanent Board of Selection;

(iii) by the appointment of officers in the temporary service of the United Provinces, in Public Works Department, Irrigation Branch, after consulting a permanent Board of Selection;

(iv) by promotion of members of the United Provinces D Subordinate Engineering Service or of Upper Subordinates in the Public Works Department, Irrigation Branch, who have in the opinion of Government shown exceptional merit.

We have stated earlier that these Rules were framed long before the Constitution of India and have suffered many amendments one of which is the substitution of the Public Service Commission for a E permanent Board of Selection. A Proviso has been added to r. 5 and that runs thus:

"Provided that it will not be necessary to consult the Commission in the case of appointment of a temporary officer to a permanent vacancy if he has already been appointed to a F temporary post in the cadre of service after consultation with the Commission. The amendments shall have effect from the date of notification."

This Proviso shows that temporary officers (whatever that expression means) could be appointed to permanent vacancies without consultation with the Commission, if they had already been appointed to G temporary posts after consultation with the Commission. Thus, we get the idea of temporary posts and permanent posts, provisional appointments and substantive appointments. Indeed, the bewildering variety was brought out during arguments by reference to the Fundamental Rules. A permanent posts means

H "a post carrying a definite rate of pay sanctioned without limit of time"

[FR 9(22)]

A temporary post means

> "a post carrying a definite rate of pay sanctioned for a limited time"
>
> [FR 9(30)]

Fundamental Rule 22B speaks of holding a post in a substantive, temporary of officiating capacity. But this jargon is not the last word after the Constitution came to be enacted.

Be that as it may, the sources of recruitment are 4-fold. The Thomson College appointments were formally stopped by a G. O. of 1950. Another big change took place. Direct recruitment, routed through the Public Service Commission was introduced in 1961. The rules of procedure for direct recruitment and kindred matters are provided by an Office Memorandum of December 1961 which we will consider more closely as they bear upon the crucial controversy.

Rule 6 gives power to Government to fix quotas for the various sources and not less than 20% of the vacancies are reserved for selected qualified members of the Subordinate Engineering Service who are category 4 in r. 5. Persons who are recruited in terms of rr. 5 and 6 are appointed subject to r. 17 which stipulates a spell of probation in regard to all candidates who are not already in the permanent employment of the Irrigation Branch. We quote the rule:

> 17. All persons appointed to the service who are not already in the permanent employ of the Irrigation Branch of the United Provinces Government *shall be placed on probation for four years* provided that such of them as have undergone training as engineer students, or have served as temporary engineers in the Irrigation Branch of the United Provinces Government, may be permitted to count the period of such training and service respectively towards this period of probation:
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> Provided also that *the Government may extend the period of probation in any case.* The Govt. may at any time during the period of probation dispense with the service of an officer, after giving him one moth's notice.

The probationer is confirmed in his appointment on his satisfactory completion of probation after passing the necessary tests. Rule 19 relates to confirmation in the appointment of a probationer and reads thus:

> 19(i) A probationer shall be confirmed in his appointment when—
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> (a) he has completed the prescribed period of probation,

A (b) he has passed all the tests prescribed in the last preceding rule, and

(c) the Government are satisfied that he is fit for confirmation.

(ii) All confirmations under this rule shall be notified in the United Provinces Gazette.

B

Two vital factors must guide us in this interpretative exercise. If a dated rule of colonial times is to be applied to-day, that meaning which sustains it as constitutionally valid must be preferred to another which may be appealing, going by officialese or literal sense. We have to regard it as a case of 'new wine in old bottle'. C We must re-interpret the rules to comport with Arts. 14 and 16 by constitutionally acceptable construction, not rigid connotation given to expressions in the vintage vocabulary of British Indian days. We stress this aspect because the argument urged is one of unconstitutionality of the Seniority List and of the Rules which deprive many engineers appointed in the normal course and serving for long D years arbitrarily and unreasonably of the credit of such service merely because the literal rigour of old Rules requires it. We must strive to salvage the Rules, if need be, by assigning a fresh sense, language permitting, which will fit the Rules into the "fundamental rights" mould. We are thus thrown into the meaning of meanings, E released from officially sanctified meanings. In short, while reading the Rules we must remember the Constitution.

Secondly, words themselves are but the skins of thought and once we get that, the root though which the language of the rules seeks to express, it is possible to interpret the words accordingly. Even so, we cannot run away from the Rules as they are, though F moth-eaten by time and by tinkering amendments.

One of the principal groups in this forensic battle is the direct recruits selected by competitive tests by the Public Service Commission. So we must bestow some attention on their genesis and position in the total scheme. We reject the submission that the G Official Memorandum incorporating these Rules, not being expressed to have been issued in the name of the Governor, is of no legal validity. We cannot 'bastardize' these Rules made and published under Government authority, acted upon for two decades and recruitments made by the Public Service Commission and universally accepted as binding 'Rules Regulating Selection for Recruitment of H Assistant Engineers (U. P. Service of Engineers Class II) in the Various State Engineering Services in Uttar Pradesh'. We will set out some parts of these Rules of December 7, 1961.

We may, at this point, crystallise the effect of the Rules read so far, so that it may serve as a spring board for further discussion. The battle between the parties or groups very much turns on what is the intent and effect of Rules 23, 3, 4, 5, 6, 17 and 18 and their impact on r.23 read in the new context of the 1961 Rules. We have to grapple with the crucial question of seniority which, when we hark back to r.23, in turn, revolves round the "date of the order of appointment". The effect of probation and confirmation is also another consideration. But r.23 sets out the guidelines and the entire endeavour of both sides has been to supply an answer which gives one group a superior position as against another in the competition for seniority which apparently has promotional value when posts of Executive Engineers fall vacant.

We must confess that because of the absence of a coherent policy of recruitment and conditions of service and on account of frequent changes through executive instructions, apart from the mystique of officialese, it has become difficult for us to rationalise the rules and decode the principles underlying regular appointments relevant to seniority. Even in court, as the argument proceeded, judges and advocates had to wrestle with the rules to extract a coherent system out of them. The High Court, on both the occasions, when challenges were made, quashed the seniority lists and directed fresh lists to be prepared. But in the absence of clear judicial guidelines the exercise by the Executive would lead to further confusion and cavil and that is why we express our dismay at the whole situation where from stage to stage, chaos, not cosmos, has been the result.

Reference was made to an investigation by the Lal Committee and the Shukla Committee which went into the question of rationalisation of the scheme of recruitment, classification, seniority and promotion; but as late as 1980 we are in no better position than when the moth-eaten rules and instructions were made decades ago. May be, the Reports of the Lal Committee and Shukla Committee to which reference was made need not, as is the fate of most Reports, gather dust but give light where the will to seek light exists. This is a sad commentary on the functional failure at the Service level of the State Government which has led not merely to incessant litigations among engineers, uncertainty about their future but also discontent and disincentive *vis-a-vis* their work in the Irrigation Department.

We see nothing arbitrary in the 1961 Memorandum although in its application, we have to remember the prior rules and when the

A two are woven into each other or, rather, when the later 1961 Memorandum is devetailed to the 1936 Rules the results that may follow will have to be ascertained with care and consistently with the ratio of the decisions of this Court in cognate situations.

What is significant to know is that Govt. decided in 1961 to B resort to direct recruitment of Assistant Engineers through competitive examinations held by the Public Service Commission. It was, however, alive to the fact that massive appointments had already been made, in the years gone by, to the posts of Asst. Engineers from among graduates in engineering by direct selection and later approval by the Public Service Commission apart from Thomson C College graduates in engineering. The Government was also aware of the promotional claims of those in the subordinate services. Moreover, there were vacancies permanent and temporary and there were appointees, permanent and temporary. The equities of the situation had to be taken note of because Government could not, without being guilty of cruel snobbery relegate all those, except D direct recruits, from among degree-holders by competitive examinations through the Public Service Commission, to a secondary status. In this holistic view it was that the Office Memorandum, dated December 7, 1961 was promulgated. We extract it because its import and impact are decisive to an extent of the fate of the cases E before us:

> The principles regulating selection for recruitment to permanent and temporary posts of Assistant Engineers in the various State Engineering Services have been under the consideration of Government for some time past and after thorough consideration the Governor is pleased to order that in future direct recruit- F ment to both permanent and temporary vacancies of Assistant Engineers (Civil, Electrical and Mechanical) in the Public Works, Irrigation and Local Self-Government Engineering Departments will be made on the results of competitive examinations to be conducted by the Public Service Commission. Candidates G possessing technical and other qualifications prescribed in the rules for the Uttar Pradesh Service of Engineers in the Departments concerned will be eligible to appear at the examination for that particular service.
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> 2. Successful candidates in order of merit will subject to the relevant rules regarding physical fitness and other matters, H be appointed directly on probation against vacant permanent posts and those following will be appointed against temporary posts.

3. All vacancies in the permanent cadre in the Irrigation and Local Self-Government Engineering Departments in a particular year will be pooled and filled as follows : A

(a) 50 per cent by direct recruitment through competitive examination.

(b) 20 per cent by promotion from subordinate services. B

(c) 30 per cent by selection from amongst temporary Assistant Engineers recruited through the Public Service Commission.

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However, as measure of concession to the existing temporary Assistant Engineers who were recruited as temporary Assistant Engineers on the advice of the Public Service Commission prior to the introduction of this scheme for the time being distribution of vacancies in the permanent cadre of Assistant Engineers will be as follows : D

(a) 30 per cent by direct recruitment through competitive examination (25 per cent for the Public Works Department),

(b) 20 per cent by promotion from subordinate service (25 per cent for the Public Works Department),

(c) 50 per cent by selection from amongst existing temporary Assistant Engineers who were recruited as temporary Assistant Engineers through the Public Service Commission. E

The distribution of vacancies in the permanent cadre in the above manner will be subject to the condition that the Governor in consultation with the Public Service Commission, may, for special reasons, increase or decrease the percentage fixed for recruitment by selection and competitive examination in any particular year. F

The candidates selected on the results of competitive examination and appointed against permanent vacancies shall be placed on probation for a period of 3 years. However, in the case of such directly recruited candidates who have served as Assistant Engineers in a particular department in temporary capacity, continuous period of temporary service rendered as Assistant Engineer immediately before selection for permanent post of Assistant Engineer may be allowed to count towards this period of probation. G

The candidates will not be required to possess one year's practical experience, prescribed in the existing rules for recruitment of Assistant Engineers as a pre-requisite qualification for H

recruitment of Assistant Engineer in the various departments. The period of practical experience will be covered by the period of probation.

During the probationary period candidates will be required to pass the Departmental Examination prescribed by the various departments. Probationers may be confirmed subject to passing these examinations and their work continuing to be satisfactory.

Temporary and officiating Assistant Engineers possessing the requisite technical qualifications will be eligible to appear in the competitive examination. The maximum age limit in the case of those working in the department with the approval of the Commission or after having been recruited by the Commission will be 40 years.

Plan and the syllabus of the competitive examination will be as shown in Appendix 'A' enclosed with these orders.

There is more of this maze of rules and notifications but we desist from bringing them on record since they have not much bearing on the ultimate result. We must emphasise that while temporary and permanent posts have great relevancy in regard to the career of government servants, keeping posts temporary for long, sometimes by annual renewals for several years, and denying the claims of the incumbents on the score that their posts are temporary makes no sense and strikes us as arbitrary, especially when both temporary and permanent appointees are functionally identified. If, in the normal course, a post is temporary in the real sense and the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricious in clothing him with no rights. Not so, if the post is, for certain departmental or like purposes, declared temporary, but it is within the ken of both the government and the appointee that the temporary posts are virtually long-lived. It is irrational to reject the claim of the 'temporary' appointee on the nominal score of the terminology of the post. We must also express emphatically that the principle which has received the sanction of this Court's pronouncements is that officiating service in a post is for all practical purposes of seniority as good as service on a regular basis. It may be permissible, within limits, for government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categories and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the service rendered in the two types of posts.

While rules regulating conditions of service are within the executive power of the State or its legislative power under proviso to Article 309, even so, such rules have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16. A

While assessing the effect of the totality of the two sets of rules placed before us, we have to make the broad approach set out above and not become prisoners of the 'official' meaning of abstruse expressions used in the rules which themselves have frequently changed with a view to "rationalisation". The two committees (the Lal Committee and the Shukla Committee) examined the entire matter but we have no idea, from the Government's affidavits, as to how far the rules have been intelligently moulded by these reports. B C

Right in the beginning, we have indicated that r. 23 is of spinal significance, and for purposes of seniority, one has to go by the order of appointment to the Service in a substantive capacity. It is difficult to overlook r. 23 or slur over the expression 'substantive capacity'. But we cannot attribute fixed connotations to expressions like 'substantive capacity', 'service', 'Cadre' and the like because we find that probation even for temporary appointees is provided for in the rules which means that even temporary appointments can be substantive. For, there cannot be probation for a government servant who is not to be absorbed substantively in the Service on completion thereof. With this background, if we approach the scheme unfolded by the Office Memorandum of December 1961 superimposed on the 1936 Rules, we get three categories of Assistant Engineers and a fixation of the proportion among them. Firstly, there are to be direct recruits through open competition held by the Public Service Commission. 50% of the posts will go to them although it is stated that the vacancies are to be "in that permanent cadre". Secondly, the subordinate services will get 20% by promotion and thirdly, 30% will belong to the temporary Assistant Engineers recruited through the Public Service Commission in the past. The office Memorandum makes it clear that direct recruitments will be made to "*both permanent and temporary* vacancies of Assistant Engineers". But this scheme of 1961 cannot stand in isolation and has to be read as subordinate to the 1936 Rules. After all, the 1961 Memorandum cannot override the Rules which are valid under Art. 313, and so must be treated as filling the gaps, not flouting the provisions. So, read, what is the eventual conclusion? D E F G

The State, in its counter-affidavit, has urged that all parties must be deemed to have accepted the decision of the High Court in its judgment of October 30, quashing the seniority list of December 30, 1965. We are inclined to proceed on that footing because, after that decision H

A was rendered, Government accepted it and went through the exercise of preparing a fresh seniority list and all the engineers concerned acquiesced in the decision and never raised any objection to the fresh preparation of a seniority list consequent upon the High Court's decision of 1967. That, by itself, does not give us any conclusive answer to the present question which has been agitated before us. First of all, B we must understand the two grievances brought to our notice by the appellant and the writ petitioners. Their contention is that whether their appointments were to temporary posts or not, the long service they have put in must weigh in reckoning seniority. Their further contention is that if the Public Service Commission has arranged C the order of merit in a particular manner and if appointments have been made irregularly without reference to that order or priority, they have no objection to marginal re-adjustments while arranging the seniority of the various appointees by giving effect to the order in which the Public Service Commission has made its recommendations. It is also fairly apparent from the arguments, although not formally D conceded by counsel, that officiation, from the date from which temporarily appointed Assistant Engineers have been formally approved by the Public Service Commission on reference by the State Government, must be given credit or at least from the date of Government's acceptance of the Commission's recommendation. There was nothing more by way of impediment in their appointments being treated E as regular. They were Assistant Engineers duly qualified. Their appointments might have been temporary, but temporary posts and temporary appointments are within the Rules. The Public Service Commission has since been consulted and has concurred and Government has accepted it. Every indicium of regular appointment is thus present. There is nothing relied on by the rivals to dis- F lodge the reckoning of service for purposes of seniority from then on, except the sole contention that the temporary Assistant Engineers are not members of the Service because their appointment is not in a substantive capacity and not a permanent post.

G We are free to confess that the rules, stricking divergent notes, like ill-tuned cymbals, have vexed us a while. The touchstone of valid interpretation being the Constitution and harmonisation of rules with fundamental rights being the proper path we have tried to sensitize the provisions to do equal justice under the law refusing to petrify r. 23 or the other relevant rules we have referred to Rule 4 of the 1936 H Rules clearly contemplates a cadre, as covering *"permanent* or *temporary* posts". So, a cadre takes in temporary posts. Once we cease to be allergic to 'temporary posts' as a component of a cadre we reach

the next step that a cadre is, as it were, a layer in the Service. Rule 4 itself, while dealing with the strength of the cadre, speaks of a holder of a post in a cadre as a member of the Service may be the holder of a temporary or a permanent post. A

We have two, perhaps three, types of direct recruits. The first is the vanishing species of Roorkee University 'engineer students'. They were directly appointed but on a temporary footing. Massive appointments were made of other degree-holders as Assistant Engineers on a temporary footing to meet the massive developmental requirements. No one can imagine that the guaranteed posts to the brilliant Roorkee boys was temporary only or that the large number of graduates were being lured into employment for long-term engineering requirements on a fleeting footing for a few months! Surely, Government wanted to recruit them on a regular basis but hesitated to appoint them to permanent posts as such because budgetary provisions, creation of permanent posts by assessment of the total requirements and the like were not instant jobs but needed more time. The Plan was to take these degree-holders on a regular lasting basis but to make them permanent after study of the situation. Permanency carries with it other rights than mere seniority and promotion. Permanent posts and temporary posts are, in ordinary officialese, sharply different but in the historical context of the evolving U.P. Service of Engineers 'thin partition do their bounds divide'. The recruitment of even temporary engineers under source (iii) of r. 5 requires consultation with the Public Service Commission. Likewise r. 14 requires for all the three types of direct recruits, temporary included, physical fitness tests. B C D E

> 14. No person shall be appointed as a member of the service unless he is in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of his duties as a member of the service. Before a candidate is finally approved for appointment to the service under the provisions of rules 5(i), 5(ii) or 5(iii) he shall be required to pass an examination by a Medical Board at his own expenses and shall pay a fee of Rs. 16 for such examination. F

Probation, tests and confirmation are laid down under rr. 17 to 19 for "all persons appointed to the service". We delve into these details to drive home the propinquity in status of permanent and temporary engineers in the special conspectus of facts here. G

We see no reason to hold that when engineers are appointed to temporary posts but after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, they are not appointments in a *substantive capacity*. In Service terminology, H

perhaps, eye-brows may be raised when we say so, but then, we must remember that the State itself in its counter-affidavit has construed r. 17 of the Rules as providing "that all persons appointed to the Service who are not already in the permanent employment of the Irrigation Department shall be placed on probation for four years" (since reduced to two years). This means that persons who are not permanently appointed but only temporarily appointed are also placed on probation and officers are not put on probation unless they are on their way to membership in the Service on completion of probation. That is to say, although they are temporary appointees, if their probation is completed and other formalities fulfilled, they become members of the Service. It follows that merely because the person is a temporary appointee it cannot be said that he is not substantively appointed if he fulfils the necessary conditions for regular appointment such as probation and consultation with the Public Service Commission etc. From this stand of the State Government it follows that the temporary appointees, whose appointments have received the approval of the Public Service Commission and who have run out the two years of probation, must be deemed to be appointed in a substantive capacity. The only advantage for permanent appointees, i.e. Assistant Engineers who have been appointed to vacancies in the permanent cadre is what belongs to permanent public servants under various rules in different areas of official life.

We are not interested in the arithmatics given in the affidavits and counter-affidavits regarding the permanent vacancies in the various categories designated as A, B and C. What we focus on is the set of principles which must regulate the service available for computation of seniority. In paragraph 22 of the State's counter affidavit the break-up of the vacancies available in the various years to the various categories has been set out. Their accuracy has not been shown to be wrong and we may, perhaps, proceed on the correctness of those figures. It is also made clear by the State that many officers belonging to the class of temporary Assistant Engineers were directly recruited before October 1958 and some of them were promoted as temporary Assistant Engineers from the Subordinate Engineers Service. "These officers had been approved for temporary appointment by the Public Service Commission before 1958". Likewise, for the other years, particulars have been furnished. The Government has also clearly undertaken that the competitive seniority as between direct recruits and the temporary appointees who have been regularised may have to be taken up later on. The State's affidavit asserts :

> "It is also correct that in the appointment order it was mentioned that seniority inter se and on the list of permanent Assistant

Engineer of the officers will be determined later on." A

We do not consider it right or necessary to fix the seniority *vis-a-vis* the date of appointment of the various parties, as that is the administrative function of Government. Nor do we think we should interfere with the order of the High Court setting aside the seniority list of 1969. A fresh list has anyway to be prepared but the more meaningful judicial exercise is to lay down the correct principles and guidelines, free from discriminatory infirmities and fairly in keeping with the extant Service Rules. The Rules are, we make it clear, those made in 1936 under the Government of India Act, 1919 and continued by force of Art. 313 of the Constitution. Changes wrought by orders and instructions such as the 1961 Memorandum cannot over-ride the Rules themselves but will operate subject to them in case of inconsistency. Even an Administration of Inaction Unlimited must remember that a systematic set of Service Rules is vital not only in fulfilment of its constitutional obligation under the proviso to Art. 309 but also to keep the morale and to promote contentment among the Civil Services by eliminating the 'inglorious uncertainties' about career prospects which cut at the root of planned living. So we hope that, what with two expert commitee reports slumbering in the Secretariat cells, Government will frame rules, tuned to the finer notes of Art. 16 and other mandates and in consonance with the realities obtaining in this and sister services, after hearing affected sides as a stroke of fairplay and without being file-logged for long. We hold that r. 23 is the relevant mariner's compass when a question of seniority arises. Deducing therefrom we get the further guideline that the order of appointment in a substantive capacity is the significant starting point for reckoning seniority.

Substantive capacity is a flexible expression which cannot be frozen by current officialese, nor by the conditions that obtained in the remote past when the rule was framed. On the contrary, its meaning must be consistent with Art. 16 and must avoid the pitfalls of arbitrariness and irrational injustice. So viewed, we hold that the appointment need not necessarily be to a permanent post. It is sufficient even if it is to a temporary post of long duration. In a Department which had permanent posts and temporary posts of a quasi-permanent nature, there is not much to distinguish the quality of service as between the two. *Patwardhan's case*(1) and *Chauhan's case*(2) have primarily or in passing clarified the equal value of officiating service.

(1) *S. B. Patwardhan & Ors. etc. etc.* v. *State of Maharashtra & Ors.*, [1977] 3 SCR 775 at 793-794-795, 796.

(2) *N. K. Chauhan & Ors.* v. *State of Gujarat & Ors.*, [1977] 1 SCR 1037 at p. 1057.

A In *Patwardhan's case*, Chandrachud, J. observed in the course of the discussion "There is no universal rule, either that a cadre cannot consist of both permanent and temporary employees or that it must consist of both." Later, the learned Judge observed in the same strain:

> The fact that the permanent strength of the cadre was determined on the basis of permanent posts at any given time, as for example when the Bombay Government passed resolutions on March 22, 1937 and April 13, 1945 cannot detract, from the position that even temporary posts of Deputy Engineers were treated as additions, though temporary, to Class IV cadre.

B

The Court, in that case, also held that confirmation cannot be the sole C touchstone of seniority as that will be indefensible :

> Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member D of the judiciary who was confirmed as District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an E employee should be confirmed or not depends on the sweet will and pleasure of the government.

In *Chauhan's case* this Court observed :

> "Seniority, normally, is measured by length of continuous officiating service—the actual is easily accepted as the legal."

F Of course, an appointee to a permanent post acquires certain rights which one who fills a temporary post cannot claim. Nevertheless, when the post is not purely temporary or *ad hoc* or of short duration or of an adventitious nature, the holder of such temporary post cannot be degraded to the position of one who by accident of circumstance or for a fugitive tenure occupies the temporary post for a fleeting term. G We must make this distinction not only to be truthful to the facts of Service life but also to do justice to those who have otherwise rendered long and satisfactory work in the Irrigation Department. In short, while we do make a distinction between permanent and temporary posts, when we come to the dimension of mere seniority, we whittle down the difference considerably. A post of short duration, say of H a few months, is different from another which is terminologically temporary but is kept on for ten or more years under the head 'temporary' for budgetary or other technical reasons. Those who are appointed

and hold temporary posts of the latter category are also members of the Service provided they have been appointed substantively to that temporary post. A

What, in the context, is a substantive capacity *vis-a-vis* an appointment to a post? In our view, the emphasis imparted by the adjective "substantive" is that a thing is substantive if it is "an essential part or constituent or relating to what is essenial".(1) We may describe a capacity as substantive if it has "independent existence" or is of "considerable amount or quantity". What is independent in a substantial measure may reasonably be described as substantive. Therefore, when a post is vacant, however designated in officialese, the capacity in which the person holds the post has to be ascertained by the State. Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post. To approximate to the official diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contra distinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation. B C D

Once we understand 'substantive capacity' in the above sense, we may be able to rationalise the situation. If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity. E

Government will ascertain from this angle whether the capacity in which posts have been held was substantive or temporary. If it is not, the further point to notice is as to whether the appointments are regular and not in violation of any rule, whether the Public Service Commission's approval has been obtained and whether probation, medical fitness etc., are complete. Once these formalities are complete, the incumbents can be taken as holding posts in substantive capacities and the entire officiating service can be considered for seniority. For other purposes they may remain temporary. It may well be that another interpretation may make r. 23 vulnerable. If a public servant serves for a decade with distinction in a post known to be not a casual vacancy but a regular post, experimentally or otherwise kept as temporary under the time-honoured classification, can it be that his long officiation turns to ashes like a Dead Sea fruit because of a label and his counterpart equal in all F G H

(1) Black's Legal Dictionary, 4th Edn. p. 1597.

A functional respects but with ten years less of service steals a march over him because his recruitment is to a permanent vacancy? We cannot anathematize officiation unless there are reasonable differentiations and limitations.

We take the view that the G.O. of December 1961, in so far as it B fixes the proportion of permanent vacancies to be filled from the various sources, has statutory force being under r. 6. So much so, the various groups can claim permanency only in terms of that proportion, although not being holder of a permanent post neither debars membership of the Service nor earning the benefit of officiating service for purposes of seniority.

C

The normal rule consistent with equity is that officiating service, even before confirmation in service has relevancy to seniority if eventually no infirmities in the way of confirmation exist. We see nothing in the scheme of the Rules contrary to that principle. Therefore, the point from which service has to be counted is the commencement of D the officiating service of the Assistant Engineers who might not have secured permanent appointments in the beginning and in that sense may still be temporary, but who, for all other purposes, have been regularised and are fit to be absorbed into permanent posts as and when they are vacant.

E We, therefore, direct that a seniority list be prepared in the light of the principles laid down by us. It is not for the court to find out how many among the temporary Assistant Engineers are eligible for permanency, how many have cleared all the requirements regarding regular appointments even in temporary vacancies—in short, how many F must be deemed to have been appointed in a substantive vacancy though temporary. That will be worked but by the State in the light of what we have laid down. We do not agree with the High Court in the partly misleading reasoning it has adopted, but do concur in the conclusion that the seniority list deserves to be set aside. We do so in partial allowance of the appeals and dismiss the writ petitions. Parties G will be 'heard' by Government through written or oral representations as it chooses, when it prepares a seniority list but the principles we have put down shall govern. The parties will bear their costs throughout.

H

P.J. *Appeals partly allowed.*
Petitions dismissed.