

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
DELHI.

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REGN. No. OA 41 of 1986.

Shri K.N. Mishra and others
Vs.

.. Petitioners.

Union of India and others.

.. Respondents.

REGN. NO. OA 79 of 1986.

Shri N.K. Dhawan & others.
Vs.

.. Petitioners

Union of India and others.

.. Respondents.

CORAM:

Shri Justice K. Madhava Reddy, Chairman

Shri B.C. Mathur, Vice Chairman.

For Petitioners (in OA 41/86)

Shri Shanti Bhushan,
Senior Advocate with
Shri Prashant Bhushan,
Advocate.

For Respondents.

Shri D.N. Nargolkar,
Counsel for Union of India
and others.

Shri A.K. Sanghi,
Counsel for Union
of India.

Shri G.D. Gupta,
Counsel for
Respondent No. 3.

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REGN. No. OA 41/86 and REGN. No. OA 79 of 1986.

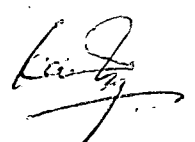
(Judgment of the Bench
delivered by

Shri Justice K. Madhava Reddy,
Chairman.)

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The much awaited seniority list of Assistants of Armed Forces Headquarters Civil Service (AFHQ Civil Service, for short) drawn up on 16/17.1.1986 pursuant to the orders of the Supreme Court dated April 25, 1985 in Writ Petition Nos. 145346-49 of 1984 was expected to put a quietus to the protracted legal battle between the direct recruits and promotees to that post. That has only proved to be the starting point of a fresh litigation which portends to be no less contentious. It is that seniority list that is the subject matter of these two petitions under Section 19 of the Administrative Tribunals Act (hereinafter referred to as "the Act").

The seeds of controversy between the directly recruited Assistants and the promotee Assistants were sown by the AFHQ Service Rules of 1968 (for short Rules) themselves and were nurtured by the non-compliance of these Rules from the date this Service was constituted with effect from March 1, 1968. The seniority list of Assistants drawn up in 1977 was challenged by direct recruits Shri A.C. Joshi and others in Civil Writ Petition No. 2/78 before the Delhi High Court. While that Writ



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Petition was pending, the Service Rules were amended in 1981.

A fresh seniority list was drawn up on 10-8-1984. This seniority

list was now assailed by the promotee Assistants before the

Supreme Court in W.P.No.14346-49 of 1984. The Supreme Court

by its orders dated April 25, 1985 quashed that seniority list

and directed a revised seniority list to be drawn up "in the

light of the observations and principles enunciated in the

fore-mentioned Judgment." The judgment referred to was the

one rendered in G.S.LAMBA Vs. UNION OF INDIA AND OTHERS (1)

In that order, the Supreme Court also observed that "the

conclusion in Lamba's case invalidating the seniority list

was reached after a review of numerous decisions bearing on

the subject and more particularly three recent decisions in

A. JANARDAN VS. UNION OF INDIA AND OTHERS (1983(2)SCR 936,

P.S.MAHAL & OTHERS Vs. UNION OF INDIA & OTHERS (A.I.R.1984 SC 1291

and O.P.SINGLA & ANOTHER Vs. UNION OF INDIA & ANOTHER

(A.I.R. 1984 SC 1595.) The Supreme Court also directed:

"the impugned seniority list will not be
enforced or given effect to till fresh
seniority list according to relevant
rules and valid principles is drawn up."

(1) 1985 (1) Scale 563.

(8)

The panel of promotions was also ordered to be drawn in the light of the revised seniority list.

After that judgment of the Supreme Court, Civil Writ Petition No. 2 of 1978 pending in the Delhi High Court was also disposed of on 24-9-1985 with similar directions.

In pursuance of the Supreme Court's Order, the Central Government prepared a fresh seniority list on November 27, 1985 obviously a tentative one and moved petitions before the Supreme Court stating that in the judgments referred to in the Supreme Court's Order dated April 25, 1985, varying principles were laid down for fixation of seniority and it was difficult to follow them and in the facts and circumstances of the case prayed for clarification of its Order dated April 25, 1985. Those petitions were registered as review petition Nos. 701-704 of 1985 and dismissed on November 18, 1985. Those petitions having been dismissed, the Central Government drew up a fresh seniority list on 16/17-1-1986 the validity of which is challenged in C.A.No. 41 of 1986 as invalid by the directly recruited Assistants. The grievance of the promotee Assistants is that the said seniority list includes the

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names of only 421 Assistants and does not include the names of all the 2249 permanent and temporary Assistant Civilian Staff Officers in the Armed Forces Headquarters. The promotee Assistants while opposing the claim of the direct recruits, seek a direction in OA 79 of 1986 against the Union of India and others to implement the judgment of the Supreme Court dated April 25, 1985 in full and by applying the same principles, include in that list "the names of all the permanent, temporary and officiating Assistants of the Department".

In their petitions, the direct recruits contend that the quota and rota rule has not broken down and, therefore, the principle of continuous officiation for the purpose of determining the seniority of promotees cannot be applied. The petitioners contend that in any case the period of ad hoc promotion and officiation or temporary promotion of the promotees cannot be taken into account for determining the seniority in the grade of Assistants. These ad hoc promotions were necessitated on account of fortuitous circumstances and not because of any permanent vacancies. Such vacancies were not substantive vacancies and merely because it so happens that these vacancies continued for one reason or the other for a long period, cannot be deemed to be substantive vacancies.

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Such promotees cannot be deemed to be officiating on a long-term basis against substantive vacancies so as to be given the benefit of continuous officiation in computing their length of service in the category of Assistants and determining their seniority. Even if it is assumed that the quota and rota rule has broken down, the Tribunal should ascertain as to in which year it ^{had} broken down and to the extent of vacancies available in that year the promotees should be regularised and their seniority computed on the basis of their continuous officiation against such substantive vacancies. In other words, continuous officiation of promotees should not be reckoned against any substantive vacancies so as to place them above the direct recruits of that year. For determining the seniority in the successive years, the substantive vacancies reserved for the direct recruits should not be touched and only if the requisite number of direct recruits were not available, promotees should be adjusted against those vacancies and given the benefit of continuous officiation. Further the number of such promotees should be limited to the number of permanent posts sanctioned and not against the temporary posts; in any event, the benefit of continuous officiation cannot be given to the promotees in respect of

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more than the number of permanent posts and temporary posts sanctioned which according to the Respondents are in all 1598. That would mean that out of a total of 2249 Assistants at least 551 promotee Assistants cannot be given the benefit of continuous officiation. In fact, on account of temporary or ad hoc or officiating promotion of Assistants as Assistant Civilian Staff Officers or their transfer to other Departments on deputation, or any account of Assistants going on long leave, vacancies had occurred in the Grade of Assistants and promotions were made and such promotions continued for more than three years. According to the direct recruits, Rule 16(7) alone becomes inoperative; the other rules of seniority namely, 16(5), 16(6) and 16(8) cannot be ignored. Those Rules have to be given effect to, for the vires of Rule 16 itself has not been challenged by any of the parties.

The arguments for the promotee respondents runs thus:

The judgment of the Supreme Court dated 25.4.1985 proceeds on the basis that the quota and rota rule has broken down. It is not now open to the direct recruits or the

Government to contend that it has not broken down. Even otherwise, it is clear from the record that the quota rota rule has broken down. Since the quota rota rule has broken down, the promotees are entitled to the determination of their seniority on the basis of their continuous officiation; more so when they were promoted, in all other respects in accordance with Rules. All promotions were made on the basis of a Select List drawn up from time to time by the Departmental Promotion Committee for officiating promotions against long term vacancies to the grade of Assistants - Group "B" non-gazetted in the Armed Forces Headquarters Civil Service. All promotions were in fact made against substantive vacancies strictly in accordance with that list and all the promotees once promoted have continued on a long term basis and almost all of them now for more than 3 years. When the quota and rota rule has broken down, the seniority must be determined on the basis of continuous officiation. Substantive vacancies occur not only in permanent posts but also in temporary posts. Even if appointments were made by way of promotion in excess of the quota, as the Government was in need of large number of such officers and the vacancies could not be filled in by direct recruits, the theory of relaxation of rules must be invoked and promotions must be



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deemed to be regular. All vacancies which have continued for more than 3 years must be deemed to have been converted into permanent posts. Even if the quota and rota rule has broken down only partially as contended for the direct recruits, the rule of continuous officiation must be given effect to for determining the seniority. The inter-se seniority among direct recruits could be adjusted without effecting the seniority of the promotees.

So far as respondents 1 and 2 are concerned their anxiety is to prove that they have acted bonafide. Their case is that they have drawn up the seniority list in the light of the directions of the Supreme Court and the principles deducible, to the best of their knowledge and judgment from the various decisions referred to in the order of the Supreme Court dated 25--4--1985. Since the seniority rules are neither questioned nor quashed, and they contemplate permanent cadre and temporary cadre, according to them, substantive vacancies occur only where the posts are permanent. Hence separate lists of permanent officers and temporary officers were maintained. The question of quota and rota rule would apply to substantive vacancies in the permanent cadre.

Until the petitions for clarification registered as Review Petitions, were dismissed by the Supreme Court on November 28, 1985, the Government proceeded on the basis that the quota and rota rule had not broken and prepared a draft seniority list. But when the review petition was dismissed, the Government proceeded to prepare the impugned seniority list on the footing that the quota and rota rule had broken down. How the seniority lists should be maintained in future has now been clarified in Office Memorandum No. 35014/2/80-Estt. (D) dated 7-2-1986 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi. But as stated even in that Office Memorandum, the general principles for reckoning seniority enunciated therein take effect from 1st March, 1986. The seniority lists drawn up in accordance with the Rules and instructions in force on the date of issue of the said O.M., were not be reopened. The Government only request for a specific declaration whether the impugned seniority list is properly prepared, and if not, pray for positive directions as to in what manner it should be prepared and undertake to modify or prepare a seniority list afresh as directed by the Tribunal. Any direction or declaration may, however, be restricted to

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the grade of Assistants in AFHQ Civil Service.

To appreciate the contentions raised it would be necessary to notice the composition AFHQ Service and the Rules bearing upon the determination of seniority of the Assistants who belong to Grade IV of that service. The service itself was constituted with effect from March 1, 1968.

The Armed Forces Headquarters Service has 4 grades classified as under:

<u>GRADE:</u>	<u>CLASSIFICATION.</u>
(i) Selection Grade (Joint Director or Senior Civilian Staff Officer)	Central Service Group "A"
(ii) Civilian Staff Officer.	
(iii) Assistant Civilian Staff Officer.	Central Civil Service Group "B" Ministerial.
(iv) Assistant.	

We are concerned in these petitions only with the seniority list of Assistants who are classified under Central Civil Service Group "B" Ministerial.

Recruitment to the Grade of Assistants governed by Rule 10 is from two sources (1) Direct and (2) by way of promotion from Upper Division Clerks (UDCs) as laid down in Appendix III of the Rules under which a quota is fixed for the two categories as under:

Grade and Classification.	Scale of pay.	Recruitment.	Eligibility condition.	Probation.
(1)	(2)	(3)	(4)	(5)

Substantive vacancies

Assistant Rs.425-15-500
(Group B EB-15-550-20-
Non-Gazetted.)700-EB-25-800

(a) Substantive vacancies
in the grade of Assistant 2 Years.
shall be filled by direct
recruitment on the basis
of competitive examinations
held by the Commission in
the following manner:-

- (i)20% of the vacancies
in the first year;
- (ii)20% of the vacancies
in the second year;
- (iii)25% of the vacancies
in the third year.
- (iv)25% of the vacancies
in the fourth year;
- (v) $33\frac{1}{3}$ % of the vacancies
in the fifth year.
- (vi)50% of the vacancies
from the sixth year
onwards.

* Provided that during the
period of five years from
the 1st August,1972, to the
31st July,1977, out of the
vacancies to be filled by direct
recruitment in the Grade of
Assistant, the number of
vacancies indicated below shall
not be filled:-

PERIOD:

No. of vacancies reserved for direct
recruitment which shall not be filled.

1--8--1972 to 1--3--1973.	7
2--3--1973 to 1--3--1974.	9
2--3--1974 to 1--3--1975.	9
2--3--1975 to 1--3--1976	9
2--3--1976 to 1--3--1977	9
2--3--1977 to 31--3--1977	2.

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The inter se seniority of these Assistants is governed by sub-rules 5, 6, 7 and 8 of Rule 16 of the APHQ Civil Service Rules, 1968. It would be profitable to read the entire

Rule which is as follows:-

"16. Seniority. - (1) All permanent officers included in the initial constitution of a Grade under Rule 9 shall rank senior to all persons substantively appointed to that Grade with effect from any date after the appointed day, and all temporary officers included in the initial constitution of a Grade under that rule shall rank senior to all temporary officers appointed to that Grade with effect from any date after the appointed day.

(2) The seniority inter se of permanent officers included in the initial constitution of a Grade shall be regulated in the order in which they are so appointed.

(3) The seniority inter-se of temporary Officers included in the initial constitution of a Grade shall be regulated in the order in which they are so appointed.

(4) The seniority inter-se of officers regularly appointed to the Grades of Joint Director and Senior Civilian Staff Officer before the coming into force of the Armed Forces Headquarters Civil Service (Second Amendment) Rules, 1975, shall be regulated in the Selection Grade of the Service in the following order:--

- (a) Officers holding the posts of Joint Directors in an officiating capacity, arranged in the order of their seniority in that Grade;
- (b) Officers holding the posts of Senior Civilian Staff Officers in a substantive capacity, arranged in the order of their seniority in that Grade;
- (c) Officers holding the posts of Senior Civilian Staff officer in an officiating capacity, arranged in the order of their seniority in that Grade.

(5) Except as provided, in sub-rule (7), the seniority of persons appointed to any Grade after the appointed day shall be determined in the following manner, namely:--

- (i) Permanent Officers - The seniority inter-se of Officers substantively appointed to the Grade after the appointed day shall be regulated in the order in which they are so appointed;

(ii) Temporary Officers; - The seniority inter-se of temporary officers appointed to the Grade after the appointed day shall be regulated in the order of their selection for such promotion.

(6) Direct recruits shall be ranked inter-se in the order of merit in which they are placed at a competitive examination on the results of which they are recruited, the recruits of an earlier examination being ranked senior to those of a latter examination. On confirmation, their inter-se seniority shall be regulated in the order in which they are so confirmed.

*Provided that the seniority of persons recruited through the competitive examinations held by the Commission -

(i) in whose case offers of appointment are revived after being cancelled, or

(ii) who are not initially appointed for valid reasons but are appointed after the appointment of candidates recruited on the basis of the results of the subsequent examination or examinations

shall be such as may be determined by the Government in consultation with the Commission.

(7) The relative seniority of direct recruits to a Grade and persons appointed to the Grade by departmental promotion shall be regulated in accordance with the provisions made in this behalf in the Third Schedule.

(8) All Officers substantively appointed to any Grade shall rank senior to those holding temporary or officiating appointments in that Grade."

The Third Schedule provided for rotation in the matter of seniority in the following words:

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THIRD SCHEDULE
Rules for the future maintenance of the Service

(See rule 10)

Grade and Classification	Scale of pay	Recruitment	Eligibility condition	Probation
1	2	3	4	5
Assistant (Class II- non-gazetted)	210-10- 270-15- 300-EB- 15-450 -EB-20 -530	Substantive vacancies (a) Substantive vacancies in the Grade of Assis- tant shall be filled by direct recruitment on the basis of competitive examinations held by the Commission in the following manner:- (i) 20% of the vacancies in the first year; (ii) 20% of the vacancies in the second year; (iii) 25% of the vacancies in the third year; (iv) 25% of the vacancies in the fourth year; (v) $33\frac{1}{3}\%$ of the vacancies in the fifth year; (vi) 50% of the vacancies from the sixth year onwards. Direct recruits in the Grade of Assistant shall be confirmed in the manner indicated in rule 14 (b) Substantive appointments against the remaining permanent vacancies in the grade of Assistant shall be made in the order of seniority of temporary officers of the Grade, who have completed the period of probation satisfac- torily, subject to the rejection of the unfit.		2 Years

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1	2	3	4	5
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The relative seniority of the above categories of officers will be determined according to the rotation of vacancies between departmental promotees and direct recruits which shall be based on the quotas of vacancies reserved for promotion and direct recruitment.

NOTE (1) Reservation of vacancies against the quota reserved for direct recruitment, for Scheduled Castes and Scheduled Tribes and released Emergency Commissioned Officers and Short Service Regular Commissioned Officers shall be in accordance with the rules and orders issued by the Government from time to time.

(2) Substantive vacancies at (a) may be filled temporarily by promotion from Upper Division Grade of the Armed Forces Headquarters Clerical Service on the basis of Seniority, subject to the rejection of the unfit. Such promotions shall be terminated when the nominees of the Commission become available to fill the substantive vacancies.

Temporary vacancies

Temporary vacancies in the Grade of Assistant shall be filled by temporary promotion from Upper Division Grade of the Armed Forces Headquarters Clerical Service on the basis of seniority, subject to the rejection of the unfit.

Minimum 5 years' 2 Year continuous approved service in Upper Division Grade of the Armed Forces Headquarters Clerical Service or in an equivalent existing Grade.

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Thus under the Rules substantive vacancies in the grade of Assistants were to be filled in partly by direct recruitment on the basis of a competitive examination held by the Union Public Service Commission and partly by way of promotion as per the quota mentioned in the Third Schedule. From the 6th year of the constitution of the service, 50% of the vacancies were to be filled in by direct recruitment and the remaining by the Departmental candidates by way of promotion. Their relative seniority was to be regulated as directed under Sub Rule 7 of Rule 16 in accordance with the Rotation fixed in the Third Schedule to the Rules.

Before we examine the principle issues arising in the case, we may dispose off a preliminary point, which, though, would not affect the main issues is nonetheless pertinent .

In answer to the charge on behalf of the direct recruits by their learned counsel, Shri Shanti Bhushan, that the impugned seniority list was prepared in a hurry, more as a defence to the contempt proceedings rather than in bona fide implementation of the Supreme Court's Order the Respondents 1 and 2 pleaded that they had drawn it up in all earnestness and good faith.

Lawyer

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The Union of India were parties to the Writ Petitions Nos., 15346-49 of 1984 filed by the Promotee Assistants in the Supreme Court. After some arguments were addressed, when the Supreme Court observed that "there are some errors and defects in the seniority list which would render it illegal and invalid in view of the decision of the Supreme Court in G.S.LAMBA AND OTHERS Vs. UNION OF INDIA AND OTHERS (1)" the Union of India agreed to review and reconsider the impugned seniority list in the light of the observations and principles enunciated in the aforesaid judgment. The Supreme Court gave directions accordingly in its Order dated April 25, 1985.

The President of the APHQ Direct Recruit Assistants Association, Ministry of Defence who was impleaded as Party-Respondent No.4 to that Writ Petition had specifically claimed that the seniority list of August 10, 1984 called in question before the Supreme Court was in accordance with the Rules. That contention of the direct recruits must be deemed to have been rejected by the Supreme Court when it directed the Government to prepare a revised seniority list and also to revise the

(1) 1985(1)Scale 563.

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panel of promotion in the light of the revised seniority list.

In compliance with that direction, the Government prepared a

draft seniority list on November 11, 1985 and sought the

Supreme Court's approval by moving an application for appropriate

direction. In that application, while stating that the quota

and rota system had not failed, the Government conceded that in

the old seniority list of August 10, 1984, there were two

defects -- (i) the carrying forward of vacancies of direct

recruits and (ii) non-conversion of temporary posts to permanent

ones since 1973. That application was treated as a Review

Petition but was dismissed on November 28, 1985.

Even according to the direct recruits, the seniority

list of November 11, 1985 was not in accordance with the Armed

Forces Headquarters Civil Service Rules, 1968 and was clearly

violative of the Fundamental Rights guaranteed to them. The

Association of direct recruits submitted representation to

the Union of India pointing out the illegalities. The promotees

Assistants also made a representation. The impugned seniority

list was obviously drawn up taking into consideration both

these representations and broadly adopting the principle of

continuous officiation for determining the inter-se seniority

of promotees and direct recruits. In the petition itself the

the bona fides of Government in drawing up the seniority list is not questioned. Only during the course of the arguments it was urged that the Government had in its anxiety to avoid the contempt proceedings initiated by the Supreme Court on the petition of the Promotee Assistants, prepared the impugned seniority list in haste. It was also alleged that since the promotee Assistants constitute a very large number, the Government succumbed to their pressure and gave a go bye to its earlier stand that quota and rota rule had not broken down and conceded their demand.

The Deputy Chief Administrative Officer, Ministry of Defence, New Delhi, who has filed a counter affidavit on behalf of Respondent No.1 and 2 detailed the circumstances in which the earlier list was prepared and the circumstances in which the impugned seniority list was drawn up. It is stated that "the Department proceeded to prepare this list with effect from 1978 Examination onwards. Since the direction of the Court was to draw a fresh seniority list based on relevant rules and valid principles, a kind of compromise was effected between the two, while drawing the tentative seniority list. The list gave due weightage to the continuous length of service principle and simultaneously implemented the rule of rotation of vacancies between promotee

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and direct recruit Assistants." When an application was filed by the Union of India in the Supreme Court for directions/modifications of the Order passed by the Supreme Court, the promotees filed a contempt petition in the Supreme Court complaining that the order of the Supreme Court dated April 25, 1985 was not being implemented by the Government. The directly recruited Assistants also filed a contempt petition contending that the judgment of the Supreme Court contemplated a compliance of the Rules and not bypassing the Rules.

Upon Supreme Court dismissing the application moved by the Union of India, the Department reconsidered the matter in the light of legal advice and proceeded to draw up a fresh seniority list based on the length of service after giving effect to the principle of continuous officiation in the Grade of Assistant. In preparing this list, it acted upon legal advice and followed the principles enunciated by the Supreme Court to the best of its knowledge and judgment. The very fact that the direct recruits as well as the promotees are in some measure aggrieved with the list now impugned, whether the seniority list is in accordance with the principles enunciated by the Supreme Court is the subject matter of a lengthy debate before this Tribunal by senior counsel. This itself establishes

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the bonafides of the respondents in drawing up this list.

Irrespective of whether the impugned seniority list is defective, incomplete or violative of any statutory or Fundamental Right of any category of Assistants or not, there can be little doubt that the Government acted bona fide and we hold accordingly.

Now the principal question.

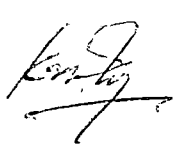
The Central Government which has prepared ^{the} ~~impugned~~ list has averred in its counter affidavit that after the Supreme Court dismissed the Review Petition on November 28, 1985, the matter was considered afresh and keeping in view the basic underlying principle that in the absence of any valid principle of seniority, continuous officiation in the cadre, grade or service will provide a valid principle for reckoning seniority, a fresh seniority list was prepared. It reconsidered the entire seniority list in the light of the decision of the Supreme Court dated April 25, 1985. It also averred that "upon consideration of the decision dated April 25, 1985 and other decisions referred to in the judgment and order dated April 25, 1985, the Department drew an inference that where the rule of rota and quota has not been strictly adhered to, the principle of continuous length of service must be invoked and drew up the impugned list accordingly". They also stated that the "principle of continuous officiations has not been made applicable

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to purely short term leave vacancies as the leave reserves are already provided in the cadre and it is not permissible to make any promotion against such vacancies" and that "the principle of continuous officiation has been applied to persons who have filled in the vacancies caused on account of the incumbents proceeding on deputation or on being temporarily promoted to the next higher grade with a lien on the permanent post". It is, therefore, necessary to consider whether in drawing up the impugned seniority list, the Government has followed the directions contained in the judgment of the Supreme Court dated April 25, 1985 correctly, arrived at the right facts and applied the right principles.

It would be seen from the judgment of the Supreme Court in Writ Petition Nos. 15346-49 of 1984 dated April 25, 1985 that while it did not expressly state that the quota and rota rule envisaged under Rule 16 of the APHQ Rules was not followed in making the appointments and that it had broken down, it did hold that "some of the errors and defects pointed out in the seniority list are such as would render it illegal and invalid in view of the decision of this Court in G.S.LAMBA AND OTHERS Vs. UNION OF INDIA AND OTHERS (1) . What does that mean?

Lamba's case was precisely one which dealt with Indian Foreign



Service Branch "B" (Recruitment, Cadre, Seniority and Promotion)

Rules, 1964, providing for recruitment from two independent

sources and the contention was that in recruitment, the Quota

and rota Rule was given a go-by. The Supreme Court declared

that:

"Shortly this is called quota rule of recruitment and rota rule of seniority interlinking them. So far there is no controversy. The contention of the petitioners is that in implementing this rule there has been such large scale deviation that it results in denial of equality to the member of the service similarly circumstanced. It will be presently demonstrably established that where rota rule of seniority is interlinked with quota rule of recruitment, and if the latter is unreasonably departed from and breaks down under its own weight, it would be unfair and unjust to give effect to the rota rule of seniority. To some extent this is not res integra. Though some advance has been made on this proposition in later decisions."

The Supreme Court then considered several of its

earlier decisions bearing on this question and in particular,

B.S. GUPTA Vs. UNION OF INDIA (2) in which it was held that

"the quota rule collapsed and the seniority rule having a link

with the quota rule would meet the same fate."

Their Lordships also referred to the decision reported

(2) A.I.R. 1972 S.C. 2627.

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in A. K. SUBRAMAN Vs. UNION OF INDIA (3) wherein it was

observed:

"when recruitment is from two or several sources, it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation. The existence of a quota and rotational rule by itself will not violate Article 14 or 16 of the Constitution. It is the unreasonable implementation of the same, which may, in a given case attract the frown of the equality clause".

Reference was also made to the observations in

P.S. MAHAL Vs. UNION OF INDIA (4) which are as

follows:

"The rotational rule of seniority is inextricably linked with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority".

in
The decision /JANARDHANA Vs. UNION OF INDIA (5)

was also referred to in which the Supreme Court held:

"As quota rule was directly inter-related with the seniority rule, and once the quota rule

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- (3) A.I.R. 1975 S.C. 483.
(4) A.I.R. 1984 S.C. 1291.
(5) A.I.R. 1983 S.C. 769.

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gave way, the seniority rule became wholly otiose and ineffective. It is equally well-recognised that where the quota rule is linked with the seniority rule, if the first breaks down or is illegally not adhered to giving effect to the second would be unjust, inequitable and improper."

Reference was also made to the decision in O.P.SINGLA

Vs: UNION OF INDIA (6) which dealt with the Delhi Higher Judicial Service Rules, 1979, in which Chief Justice, Chandrachud speaking for the majority held:

"...upon its true interpretation, the proviso prescribed a quota and Rule 8(2) provided for rotational system of giving seniority according to the quota. Where recruitment is from two independent sources, the rule of seniority on a rotational basis could not be held to be unconstitutional or violative of Art. 16".

But then proceeding to examine the effect of enormous departure in the matter of recruitment according to quota and its shadow over the interlinked seniority, the Chief Justice observed:

"However, instances are not unknown wherein though the provision of a rule or a Section is not invalid, the manner in which the provision is implemented in practice, leads to the creation

(6) A.I.R. 1984 S.C. 1595.

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of disparities between persons, who being similarly circumstanced are entitled to equal treatment."

Noting the "Ugly fact" (as the learned Chief Justice put it) that the provision prescribing the quota of direct recruitment and promotees was" put in cold storage for a long time", the learned Chief Justice observed:

"In these circumstances, it will be wholly unjust to penalise the promotees for the dilatory and unmindful attitude of the authorities. It is not fair to tell the promotees that they will rank junior to the direct recruits who were appointed five to ten years after they have officiated continuously in the posts created in the service and held by them though such posts may be temporary. This Court at least must fail them not."

After thus taking note of the earlier decisions, the Supreme Court/enunciated the principles in the following words:

"Where recruitment to a service or a cadre is from more than one source, the controlling authority can prescribe quota for each source. It is equally correct that where the quota is prescribed, a rule of seniority by rotating the vacancies can be a valid rule for seniority. But as pointed out earlier, if the rule of seniority is inextricably intertwined with the quota rule and there is enormous deviation from the quota rule, it would be unjust, inequitable and unfair to give effect to the rota rule. In fact as held in O.P.Singla's case (A.I.R.1984SC 1595) giving effect to the rota rule after noticing enormous departure from the quota rule would be violative of Art. 14. Therefore, assuming that quota rule was mandatory in character, as pointed out earlier, its departure must permit rejection of rota rule as valid principle of seniority..."

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The court then considered whether in that case quota and rota rule had broken down and if so, and whether the seniority rule was interlinked with quota and rota rule and if the quota rota rule has broken down, how the seniority should be reckoned.

Their Lordships of the Supreme Court in their Order dated April 25, 1985, in addition to the G.S.Lamba's case specifically referred to three decisions in (i) A.JANARDHAN Vs. UNION OF INDIA AND OTHERS (1983(2)SCR 936) (ii) P.S.MAHAL & OTHERS Vs. UNION OF INDIA AND OTHERS (A.I.R. 1984 S.C.1291) and (iii) O.P.Singla Vs. UNION OF INDIA (A.I.R. 1984 S.C. 1595). In enunciating the above principles in G.S.Lamba's case, the Supreme Court considered all these cases. It is, therefore, unnecessary to refer to them in this context once again. It is thus a well established principle of law, which is no longer res integra, that once quota rule of seniority breaks down, the interlinked Rota Rule of Seniority also breaks down and cannot be given effect to.

When the learned Senior Counsel for the Union of India informed the Supreme Court that "in view of the aforementioned decisions, the Government of India has decided to review and reconsider the impugned seniority list in the light of the observations and principles enunciated in the aforementioned judgment" the Court accepted the same and directed that "the

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impugned seniority list will not be enforced or given effect to till fresh seniority list according to relevant rules and valid principles is drawn up" and made the rule absolute to that effect.

Hence, if it is found on a scrutiny of the seniority list that the above directions of the Supreme Court have been adhered to, then no exception can be taken to it. It is, however, clear from the order of the Supreme Court that if on a consideration of the recruitment Rules governing appointment to the grade of Assistants in AFHQ Service which is admittedly based on quota rule, it is found that the Rota seniority in the cadre is inter-linked with the quota rule and the quota Rule has broken down, then the rota rule also cannot be given effect to. It is, therefore, first necessary to consider whether appointment to the cadre of Assistant by way of direct recruitment and by way of promotion was done strictly or at least substantially in accordance with the quota and rota rule envisaged by Schedule III of the AFHQ Service Rules.

The inter-se seniority of all permanent officers included in the initial constitution of a Grade under Rule 9 were declared under 16(1) to (4) as senior to all those substantively appointed to that Grade with effect from any date after the appointed day i.e., the date on which the Rules came into force, viz., March 1, 1968. There is no quarrel about

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the seniority of these Assistants.

The entire dispute is between the Assistants recruited directly and by way of promotion after March 1, 1968 and before April 14, 1981 when the Rules were amended. The disputes relate to their inter se seniority.

Of the petitioners in O.A.41 of 1986, Petitioners 1, 3 and 4 belong to the 1978 batch of the directly recruited Assistants and the 2nd petitioner belongs to the 1979 batch. Petitioners 1 to 4 entered AFHQ service as Assistants respectively on February 26, 1980 May 26, 1981, August 2, 1980 and October 30, 1980. Petitioners 1, 3 and 4 were promoted to the rank of Assistant Civilian Staff Officers (ACSO) in October, 1984.

As per the counter affidavit filed on behalf of Respondents 1 and 2, the number of posts falling to the quota of direct recruits and those that were actually appointed, by way of direct recruitment substantively are as under:

Year of vacancies.	No. of vacancies falling to DR	No. of DRs., substantively appointed.	Year of Examination.	No. of DR quota vacancies carried forward.
(1)	(2)	(3)	(4)	(5)
1968-69	22.	22
1969-70	17.	18	1969	-1.
1970-71	17.	17.
1971-72	33	17	1971	16.
1972-73	23	20	1972	3.

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(1)	(2)	(3)	(4)	(5)
1973-74.	47	17	1973.	30.
1974-75.	51	37	1974	14.
1975-76	42	43	1975	-1.
1976-77	106	42	1976	64.
1977-78	64	36	1977	28.
1978-79	77	41	1978	36.
1979-80	104	22	1979	
1980-81	105	69	1980.	

According to the petitioners, the number of permanent posts of Assistants is 1389 and the number of temporary posts of Assistants is 309 making a total of 1698, but actually as many as either hold *lien* on the post of Assistants or are *per* 2249 persons are/working as Assistants. In other words, 551 persons in the category of Assistants were appointed in excess of the sanctioned strength of permanent and temporary Assistants

The number of persons appointed by way of direct recruitment to the cadre of Assistants as detailed above clearly shows that except in years 1969-70 and 1975-76, the number of vacancies falling to the quota of direct recruits were never wholly filled in, they were not even substantially filled in. While in 1968-69 and 1969-70, 22 posts and 17 posts respectively were available for direct recruitment, none were recruited and appointed.

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In 1973-74, 47 posts were available for direct recruitment, only 17 were appointed. In 1976-77 while 106 posts were available, 42 were appointed. In 1979-80, 104 posts were available but only 22 were appointed. The appointment in these years was much below 50%.

In other years between 1968-69 and 1980-81 it was just between 50% and 60%. In 1975-76, while 42 posts were available, 43 were appointed by direct recruitment. The excess number of direct recruits were appointed in 1969-70 and 1975-76 obviously on the assumption that the vacancies reserved in a year for direct recruitment and which remained unfilled in that year could be carried forward. If the vacancies could not be carried forward,

the appointment of direct recruits in excess of their quota in a particular year, ^{would be} *be* in violation of the quota rule. The fact remains

that even after carrying forward the vacancies that arose year after year and remained unfilled, the entire quota of direct recruits was not filled in by 1981. Except in two years, the quota of direct recruits was never wholly filled in. Against all these resultant vacancies and some more arising out of deputations, promotions, leave, death, resignation, and retirement etc., as well as the quota reserved for promotees, recruitment was made by way of promotion out of the select list of U.D.Cs., drawn up by the D.P.C., for appointment against long term vacancies strictly in accordance with the order in which they

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were placed in the select list.

It is thus evident that the quota and rota rule for appointment of Assistants was neither strictly nor even substantially followed. There was enormous departure from the quota rule. The quota rule itself although not violative of Art.14 and 16 of the Constitution, it was not even substantially implemented. There was large scale deviation from it year after year for over ten years. It was admitted in paragraph 18(i) of the counter affidavit of Respondent Nos., 1 and 2 that "till 1981 there was no provision for lapsing of vacancies nor was there any specific provision for not carrying forward the vacancies- The seniority of direct recruit Assistants had been assigned by carrying forward the vacancies on the basis of administrative instructions." This also establishes that the rule of quota and rota had been observed only in the breach and that necessitated carrying forward of the vacancies reserved for direct recruit Assistants.

In preparing the list of August 10, 1984, the Government had taken the stand that the quota rule has not broken down. That was the plea of the Government while moving the application for modification along with a tentative seniority list purported to have been framed in accordance

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with the directions of the Supreme Court Order dated April 25, 1985. Although the Government do not concede that the quota and rota rule has broken down, in preparing the present list, the Government too has proceeded on the basis that the quota Rule as well as the rota rule has broken down. However, in view of the above facts which are incontrovertible, the conclusion is inescapable that the quota of recruitment to the post of Assistants had for over a decade broken down between 1968-69 and 1980-81. Obviously that fact was taken note of and on 14-4-1981 the III Schedule to the Rule was amended making specific provision for appointment of Upper Division Clerks of the Armed Forces Headquarters Service by way of promotion on the basis of the seniority subject to the rejection of unfit to substantive vacancies both against permanent posts and temporary posts if sufficient number of candidates as per the quota are not available for filling up the vacancies in any year by way of direct recruitment as per Rules.

In that factual position we have to keep in mind the observation of the learned Chief Justice, Sri Chandrachud in D.P.SINGLA Vs. UNION OF INDIA (6) though quota rule itself is not invalid.

(6) A.I.R. 1984 S.C. 1595.

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"the manner in which the provision is implemented in practice leads to the creation of disparities between two persons who being in similar circumstances, are entitled to equal treatment."

If the quota rule was put in the cold storage for a long time and had thus broken down, the question would be -- "Can Rule 16 extracted above be followed for determining the inter se seniority of Direct Recruits and Promotees?". Now that it is well settled that if, the quota rule breaks down and the Rota Rule, is interlinked with Quota Rule the Rota Rule also cannot be given effect to. We have to see whether the Rota Rule of seniority laid down by sub-rule 7 of Rule 16 is so interlinked with the Quota Rule that it cannot be given effect to. If it is so, what is the principle to be followed in drawing up the seniority list of Assistants? Let us examine Rule 16 and whether the Rota Rule of seniority is inextricably linked up with the quota rule. Rule 16(1) to (4) deals with the determination of seniority of officers appointed to the service upon its initial constitution before the said Rule came into force on 1--3--1968. We are not concerned with those sub-rules, for the dispute in these petitions is between direct recruits and promotee Assistants appointed on and after March 1, 1968 when these Rules came into force. It is

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sub rules (5), (6), (7) and (8) of Rule 16 that are the relevant to the matter in issue.

Sub-rule 5 speaks of seniority of persons appointed to any grade after the appointed day, that is March 1, 1968. It classifies them into "Permanent Officers" and "Temporary Officers". The inter-se seniority of permanent officers substantially appointed to the grade is required to be regulated in the order in which they were so appointed, and the inter se seniority of temporary officers appointed to the grade is required to be regulated in the order of their selection for such promotions. This rule is subject to sub-rule (7) of Rule 16 to the extent that sub-rule provides otherwise. Sub-Rule (7) of Rule 16 lays down that the relative seniority of direct recruits and departmental promotees shall, as laid down in Schedule III be determined according to the rotation of vacancies between departmental promotees and direct recruits based on the quotas of vacancies reserved for promotion and direct recruitment.

Sub-rule (6) lays down that direct recruits shall be ranked inter se in the order of merit in which they are placed at a competitive examination on the results of which they are recruited, the recruits of an earlier examination being ranked

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senior to those of a later examination. There is no quarrel about this in these petitions. In whatever manner the inter se seniority of the direct recruits and promotees may be determined, it is common ground that in ranking the direct recruits ^{themselves} / the order of merit in which they were placed at the competitive examination determines their inter se seniority.

Sub-rule (8) lays down that all officers substantively appointed to any grade shall rank senior to those holding temporary or officiating appointments in that grade.

Rule 16 thus inter links seniority of Assistants with the quota and rota rule laid down in the Third Schedule of the AFHQ Service Rules. As discussed above, the Supreme Court has unequivocally laid down, that where the seniority is interlinked with quota and rota Rule of recruitment to a grade, post or service and the ^{Rule 68} quota / of recruitment breaks down or is not observed over a long period, the Rota Rule of seniority must also give way; the Rules of seniority cannot be implemented de hors the Quota and Rota Rule.

Shri Shanti Bhushan, learned counsel for the direct recruits contends that even in such a situation, Rule 16 cannot be wholly given a go-by. Only sub-rule (7) of Rule 16

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breaks down, the other sub-rules are valid and can still be given effect to. According to him direct recruits appointed to the grade of Assistants against their quota in a particular year must be given their position in the seniority list and all promotees who have been continuously officiating on the post of Assistant on a long term basis but in excess of their quota should be placed below the direct recruits.

Shri G.D.Gupta, learned counsel for the promotees, however, contends that if the promotees were continuously officiating on a long term basis irrespective of whether those posts were permanent or temporary, those vacancies must be treated as substantive and the departmental promotees officiating in such vacancies must be given the benefit of continuous officiation and treated as seniors to those direct recruits who were selected and appointed later to the service grade or cadre. Shri Shanti Bhushan points out, if that is done, it would amount to ignoring sub rules 5 and 8 of Rule 16 and that is not permissible. According to him sub-rule 5 of Rule 16 will have to be given effect to; merely because sub-rule (7) cannot be implemented (due to quota and rota rule breaking down, it would be illegal

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to ignore sub-rule (5) and (8) for those sub-rules have not been declared as void or ultra vires and can be implemented. Let us examine this contention.

Under Rule 2(1) "Permanent Officer" is defined as under:

"Permanent Officer" in relation to any grade means a person who has been substantively appointed to a substantive vacancy in that Grade;"

"Temporary Officer" is defined in Rule 2(p) as follows:

"Temporary Officer" in relation to any Grade means a person holding a temporary or officiating appointment in that Grade on the basis of his being regularly approved for such appointment"

"Long Term Appointment" is also defined in Rule 2(k) in the following words:

"Long term appointment" means appointment for an indefinite period as distinguished from purely temporary or ad hoc appointment, like appointment against a leave or other local vacancy of a specified duration;"

From the above definitions, it would be clear that if the vacancy is not against a leave or other local vacancy for a specified duration (emphasis supplied)

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it would be a long term appointment provided it is for an indefinite period as distinguished from a purely temporary or ad hoc appointment.

Under sub-rule(5) "Seniority inter se of officers appointed substantively to the grade has to be regulated "in the order in which they are appointed" in the case of "permanent officers" and in the case of temporary officers "in the order of their selection for appointment." Sub-rule (7) of Rule 16 operates as an exception to sub-rule (5) of Rule 16. If sub-rule (7) cannot be given effect to which is an integral part of the Scheme of recruitment to the grade and determination of seniority in the Grade cannot also be given effect to as laid down by the Supreme Court. However, on the wording of Sub-Rule(5), the factor which must determine seniority is, substantive appointment to the grade and the order in which they are so appointed in the case of permanent officers and the "order of their selection for promotion in the case of temporary officers. Though no question appointing a direct recruit as a temporary officer^{arises} this sub-rule as such does not make any distinction in this behalf between direct recruits and promotees. In the case of appointment as permanent officers, irrespective of whether they are promotees or direct recruits seniority has to be determined on the basis of their substantive appointment and the order in which they are appointed. In other words length of service in the grade of Assistants determines their seniority. There is of course a controversy as to when the vacancy could be treated as a substantive vacancy and when an appointment may be treated as substantive appointment in the case of a promotee and also whether the period of appointment against a temporary post could count for seniority. We would advert to this after considering as to what principle should be followed, for determining the seniority where the quota and rota rule has broken down.

The Supreme Court had occasion to consider in a number of judgments as to how the seniority should be determined where the quota and rota Rule has broken down and the seniority is interlinked with quota and rota rule and declared that if the quota rule has broken down it would be unfair and unjust to give effect to the rota rule of the seniority.

In O.P. SINGLA Vs. UNION OF INDIA & OTHERS (6) the Supreme Court observed:

"It will be wholly unjust to penalise the promotees for the dilatory and unmindful attitude of the authorities. It is not fair to tell the promotees that they will rank junior to the direct recruits who were appointed five to ten years after they have officiated continuously in the posts created in the service and held by them though such posts may be temporary.. ."

(6) A.I.R. 1984 S.C. 1595.

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The Supreme Court in JANARDHANA Vs. UNION OF INDIA (5) expressed concern over the undesirable situation that would result by giving effect to the rota rule of seniority even after the quota rule broke down in the following words:

"..... we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service jurisprudence from the precedence namely that a person already rendering service as a promotee has to go down below a person who comes into service decades after the promotee enters the service and who may be a schoolian, if not in embryo, when the promotee on being promoted on account of the exigencies of service as required by the Government started rendering service. A time has come to recast service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation."

and pronounced:

"It is, therefore, time to clearly initiate a proposition that a direct recruit who comes into service after the promotee was already unconditionally and without re-

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reservation promoted and whose promotion is not shown to be invalid or illegal according to the relevant statutory or non-statutory rules, should not be permitted by any principle of seniority to score a march over a promotee because that itself being arbitrary would be violative of Articles 14 and 16"

in several cases *for*
The Supreme Court/dealing with : situations

where quota rule had broken down, has consistently taken the view that in the absence of any other valid rule of seniority, continuous officiation should be the basis for reckoning the seniority of the persons appointed to a particular post, grade or cadre.

As early as in D.R. NIM Vs. UNION OF INDIA (8)

the Supreme Court held that:

"... where an officer has worked for a long period as in this case for nearly fifteen to twenty years in a post and had never been reverted it cannot be held that the Officer's continuous officiation was a mere temporary or local or stop gap arrangement even though the order of appointment may state so.

In such circumstances the entire period of officiation has to be counted for seniority.

(8) 1967(2)SCR 325: AIR 1967 S.C.1301.

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Any other view would be arbitrary and violative of Articles 14 and 16(1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstances."

Though a somewhat different note was struck by the Supreme Court in S.G.JAISINGHANI Vs. UNION OF INDIA (9) and BISHAN SARUP GUPTA Vs. UNION OF INDIA (7) and the theory of "Pushing down" and "Regularisation" was propounded, *per* in subsequent years"/as observed by the Supreme Court itself in G.S.LAMBA Vs. UNION OF INDIA (11).

"These two decisions are of little help in view of the later decisions directly on the point and discussed hereinabove."

And those cases are B.S.GUPTA Vs. UNION OF INDIA (2) A.K.SUBRAMAN Vs. UNION OF INDIA (3), P.S.MAHAL Vs. UNION OF INDIA (4) O.P.SINGLA Vs. UNION OF INDIA (6) and A.JANARDANA Vs. UNION OF INDIA & OTHERS (5).

In N.K.CHAUHAN Vs. STATE OF GUJARAT (12)

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- (2) A.I.R. 1972 S.C. 2627.
 - (3) A.I.R. 1975 S.C. 483.
 - (4) A.I.R. 1984 S.C. 1291.
 - (5) A.I.R. 1983 S.C. 769.
 - (6) A.I.R. 1984 S.C. 1595.
 - (7) (1975) 1 SCR 104; 1974 Lab. IC 1090
 - (9) (1967) 2 SCR 703 : A.I.R. 1967 SC 1427.
 - (11) A.I.R. 1985 S.C. 1019.
 - (12) A.I.R. 1977 S.C. 251.

the Court held:

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

The Court further held:

"Promotees regularly appointed during the period "A" in excess of their quota, for want of direct recruits (reasonably sought but not secured and because tarrying longer would injure the administration) can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods...."

In S.B.PATWARDHAN Vs. STATE OF MAHARASHTRA(13)

while striking down Rule 33 of the Bombay Service of Engineers Recruitment Rules 1970 in so far as it makes seniority dependent upon the fortuitous circumstances of confirmation which denies to the promotees the benefit of their long and valuable experience, the Supreme Court observed:

"The vice of that clause is that it leaves the valuable right of seniority to depend

(13)A.I.R.1977 SC 2051.

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upon the mere accident of confirmation. That under Articles 14 and 16 of the Constitution, is impermissible...."

In O.P.SINGLA Vs. UNION OF INDIA (6)

after reviewing the entire case on the subject, the Supreme Court ruled:

"No distinction can be made between direct recruits on one hand and promotees appointed to the service on the other in the matter of their placement in the seniority list. Exclusion from the seniority list of those promotees who are appointed to posts in the Service, whether such appointment is to temporary posts or to substantive vacancies in a temporary capacity, will amount to a violation of the equality rule, since, thereby persons who are situated similarly shall have been treated dissimilarly in a matter which constitutes an important facet of their career".

The Supreme Court declared:

"Since the rule of "Quota and Rota" ceases to apply when appointments are made under Rules 16 and 17, the seniority of direct recruits and promotees appointed under those

(6)A.I.R.1984 S.C.1595.

Rules must be determined according to the dates on which direct recruits were appointed to their respective posts and the dates from which the promotees have been officiating continuously either in temporary posts created in the service or in substantive vacancies to which they were appointed in a temporary capacity."

In A. JANARDHANA'S case also the Supreme Court held that "once the quota rule was relaxed, rota cannot be the basis for determining the seniority and in the absence of any other rule, continuous officiation would be the only available rule for determining the inter-se seniority". In A. JANARDHANA's case the entire case law on the subject was reviewed.

In G.S. LAMBA Vs. UNION OF INDIA (11) the Supreme Court while holding that:

"giving effect to the rota rule after noticing the enormous departure from the quota rule would be violative of Articles 14 and 16, ruled that selection or recruitment of
 - - - - - one year shall have precedence over selection - - - - -
 (11) A.I.R. 1985 S.C. 1019.

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or recruitment of the next year and this is what is known service jurisprudence as seniority, according to continuous officiation in the cadre or the grade..... This is in tune with fair play and justice and ensures equality as mandated by Article 16."

The Supreme Court also further pointed out that "assuming quota rule was mandatory in character.... its departure must permit rejection of rota rule as valid principle of seniority..... The Court further declared:

"... in the absence of any other valid principle of seniority, it is well established that the continuous officiation in the cadre, grade or service will provide a valid principle of seniority. The seniority lists having not been prepared on this principle are liable to be quashed and set aside."

The principle that where the quota Rule of recruitment has broken down and the Rota Rule of seniority is interlinked with the Quota Rule, in the absence of any other valid Rule of seniority, seniority in a cadre, grade or service would have to be determined on the basis ^{so far as we are concerned must be taken as established beyond controversy.} of continuous officiation/. Ignoring this principle would be violative of Articles 14 and 16 of the Constitution.

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As the principle of continuous officiation enunciated in Janardhana's case was subjected in its application to the condition that the promotion "is not shown to be invalid or illegal according to the relevant Rules" controversy was raised that that principle could not be applied where the promotions were not made strictly in accordance with the Recruitment Rules.

A scrutiny of all these cases would reveal ^{L2} that in all these cases appointments in excess of the quota were held to be valid having regard to the power vested in the competent authority to make appointments in relaxation of the Rules and so long as the promotions were otherwise regular, their ^{L2} That was so / held in appointments were held to be valid.

STATE OF U.P. V. MANBODHAN LAL SRIVATSAVA (14) and N.K. CHAUHAN Vs. STATE OF GUJARAT (15). That view was upheld and reiterated in G.S. LAMBA'S case.

In G.S. LAMBA Vs. UNION OF INDIA (11)

the Supreme Court dealing with the question

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- (11) A.I.R. 1985 S.C. 1019
 - (14) 1958 SCR 533: A.I.R. 1957 S.C. 912
 - (15) (1977) 1 SCR 1037: (1977 Lab IC 38)

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whether appointment of departmental promotees in excess of the quota prescribed by the rules would be illegal or invalid and whether such promotions or the service rendered by them on such "irregular" promotion should be ignored for the purpose of computing the seniority, the Supreme Court held such appointments to be valid on the ground that the Rules empowered the Government to relax any provision of the service rules. The Court observed:

".... assuming there was failure to consult the Union Public Service Commission before exercising the power to relax the mandatory quota rule, and further assuming that the posts in Integrated Grades II and III were within the purview of the Union Public Service Commission and accepting for the time being that the Commission was not consulted before the power to relax the rule was exercised yet the action taken would not be vitiated nor would it furnish any help to Union of India which itself cannot take any advantage of its failure to consult the Commission. Therefore, it can be safely stated that the enormous departure from the quota rule year after year permits an inference that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be

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illegal or invalid but would be valid and legal as held by this Court in N.K.CHAUHAN Vs. STATE OF GUJARAT (1977) 1 SCR 1037: 1977 Lab IC 38).

Therefore the promotion of the promotees was regular and legal both on account of the fact that it was made to meet the exigencies of service in relaxation of the mandatory quota rule and to substantiate vacancies in Service."

Let us apply this test to the instant case.

In the counter affidavit filed by the Government, it is submitted that "so far as temporary vacancies were concerned, they were to be filled in by promotion from the grade of U.D.Ss., with 5 years service on the basis of the seniority subject to rejection of unfit. But in case of substantive vacancies falling to the direct recruitment quota and remaining unfilled due to non-availability of direct recruits, those vacancies were filled in by giving promotions to the departmental candidates on the basis of seniority-cum-fitness and such promotions were to be terminated when the nominees of the UPSC were available. Only after the amendment of the Rules on April 14, 1981, if sufficient number of direct recruits were not available for filling up the vacancies in any year, such substantive vacancies were to be filled in by promotion." In other words, in preparing the seniority list of August 10, 1984 those promoted until 1981 were not treated as appointed against substantive vacancies and were not given the benefit of continuous officiation in determining their seniority. However, as averred in paragraph 25 of the counter filed on behalf of the Respondents 1 and 2

the impugned seniority list, they were given the benefit of continuous officiation and were treated as appointed to the substantive vacancies from the date of their initial appointment on an officiating basis.

It is conceded in paragraph 25(v)(ii) of the Counter affidavit that:

"The principle of continuous officiation has been applied to persons who have filled in the vacancies caused on account of the incumbents proceeding on deputation or on being temporarily promoted to the next higher grade with a lien on the permanent post."

Even as conceded by the Government, all the vacancies against which appointments by way of promotion were made from select list were permanent or substantive vacancies which have continued for more than 3 years and none of the promotees have ^{fill in} faced reversions. To these vacancies, recruitment had to be made by applying the quota rule, but the quota rule had broken down. Hence officiating promotions had to be made from out of the select list drawn up by the Departmental Promotion Committee.

It may now be taken as established beyond controversy that all promotees to the grade of Assistants in fact

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were initially approved for officiating promotion on long term basis by the Departmental Promotion Committee year after year and when they were appointed by way of promotion, they were not appointed "on a purely temporary or ad hoc basis". They were not appointed for any "specified duration. Except that they may have been appointed in excess of the quota reserved for promotees, all the rules that are required to be followed for promoting a departmental candidate were observed and once they were promoted, they were not reverted at all. They have been continuously officiating from the date of their promotion and were never reverted. Their appointment for all practical purposes was regular and but for invoking the quota and rota rule by virtue of their longer period of service as Assistants, they would be seniors to the direct recruits joining as Assistants later in point of time.

In this context Rule 22 ^{and} ~~xxxx~~ vests specific power in the Government to relax rules. The Government is also empowered under Rule 20 to make regulations not inconsistent with the rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to these rules.

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So also the appointment of promotees on officiating basis from the select list of D.P.C., cannot be termed as irregular merely because they are not put on probation. For that again it was not done in the exigencies of service. Moreover that is a matter not in the hands of the promotees. Any such lapse on the part of the Authorities or as the Supreme Court put it in O.P.SINGLA Vs. UNION OF INDIA (6)"the dilatory and unmindful attitude of the Authorities" cannot affect the right of the promotees".

Further under the rules it is provided that the officers appointed would be required under Rule 19 to serve on deputation elsewhere, it must be deemed that these promotees appointed against deputation vacancies which have continued on a long term basis were regular and valid. That was so held in MANBODHAN LAL SRIVATSAVA'S CASE (14), N.K.CHAUHAN'S case (15) and S.B.PATWARDHAN'S Case (13) all of which were referred to with approval in G.S.LAMBA'S case.(11).

When clothed with these overriding powers, appointment by way of promotions made from select list between 1968-69 and 1980-81 during which period the quota and rota rule had broken down, must be deemed to have been made in exercise of the power of relaxation of rules vested in the Government and such appointments must be treated as valid. Once these appointments are treated as valid, in the absence

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- (6) A.I.R.1984 S.C.15995.
 (11) A.I.R.1985 S.C.1019.
 (13) A.I.R.1977 S.C. 2051.
 (14) A.I.R.1957 S.C. 912.
 (15) (1977) 1 SCR 1037 : (1977 Lab IC 38)

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of any other specific rule, even under Rule 16(5) which merely lays down that the seniority must be counted from the date of the appointment to the grade, must have reference to the date of the first officiating promotion of the promotee which has continued uninterruptedly. That date must be taken as the date on which he was appointed to the grade of Assistant for purpose of sub-rule (5) of Rule 16. Or else even that sub-rule would ~~also~~ break down and cannot be given effect to. In our view, seniority in this manner would not only conform to the mandate of the Supreme Court but would also be just and equitable.

Thus the principle of taking into account the period of continuous officiation in determining the seniority of promotees where quota rota rule has broken down ^{which} is established in Service law must be given effect to.

Even so Shri Shanti Bhushan, learned counsel for the Direct Recruits contends that the principle of counting the period of continuous officiation of a promotee for determining his seniority would apply only to permanent vacancies and not to what the Supreme Court termed in P.S. MAHAL Vs. UNION OF INDIA (4) "as fortuitous" or

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or "adventitious vacancies" or to "temporary vacancies". It cannot apply to deputation vacancies or leave vacancies. The vacancies should be regular and not temporary and such vacancies can arise only against permanent and not temporary posts. It is, therefore, necessary to consider as to the type of vacancies to which the principle of continuous officiation for determining seniority would apply.

In A.K.SUBRAMAN Vs. UNION OF INDIA (3) the Supreme Court declared that the quota rule must be held to be applicable "to long term vacancies."

In BISHAN SARUP GUPTA Vs. UNION OF INDIA (2) the Supreme Court dealing with a situation where "the whole cadre has consisted of permanent and temporary posts for years" observed:

" that permanent vacancies are, therefore, likely to take place both in the permanent posts and in the temporary posts"

and held:

"We, therefore, find no sufficient warrant for the contention that the vacancies referred to in the quota rule are vacancies only in the permanent posts"

In that context the Supreme Court considered what are "Permanent vacancies" and held:

"the vacancies must be permanent vacancies that is to say vacancies which are not for a few days or for a few months or are otherwise adventitious"

In P.S.MAHAL Vs. UNION OF INDIA (4) the question posed and considered in para 21 of the Judgment was whether quota rule applies only to permanent vacancies or also to fortuitous or

(2) A.I.R. 1972 S.C.2627.
 (3) A.I.R.1975 S.C.483.
 (4) A.I.R.1984 S.C.1291.

(6)

and adventitious vacancies. The Supreme Court declared:

" if a vacancy arises on account of an incumbent going on leave or for training or on deputation for a short period, it would be a fortuitous or adventitious vacancy and the quota rule would not be attracted in case of such a vacancy. But where a vacancy arises on account of the incumbent going on deputation for a reasonably long period and there is no reasonable likelihood of the person promoted to fill such vacancy having to revert, the vacancy would be subject to the quota rule, because it would be a regular vacancy..... and the person promoted to fill the vacancy would be an officiating Executive Engineer who would continue as such without reversion until confirmed and his promotion would, therefore, be by way of recruitment to the cadre of Executive Engineers".

The Supreme Court in the above case also declared:

"... that a vacancy may arise in a post on account of death, retirement or resignation of the incumbent of the post or it may arise on account of the dismissal, discharge or reversion from the post or promotion to a higher post or by raising of deputation to another department or organisation whenever the vacancy caused it would be filled up by promotion.... and the quota rule would apply so long as the

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vacancy is permanent vacancy".

In this context they referred with approval to the above observations in BISHAN SARUP GUPTA Vs. UNION OF INDIA (2).

In A.K.SUBRAMAN Vs. UNION OF INDIA(3)

the negative definition of a permanent vacancy was upheld for the ^{non-} application of quota rule. Their Lordships said "that a vacancy which is of a short duration arising on account of fortuitous or adventitious circumstances would not be regarded as permanent vacancy and to such a vacancy, quota rule would not apply for it is not a permanent post."

In P.S.MAHAL Vs. UNION OF INDIA (4)

the Supreme Court treated "long term vacancies" as synonymus with permanent vacancies and held the quota rule applied to such vacancies.

The Supreme Court in the aforesaid case also

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- (2) A.I.R. 1972 S.C.2627.
(3) A.I.R. 1975 S.C.483.
(4) A.I.R.1984 S.C. 1291.

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held:

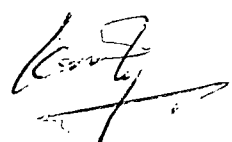
"The vacancies arising in the posts of Executive Engineers on account of deputation to other departments, organisations and public sector undertakings are, therefore, long term vacancies and cannot be characterised as vacancies of fortuitous or adventitious character....."

The Supreme Court also took note of the fact:

"... that the view that deputation vacancies being long term vacancies should be regarded as permanent vacancies for the applicability of the quota rule prevailed with the Government of India as far back as 19th October, 1971 long before the present controversy arose between the parties and even prior to the decisions in BISHAN SARUP GUPTA's case and A.K. Subraman's case. We find that this view was reaffirmed by the Government of India in the Office Memorandum dated 30th December, 1976 issued by the Department of Personnel and Administrative Reforms, Cabinet Secretariat where it has been stated under the heading "Determination of Regular Vacancies".

It was stated:

"It is essential that the number of vacancies in respect of which a panel is to be prepared

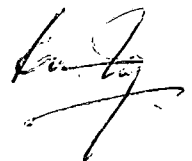


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by a D.P.C. should be estimated as accurately as possible. For this purpose the vacancies to be taken into account should be the clear vacancies arising in post/grade/service due to death, retirement, resignation, regular long term promotion of incumbents of one post/grade to higher post/grade and vacancies arising from creation of additional posts on a long term basis and these arising out of deputation. As regards vacancies arising out of deputation it is clarified that for the purpose of drawing up a select list for promotion, vacancies arising out of deputation for periods more than one year should be taken into account, due note however, being kept also of the number of the deputationists likely to return to the cadre and who have to be provided for. Purely short term vacancies arising as a result of officers proceeding on leave, on deputation for a shorter period, training etc., should not be taken into account for the purpose of preparation of a panel."

The Supreme Court in P.S.MAHAL Vs. UNION OF INDIA (4) concluded:

"that the vacancies in the posts of Executive Engineers arising on account of deputation of Executive Engineers to other departments, organisations and public undertakings for a period of one or more years were long term vacancies and they could not be regarded as fortuitous or adventitious in character and



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hence they were subject to the quota rule."

It is, therefore, clear that if quota rule breaks down, promotions whether officiating or temporary or against vacancies such as those referred to above should be deemed to be appointments against long term vacancies.

In P.S.MAHAL Vs. UNION OF INDIA (4)

it was also emphasised that termination of lien is not necessary to consider that a vacancy as a long term vacancy in order that the quota rule may apply.

The Supreme Court declared:

"It is now settled as a result of the decision in A.K.SUBRAMAN's case that the quota rule is to be applied at the time of initial recruitment in an officiating capacity to the cadre of Executive Engineers and not at the time of confirmation. It is, therefore, not necessary that the lien of an officer

(4) A.I.R.1984 S.C.1291.

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on a post of Executive Engineer must be extinguished before any promotion to that post can be made in accordance with the quota rule. Even where a confirmed Executive Engineer is promoted to the post of Superintending Engineer but continues to have his lien on the post of Executive Engineer, a vacancy would undoubtedly arise in the post of Executive Engineer by reason of his promotion and such vacancy would clearly be a permanent vacancy liable to be filled according to the quota rule. So also a vacancy attracting the applicability of the quota rule would arise where an Assistant Engineer or Assistant Executive Engineer regularly promoted within his lawful quota dies or retires before confirmation. The occurrence of a vacancy in the post of Executive Engineer inviting the application of the quota rule has, therefore, nothing to do with the extinguishment of lien on the post...."

This answers the contention of Shri Shanti Bhushan that so long as another person holds a lien on the post of a departmental candidate who has been appointed by way of promotion to the post of Assistant cannot be considered a member of their service and his seniority cannot be counted from the date of his continuous officiation and that the seniority can be considered only on the date of confirmation stands negatived. The court categorically

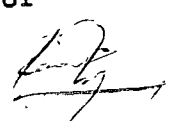
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laid down:

".....whenever there is a permanent vacancy, that is to say, a long term vacancy in a post of Executive Engineer, it would have to be filled according to the quota rule irrespective of the fact whether there is any officer having a lien on that post.

It is true that a confirmed Executive Engineer who goes on deputation may revert to the post on which he has a lien and so also an officiating Executive Engineer who goes on deputation may revert back on termination of his deputation and theoretically, in either case, an Assistant Engineer or Assistant Executive Engineer who is promoted to fill the vacancy arising on account of deputation may have to revert, but in actual practice and reality, not a single Assistant Engineer or Assistant Executive Engineer promoted as Executive Engineer to fill a vacancy arising on account of deputation, has had to revert, because deputation is a normal feature in this service and 20 to 25 per cent of the Executive Engineers are continuously on deputation. Even if one Executive Engineer comes back on termination of his deputation, another has to be sent in his place and the deputations thus go on rotating with the result that the vacancy in the post of Executive Engineer arising on account of deputation does not cease and the Assistant Engineer or



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Assistant Executive Engineer promoted as Executive Engineer to fill the vacancy does not ever have to revert and consequently, the vacancy filled by him is really and truly a permanent or long term vacancy which has to be filled according to the quota rule". (emphasis supplied).

Repelling the argument that where an Assistant Engineer or Asst. Executive Engineer was promoted against a vacancy of an Executive Engineer on deputation, the quota rule would not apply, because the promotion would not, in such a case be to fill in a post in the sanctioned strength of the cadre of Executive Engineers but would be filled in deputation vacancy. This argument, plausible though, it may seem at first sight, is in our opinion not sustainable and the Court held:

The contentions of respondents seeking exclusion of deputation vacancies from the applicability of the quota rule must, therefore, be rejected, provided of course the promotion of the Assistant Engineer or Assistant Executive Engineer to a deputation vacancy is a regular promotion, that is, after selection by the Departmental Promotion Committee and is not an ad hoc promotion" (emphasis supplied).

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(65)

If in regard to such vacancies quota rule has to be applied and that rule has broken down and the departmental candidates have been promoted out of a select list drawn up in accordance with the rule by the Departmental Promotion Committees and promoted in accordance with that list and such promotees are holding the post continuously, merely because they are holding the post in excess of their quota, they cannot be denied the benefit of continuous officiation in the matter of their seniority in the cadre of Assistants. So would be the position of a vacancy occurring due to promotion against a long term vacancy or against a vacancy caused due to death or retirement.

In this case also the fact remains that Assistants once promoted on selection by the Departmental Promotion Committee against such vacancies were never reverted. Just as promotees against quota of direct recruits, where direct recruits were not available, are entitled to the benefit of continuous officiation in the matter of seniority, so also promotees appointed against vacancies which were "not fortuitous" but "long term vacancies" arising on account of Assistants being sent on "deputation or on being promoted against vacancies arising on

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account of deputation or going on "long term leave", or on account of "regular promotion" or on being "removed", or due to "retirement", "resignation", "death" or on account of "creation of additional posts" would also be entitled to the same benefit in the matter of seniority.

It is next contended that in any case the promotee Assistants cannot get the benefit of their continuous officiation against temporary posts. In our view, in the face of the pronouncements of the Supreme Court, this contention cannot be upheld. The test is not, whether the post is permanent or temporary; the test is: "Whether it is substantive vacancy or not. Rule 16(5) also speaks of substantive vacancies.

In O.P.SINGLA Vs. UNION OF INDIA (6)

the Supreme Court observed:

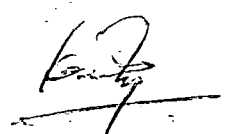
"It is, however, difficult to appreciate how, in the matter of seniority, any distinction can be made between direct

(6) A.I.R. 1984 S.C.1595.

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recruits who are appointed to substantive vacancies in the Service on the recommendation of the High Court under Rule 5(2) and the promotees who are appointed in consultation with the High Court under Rule 5(2) and the promotees who are appointed in consultation with the High Court to posts in the service under Rules 16 and 17. Rule 16 provides for the appointment of promotees to temporary posts in the Service, while Rule 17 provides for appointment of promotees to substantive vacancies in the Service on a temporary basis. Promotees who are appointed to the Service under either of these two rules must be considered as belonging to the same class as direct recruits appointed under Rule 5(2). They perform similar functions, discharge identical duties and bear the same responsibilities as direct recruits. They are appointed on a regular basis to posts in the service in the same manner as direct recruits are appointed, the only distinction being that where the latter are appointed on the recommendation of the High Court, promotees are appointed in consultation with the High Court. Therefore, no distinction can be made between direct recruits on one hand and promotees appointed to the service on the other, in the matter of their placement in the seniority list. Exclusion from the seniority list of those promotees who are appointed to posts in the Service,



(11)

whether such appointment is to temporary posts or to substantive vacancies in a temporary capacity, (emphasis supplied),

will amount to a violation of the equality rule since, thereby, persons who are situated similarly shall have been treated dissimilarly in a matter which constitutes an important facet of their career".

The Supreme Court in G.S.LAMBA Vs. UNION OF INDIA (11)

held:

"Once the promotees were promoted regularly to substantive vacancies even if temporary unless there was a chance of their demotion to the lower cadre, their continuous officiation confers on them an advantage of being senior to the later recruits under Rule 21(4). If as stated earlier by the enormous departure or by the power to relax, the quota rule was not adhered to, the rota rule for inter se seniority as prescribed in Section (1)(ii) cannot be given effect to. In the absence of any other valid principle of seniority it is well established that the continuous officiation in the cadre, grade or service will provide a valid principle of seniority..."

(11)A.I.R.1985 S.C.1019

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(73)

In A.JANARDHANA Vs. UNION OF INDIA(5)

the Supreme Court held that:

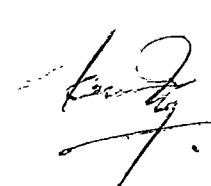
"now if recruitment contrary to Rule 3, namely, by interview by the Union Public Service Commission, which is not the recognised mode of recruitment, is held valid in Bachan Singh's case (A.I.R.1973SC44) on the ground that it was done in relaxation of the rules, it must follow as a corollary that the same emergency compelled the Government to recruit by promotion engineers to the post of AEE Class I in excess of the quota by exercising the power of relaxation and such recruitment ipso facto would be valid. The promotees being validly promoted as the quota rule was relaxed, would become the members of the service. Whether the vacancies were in the permanent strength or in the temporary cadre is irrelevant because none of them is reverted on the ground that no more vacancy is available. Appellant and those similarly situated were recruited by promotion as provided in Rule 3(ii) and it must be conceded that the recruitment by promotion during these years was in excess of the quota as provided in Rule 4. But the recruitment having been done for meeting the exigencies of service by relaxing the rules including the quota rule,

(5) A.I.R.1983 S.C. 769.

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(73)

the promotion in excess of quota would be valid. In this connection, it may be recalled that the expression "service" has been defined to mean Military Engineering Service Class I. The rules are silent on the question of the strength of the service. Keeping in view the exigencies of service and the requirements of the State, temporary posts would be a temporary addition to the strength of the cadre, unless it is made clear to the contrary that the temporary posts are for a certain duration or the appointments to temporary posts are of an ad hoc nature till such time as recruitment according to rules is made. In the absence of any such provision, persons holding permanent posts and temporary posts would become the members of the service provided the recruitment to the temporary posts is legal and valid, there is no difference between the holders of permanent posts and temporary posts in so far as it relates to all the members of the service. This clearly follows from the decision of this Court in S.B.Patwardhan Vs. State of Maharashtra (1977)3 SCR 775 at p 793: (AIR 1977 SC 2051 at page 2062), that there is no universal rule, either that a cadre cannot consist of both permanent and temporary employees or that it must consist of both....."



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Pruty The cases of O.P.SINGLA Vs. UNION
G.S.LAMBAO (1) and A. JANARDHANA (5)
OF INDIA (6) thus place promotees appointed to

post in the service whether such appointment is
to temporary post or of a substantive vacancy in
the temporary capacity on par with those appointed
regularly to the extent of their quota. If the
quota and rota rule is not followed and it has
broken down, their seniority is counted on the
basis of their continuous officiation against
posts irrespective of whether their appointment
is to temporary posts or permanent posts or
substantive posts in temporary capacity.

In a more recent case NARENDER CHADHA
Vs. UNION OF INDIA (16) even persons

Pruty persons promoted in violation of rules and
working for more than 15 years, the entire period
of officiation was directed to be counted
for the purpose of seniority vis-a-vis the
direct recruits. The Supreme Court observed:

(5) A.I.R.1983 S-C.769.

(6) A.I.R.1984 S.C.1595

(16) A.I.R.1986 SC 638.

(11) A.I.R. 1985 S.C.1019.

Pruty

(15)

"...we are faced in this case with the problem of resolving conflicts which have arisen on account of a violent departure made by the Government from the Rules of recruitment by allowing those who were appointed contrary to the Rules to hold the posts continuously over a long period of time. The question is whether after such a long period it is open to the Government to place them in seniority at a place lower than the place held by persons who were directly recruited after they had been promoted, and whether it would not violate Articles 14 and 16 of the Constitution if the Government is allowed to do so. Promotions of officers have been made in this case deliberately and in vacancies which have lasted for a long time....."

Taking that fact into consideration, even while declaring:

".... it is not our view that whenever a person is appointed in a post without following the Rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that post. Such a person may be reverted from that post. But in a case of the kind before us where persons have been allowed to function in higher posts for 15 to 20 years with due deliberation

K. S. J.

(76)

it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as persons not belonging to the service at all, particularly where the Government is endowed with the power to relax the Rules to avoid unjust results."

As referred to in the several decisions of the Supreme Court, the Supreme Court directed that all persons who are promoted to the several posts contrary to the rules, as having been regularly appointed to the said posts and they be assigned their seniority in the cadre "with effect from the dates from which they were continuously officiating in the said post".

Shri Shanti Bhushan, learned counsel for the petitioners, however, contended that the decision in that case must be confined to the facts of that case and the Supreme Court cannot be taken to have laid down so as a general principle and, therefore, cannot be applied to this case. We must, however, observe that in NARENDER CHADHA Vs. UNION OF INDIA (16) the Supreme Court did not lay down any principle



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different from the one laid down in the earlier cases.

In fact, after referring to the earlier decisions it considered three questions -- (i) whether a violent departure from the rules of recruitment is made by the Government by allowing those who are appointed directly to hold the post continuously over a long period?

(ii) whether the Government would be justified to place them in seniority at a place lower than the place held by persons who were directly recruited after they

had been promoted? and (iii) whether it would not violate Articles 14 and 16 of the Constitution; if

the Government is allowed to do so? The Court

held that "they must be deemed to have been duly appointed to the post and that all persons who are

promoted to the several posts should be assigned

seniority in the cadre with effect from the date from

which they are continuously officiating in the said

posts." promotees claim that

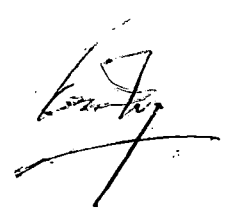
The / these two principles ~~xxxx~~ ~~xxxx~~

~~promotees claim~~ should be implemented and it is these principles that are

/ implemented in drawing up the impugned seniority list.

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It is also pertinent to note that the Government contemplated that all temporary posts should be converted into permanent posts if they have lasted for 3 years or more. Though they were not in fact not converted, they must be treated as permanent posts and all vacancies which have lasted for more than three years have to be treated as substantive vacancies for the purpose of reckoning seniority of promotees appointed against those vacancies. When there is no distinction between temporary posts and permanent posts so far as substantive vacancies are concerned, the promotees who have continuously officiated in such vacancies should get the benefit of their continuous officiation in reckoning their seniority. The inequity of not following this rule would be abundantly clear from the seniority list which was prepared on the basis of quota and rota rule. AFHQ service was constituted on March 1, 1968. In the seniority list which was quashed by the Supreme Court, direct recruits of 1980 are shown from Sl.Nos. 10 to 40 while those promoted as Assistants between 27-3-1971 and confirmed on 1-9-1975 are shown from Sl.Nos. 41 onwards.

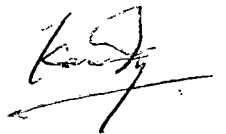


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Direct recruits appointed in 1968 under these rules were shown in the year 1977 seniority list at Sl.Nos.187,192,197,200, 205, 210 and 214 while promotees of the year 1964 are placed below them. Direct recruits of the year 1974 batch were placed above some of the 1965 and 1966 year promotees.

Giving effect to the principle of continuous officiation of promotees in determining their seniority would arrest this unjust, inequitable and undesirable consequence and make a promotee whose continuous officiation had begun a day prior to the appointment of a direct recruit, senior to such direct recruit. To that, the direct recruits should not justifiably have any grievance. After all when the artificial rule of seniority in a particular grade, appointment to which is based on quota and rota rule has broken down, seniority must naturally be determined by the length of service in the particular grade. Otherwise what else is seniority in service jurisprudence? The benefit of their long period of service in the cadre for reckoning seniority could be denied only if the appointment itself were invalid. But as held above, when due to exigency of service, appointments were made by way of promotion and the rules themselves specifically vest power to relax the rules

appointments made in

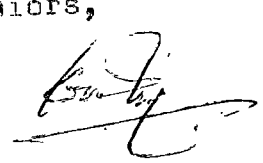


above circumstances must be deemed to be regular and valid and the promotees cannot be denied the benefit of their longer period of service.

In sum, the benefit of this long period of service would accrue to all promotees, who have continuously officiated against long term vacancies and long term vacancies would be those that "are not for a few days or a few months or are otherwise adventitious". Irrespective of whether the posts were temporary or permanent, so long as the promotion was against long term or substantive vacancies and not against short term or fortuitous vacancies, the period of continuous officiation would have to be reckoned for determining seniority. Whether the vacancies occurred due to long term deputation or long leave due to death, retirement, resignation, dismissal or removal, or due to promotion regular, ad hoc, officiating or otherwise, and whether the deputationists or promotees hold a lien or not, the benefit of continuous officiation would accrue to promotees against such vacancies.

The only other contention that remains to be considered is whether the vacancies should have been reckoned from year to year and appointment of direct recruits deemed to have been made in the year in which the examination was held and only against posts as are available in that year, the promotees should be given the benefit of continuous officiation in the matter of seniority.

Shri Shanti Bhushan fairly conceded that the list of August 10, 1984 was based on slot system upto 1981 and that is not valid. He has also no objection to the list being prepared by putting year after year direct recruits and promotees in the ratio of 1 : 1 and then placing the promotees from the select list below them in each year. But in so far as the ratio of 1 : 1 between direct recruits and promotees is ignored and all promotees continuing on an officiating basis as Assistants are treated as seniors, he says the list is bad.



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It is contended that even if the quota and rota rule has broken down, in this case only, sub-rule (7) to Rule 16 has to be ignored, sub-rules (5) and (6) have to be implemented and the principle of continuous offication as laid down by the Supreme Court cannot be applied.

Shri Shanti Bhushan points out that these rules have not been challenged^{as} ultra vires and they are separable and must be implemented. According to him, as vacancies arise year after year, persons who have been recruited for vacancies arising in a particular year, join a year or two later because various other formalities have to be completed. The 1978 year batch of direct recruits after selection actually joined in the year 1980, they should be given seniority from the year the vacancies arose or at least the year they were recruited in service and not from the date they joined. The promotee Assistants who have been officiating in excess of their quota albeit continuously between 1978 and 1981 cannot be placed above. Further under sub-rule (5) of Rule 16 inter se seniority of permanent officers and temporary officers must be maintained separately and promotee officers before they could be appointed regularly have to be placed on probation which they have to complete satisfactorily. Though at first flush this argument

seems to be plausible, this is again an insistence upon the application of the quota rota rule which as was already held by us, had broken down.

We are unable to agree with this contention.

This contention ^{is} again an insistence upon the partial implementation of the quota and rota rule which we have already held, has broken down. No such distinction of partial break-down or total break-down of quota and rota rule can be drawn. Either it has broken down or it has not. Once we have come to the conclusion that it has broken down, there is no escape from the application of well settled principle of computing the period of continuous officiation for determining the seniority. Sub-rule (5) of Rule 16 speaks of seniority inter se between officers appointed substantively to the grade irrespective of whether they are permanent officers or temporary officers. All that sub-rule (5) lays down is that the inter se seniority shall be reckoned in the case of permanent officers in order in which they are appointed and in the case of temporary officers in the order of their selection for such promotion. The seniority Rule refers to appointments in permanent and temporary cadres and are regulated by Schedule III. As already discussed above, substantive vacancies may occur in permanent cadre as well as in temporary cadre. All substantive vacancies have to be filled in, in accordance with the quota and rota rule. When that rule has broken down and consequently sub-rule (7)

of Rule 16 cannot be given effect to and sub-rule (5) cannot be ignored even then the date on which they they are appointed has to be taken into account.

When the quota and rota rule has broken down, as laid down by the Supreme Court, the appointment of promotees in excess of the quota, such appointment would be valid and the principle of continuous offication would have to be given effect to. No doubt vacancies arise each year and recruitment has to be made year after year.

Only because that was not done, the quota and rota rule had broken down, not just in an year or two,

but for over a decade and officating promotions

from out of a select list on long term basis had

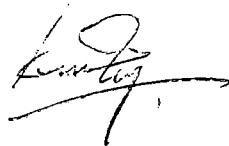
to be made. There is no reason to ignore the

continuous offication of such promotees in the matter

of reckoning their seniority. No judgment of the

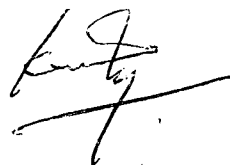
Supreme Court has been brought to our notice which so

directs. By applying this principle of continuous



(84)

officiation, while the direct recruits get the benefit of the total length of their service from the date of their continuous officiating appointment, none of them will steal a march over the direct recruits who were already appointed to the service. Not every promotee but only those who have been promoted on an officiating basis against long term vacancies, (not against leave or fortuitous vacancies) and who have continued as such without reversion, would get the benefit of this rule. Not a single instance of a promotee who does not answer this description being placed above a direct recruit appointed earlier, has been pointed out to us so as to strike down or modify the impugned seniority list.



(85)

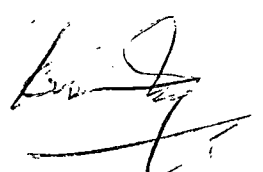
list. If there is any discrepancy in fixing the seniority amongst the direct recruits themselves, with which we are not concerned in this writ petition, it is always open to them to make their representation and for the Government to rectify the errors, if any, without, however, affecting the seniority of promotees who have been declared seniors to the direct recruits on account of their continuous officiation.

It would be seen from the impugned seniority list that the principle of continuous officiation had been applied. At Sl.Nos.1 -- 19 are promotees who were officiating continuously from 1978. They were all appointed on selection by the D.P.C. The promotees placed at Sl.Nos. 20 -- 92 were those who started their officiation in the post of Assistants in the year 1978. At Sl.Nos. 93--231 are promotees who started officiation as Assistants in 1979. The first direct recruit⁶² of 1978 batch joined as Assistant for the first time on 26--2--1980. Before he joined in 1980, the promotees placed at Sl.Nos.292-300 had commenced their continuous officiation. They were, therefore, rightly placed above the direct

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(40)

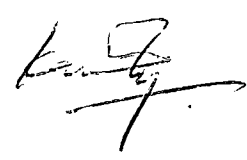
recruits who joined on February 26, 1980, and the direct recruits who joined on February 26, 1980 were placed from Sl. Nos. 301 onwards in the impugned list. None of the promotees who started officiation, even though, against long term vacancies from a date subsequent to February 26, 1980 have been placed above any direct recruit appointed to the service on that date. In our view, this list is in consonance with the principles laid down by the Supreme Court for reckoning inter se seniority between direct recruits and promotees where the quota and rota rule has broken down. The direct recruits cannot complain of any hardship or injustice. Merely because they were selected on the basis of a competitive examination in the year, 1978, they cannot, without actually joining service claim to be seniors to those already in the grade of Assistants. Such a claim apart from being violative of the Fundamental Right guaranteed to all Assistants including promotees, under Articles 14 and 16, is neither just nor equitable.



(6)

In view of the above discussion, all the contentions raised by the petitioners in O.A.No.41/86 are rejected. O.A.No.41/86 therefore, fails and is accordingly dismissed.

In OA No.79/86 all that the promotees' claim is that the respondents who prepared the seniority list in respect of the direct recruits and promotees have confined it to only 421 Assistants. When the Supreme Court had, by its judgment dated April 25, 1985, directed the Central Government to prepare a fresh seniority list of Assistants according to the relevant rules and valid principles and to revise the panel of promotion in the light of the revised seniority list, the seniority list cannot be confined to only some members of that grade. The seniority list so drawn up must include all members of that Grade occupying substantive vacancies irrespective of whether the vacancies were in temporary or permanent posts and the seniority must be reckoned giving the benefit of continuous officiation.



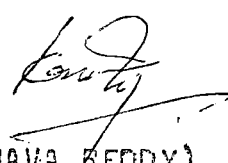


It is pertinent to note that the Supreme Court did not consider the case of any individual promotee or direct recruit. In fact the dispute before the Supreme Court was between the entire category of promotee Assistants and directly recruited Assistants. The directly recruited Assistants were represented by its Association. In these petitions too -- both the direct recruits and promotees have raised issues common to all direct recruits and promotees have raised issues common to all direct recruits and promotee Assistants. Both the groups have contested the matter in a representative capacity. The principles that have been followed by the respondents in preparing the seniority list and the issues raised challenging the said seniority list are common to all direct recruits and promotee Assistants. They are not peculiar to the petitioners. There is no intelligible differentia to restrict the list to a meagre 421, when according to the Respondents as many as 2249 are


(81)

working as Assistants.

The respondents are, therefore, directed to draw up a complete seniority list in the light of this judgment including therein all the temporary, permanent and officiating Assistants working in substantive vacancies giving them the benefit of continuous officiation and also to frame a fresh panel of promotion based on that seniority list within three months of the receipt of this order. The parties will be entitled to all consequential benefits. OA.No.79/86 is accordingly allowed. Directions as indicated above shall issue. In the circumstances, there will be no order as to costs.


(K.MADHAVA REDDY)
Chairman

August 22, 1986.


(B.C. MATHUR)
Vice-Chairman.

August 22, 1986.