
(1981) 07 PAT CK 0013

In the Patna High Court

Case No : C.W.J.C. No's. 1880 of 1970 and 534 of 1972

Bishundeo Mahto and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 30-07-1981

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309, 310, 311

Citation : (1982) 30 BLJR 242

Hon'ble Judges : Sarwar Ali, J;S. Narain, J;H.C. Agrawal, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sarwar Ali, J.—These two writ applications have been referred to the Full Bench to consider the correctness of a Bench decision of the Court in Shri Rajib Ranjan Pathak v. State of Bihar (C.W.J.C. 290 of 1969) decided on 28th April, 1970. In this case the Bench interpreted the State Government Circular No. 6509-A dated 12-12-1934 in relation to the determination of seniority of officers in State and Subordinate Services where more than one officer is appointed to the service at the same time. Since by virtue of the notification issued by the State Government (Notification No. 3555-3, 27/50-A dated 15-4-1950) the aforesaid notification of 1934 has the force of rules made under Article 309 of the Constitution of India, I shall refer to the said notification as the 1934 Rules.

2. Both in the State Services as well as in Subordinate services a number of posts are permanent. Temporary posts are also created from time to time which, according to exigency of the services, may be made permanent at a later stage. Appointments to permanent posts are sometimes on substantive basis, and in some cases on probation, officiating or temporary basis. The probationary and officiating appointments are of a temporary nature. Similarly so far as the temporary posts are concerned substantive appointments can be made and are, in fact sometimes made even on temporary posts. Appointments to services may be made either by direct recruitment or by promotion under the rules governing

the services, or a valid governmental instruction. It is, therefore, natural that the State Government should lay down the rules or criteria for the determination of seniority to the services in these differing situations.

3. In relation to the determination of seniority the State Government framed rules of general application in 1934. These, therefore, apply where there are no special rules governing a particular, service. Where, however, there are such rules they apply and not the rules of 1934-Generalia specialibus non derogant. The 1934 Rules are as follows:

The Local Government have recently had under consideration the principles to be followed in determining the seniority of officers of the Provincial and Subordinate Services when more than one officer is appointed to a service at the same time. It has been decided that the following instructions should be observed in future:

(a) Where officers are recruited by promotion and by direct appointment at the same time, the promoted officers shall take precedence over the officers directly recruited.

(b) Promoted officers shall keep the position inter se which they held in the service from which they were promoted.

(c) The decision regarding the seniority of direct recruits shall be made by the authority entitled to appoint at the time of their first appointment. In all cases such decisions shall be final.

(2) Government do not consider it practicable to lay down definite criteria to determine the seniority of direct recruit. The following suggestions, however, are made for the guidance of departments concerned;-

(a) Direct recruits at the time of their first appointment may be given an opportunity to supply any information which may be of value in determining their seniority.

(b) When direct recruits have been placed in order of merit by a Selection Board full consideration should be given to the opinion of such Board.

(c) Seniority may be determined by general condition of merit, by educational qualifications or by age.

(d) It is not possible to give a scale showing the relative value of educational qualifications but if departments experience difficulty the advice of the Director of Public Instruction may be taken.

3. These instructions shall not apply to the Provincial Civil Service, (Judicial Branch).

4. Two other circulars both having the force of rules under Article 309 of the Constitution were issued in the year 1944. They are memo No. 2766/A dated 15-7-1944 and memo No. 322-A R. dated 9-9-1944. These may also be quoted. The memo dated 15th February, 1944 reads :-.

Government have recently had under consideration the question whether the seniority of an Inspector or Sergeant Major on substantive promotion to the rank of Deputy Superintendent of Police should depend upon his length of officiating services as Deputy Superintendent of Police or on his seniority in the gradation list of Inspectors or sergeants-Major. It has been decided that length of officiating service should not be the criteria of deciding seniority on substantive promotion to the higher service but that the following procedure should be followed uniformly in making promotions to higher services and in determining the seniority of officers on promotion.

2. A definite decision regarding the fitness of officers for promotion to the higher service should be taken not when officers are promoted to officiating vacancies but when substantive vacancies occur. In making this decision the policy should be to reject rigorously all those who are unfit for promotion i.e. all those who are not definitely fit for the higher posts and subject to the conditions, to promote by seniority. Thus if more than one officer has to be promoted to the post of Deputy Superintendent of Police on the same day, their seniority inter se should depend on their seniority as Inspectors or Sergeants-Major, provided all of them satisfy the criterion of fitness. His Excellency has decided that the above principles should also be followed by other departments of Government while making promotions to the service under their administrative control.

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The memo dated 9-9-1944 is as follows:

With reference to Education Department unofficial Memo No. 1380-B dated the 28th July, 1945, I am directed to say that an officer whose fitness for promotion in the higher post has been considered and who has been declared unfit for substantive promotion would not normally be allowed to act subsequently in the higher post. But exception to this principle will occur. An officer may show such improvement in his work or may have overcome his earlier defect to such an extent that a further trial may be justified. On the other hand if an officer has been found clearly and definitely unfit for promotion to the higher post there would be no question of his being tried again.

The test of merit is to be applied from time to time as vacancies for substantive promotion occur and all those promoted substantively at the same time will retain their seniority inter se irrespective of when they first officiated in the higher post.

I would refer to these as July 1944 Rules and September, 1944 Rules. It is the true meaning of the 1934 Rules, and the two rules of 1944 which requires consideration so also the decision in Rajib Ranjan's case and the ratio thereof.

5. The decision in Rajib Ranjan's case, interpreting the Rules of 1934, is that the said Rules apply at the time of temporary appointments, When the temporary appointees are confirmed, although on different dates and not at the same time,

they retain their seniority which they had at the time of their temporary appointment in accordance with the Rules of 1934. In the referring order in the present writ cases it was observed:

We are inclined to think that the Rules 1934 are applicable to permanent appointments. Confirmation of an officiating or temporary Government servant is also an appointment.

6. Before interpreting the relevant rules it would be appropriate to make some general observations which are relevant in this context:

(a) The question of seniority is limited to the persons in the cadre. There is no competition with the holders of ex-cadre post.

(b) In many cases there are no materials available to determine whether the post is within or outside the cadre. In such a situation one may be compelled to count such posts within the cadre.

(c) Many a time cadre consists of both temporary and permanent posts. Promotion to either is relevant for seniority.

(d) For the purpose of determination of seniority promotion on consideration of merit is relevant. Where, however, such promotion is without consideration of merit, it cannot be said to be relevant.

(e) The question whether a person will lose seniority because of administrative lapses on the part of the authorities having power to promote cannot be taken to be finally settled by the Supreme Court. Reason demands that no person should ordinarily be made to suffer on account of such lapses. But whether the service rules are clear they would prevail over other considerations.

The rules relating to seniority have to be interpreted taking these into consideration.

7. Before interpreting the relevant rules it would also be appropriate to appreciate the reality of the situation as exists today. Initial appointments as also promotions are made both on substantive basis as also on temporary basis. While making substantive appointments all those, who are eligible have to be considered. Thereafter selection is made and initial appointments or promotions notified. Temporary appointments are also of two kinds. Sometimes it is an ad hoc arrangement due to exigency of a particular situation, without considering the respective merits of all those who are eligible. This is, so to say, a stop-gap arrangement. Such an appointment is fortuitous. It does not confer any right of continuance even on the temporary post. Later the matter is considered on merit. The stop-gap arrangement or the ad hoc appointment may be upset and appointment/promotions adjusted on the basis of consideration of merit. But in most cases where temporary promotion is to be given all eligible persons are considered. It is then a matter of selection for the post. The question for consideration is whether the Rule of 1934 applies only at the stage of temporary

appointment (where the appointment is on consideration of merit) or when substantive appointment is made.

8. I have already indicated that the Division Bench of this Court has taken a view that the rules 1934 are applicable only at the stage of initial temporary appointment and is not applicable when a temporary appointee is substantively appointed to the post. The referring order on the other hand prefers it to be confirmed to the cases of substantive appointment. The crucial words in the rules are "when more than one officers are appointed to a service at the same time. "The first question to ask is; Can it be said that a person appointed to a temporary post in one of the departments of the State or offices under the State is not appointed to a service in the State ? The answer in my opinion, must clearly be in the negative, A person holding a temporary post under the State has been held to be a holder of "Civil Post" within the meaning of Article 311 of the Constitution. It is difficult to hold that a person who has been appointed on a temporary post is entitled to the protection of Article 311 of the Constitution, as a holder of Civil Post, without being treated as having been appointed to a service in the State. The expression "appointed to service in the State is not a term of art. The plain meaning of the word used have to be given effect to. There is nothing in the subject matter or context to warrant the giving of a restricted meaning. The width and amplitude of the words used do not require to be cut down Rajib Ranjan's case in so far as it holds that the rules are applicable in reference to temporary appointments appears to me to lay down the correct law. It has to be appreciated that sometimes temporary or even substantive appointments are made in the higher cadre while an officer is still holding a temporary post in the lower cadre. If the promotion takes place on the basis of merit, it is imperative that the inter se seniority in the lower rank is fixed or ascertainable. It has further to be appreciated that while deciding the question of promotion in most cases seniority is an important, if not the most important, factor. There would be a vacuum if the rule is made applicable only to substantive appointments. When however, promotions are made as a stop-gap arrangement or an ad hoc basis, without considering the merit of the respective candidates the rule is not applicable. Such an arrangement is only a matter of administrative convenience. It does not confer any right to the post. It has to be followed by a proper decision on consideration of merit.

9. The next question that requires to be considered is whether the rule has only application at the stage of appointment to a temporary post and is inapplicable when substantive appointments are made. The contention is that if a person has already been appointed, the question of his reappointment does not arise. The argument is attractive, but, in my view the rule is applicable at the stage of substantive appointment as well. A temporary appointee, has no right to the post Parshotam Lal Dhingra Vs. Union of India (UOI), . The right to the post only accrues when there is a substantive appointment to a permanent post. The appointee then holds lien on the post. Substantive appointment to a permanent post is thus appointment to the service with the right to hold the post. The

appointment of this nature is also an appointment to the service different in quality and attribute than a temporary appointment. It is not a promotion from a temporary to substantive post. For the purpose of the rule it is a new or fresh appointment. I am thus of the view that the rule applies both at the stage of temporary as also substantive appointment.

10. I have so far been considering the Rule of 1934, without considering the impact of the two rules of 1944. (All the three have the force of rules made under Article 309 of the Constitution Vide Govt. Notification dated 15-4-1950).

11. July, 1944 Rules require that at the time of substantive promotion test of merit should be strictly applied. Those, who are unfit for promotion should be rejected. If more than one officer is appointed on the same day their inter se seniority is dependant on their position in the lower cadre, September 1944 Rules states that even those rejected may be permitted to act in the higher post if they show such improvement in their work or may have overcome earlier defect to such an extent that a fair trial would be justified. Thus if officers are promoted substantively on the same day their seniority on substantive promotion is determined on the basis of their inter se seniority in the lower rank. This is so. even though an officer had been temporarily promoted at an earlier date. To illustrate if A, who is junior to B, is promoted temporarily before B then if both A and B are given substantive appointments on the promoted post at the same time B will be senior to A. As a matter of construction and interpretation of these rules, I would hold that this applies where substantive promotions are made at the same time. If, however, a junior in rank is promoted substantively, earlier to a senior in the said rank, the subsequent promotee does not become senior to the earlier promotee. Had the intention of the rule-making authority been otherwise, it is but expected that it would have been so specifically stated in the rules. It may again be emphasised that a person who is appointed substantively on a permanent post has a right to hold the post. Ordinarily, and in the absence of statutory rules, I would be inclined to think that a person who has a right to the post, on the basis of substantive appointment from an earlier date, should be reckoned senior to a person who acquires a right on a later date, irrespective of the fact whether he was senior or junior in the lower rank.

12. The two rules of 1944 deal with the promotion. If, however, an officer, who holds a temporary post, is appointed substantively to the said post, the seniority has to be determined on the basis of the rules of 1934, as interpreted.

13. Having dealt with the matter on the basis of first impression it would be pertinent to see whether any decision of the Supreme Court takes a view contrary to the view expressed by me. In course of argument several decisions were cited. Most of them relate to quota rules dealing with a situation where quota has been fixed for promotees and direct recruits and quota as fixed has not been adhered to in making the appointment. Those cases will be considered when I am dealing with these two writ applications on merit. The decision which requires immediate consideration is that of S.B. Patwardhan and Another Vs.

State of Maharashtra and Others, . The impugned rules in that case fixed the seniority between the direct recruits and promotees on the basis of confirmation irrespective of the length of continuous officiation. It was held that the rules were hit by Articles 14 and 16 of the Constitution as they left the valuable right of "seniority dependant upon the mere accident of confirmation. In that situation it was held that the seniority will be dependant on continuous officiation. It was pointed out that "for the purposes of seniority, the promotees had to depend firstly on the availability of the substantive vacancies and secondly on the arbitrary discretion of the Government to confirm or not to confirm them in those vacancies" The impugned rules having been declared as unconstitutional, it was held that seniority should be determined on the basis of continuous officiation. The decision is only applicable to cases where the confirmation is based on fortuitous circumstances and not on test of merit of respective eligible candidates. The decision aforesaid is therefore, not applicable to cases where confirmation is based on consideration of respective merits of persons eligible for promotion-confirmation.

14. It has next to be considered when a person can be said to be appointed or promoted substantively. In view of the decision in Parshotam Lal Dhingra Vs. Union of India (UOI), , it is clear that the question whether a person holds a post substantively is not dependant on whether he holds a temporary or a permanent post. Appointment to a temporary post can also be substantive.

The question when a person can be said to have been appointed substantively has been considered by the Supreme Court recently in Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, . In this case the relevant rule under consideration stated that seniority in the service shall be determined according to the date of the order of appointment to the service. Rule 3(6) defined "Member of Service" to mean a "Government Servant" appointed in a substantive capacity under the provisions of these rules to a post in the cadre of the Service. In this situation the questions, as to what was meant by appointment in a substantive capacity was considered. Note was taken of Rule 17 which provided that "all persons appointed to the service who are not already in the permanent employment of the Irrigation Department shall be placed on probation for four years" (later reduced to two years). It was observed that in this situation the temporary appointees on completion of their probation and fulfilment of other conditions became members of the service and must be deemed to be appointed in a substantive capacity. In this context it was observed:

Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post. To approximate to the official diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation.

At another place (paragraph 26) it was explained that where appointments are made to temporary posts but after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, there was no reason to hold that such appointments are not in a substantive capacity.

In view of the decision in Baleshwar Das's case it can safely be said that (a) regular method of appointment after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, and (b) long duration for which the post is held, are two important indicia for coming to the conclusion that the appointment is in a substantive capacity. The terms of appointment are also relevant, but not conclusive. Other relevant factor, like the service rule in question or whether the appointee was on probation which has been completed have also to be taken in account. It is only after taking into consideration all the relevant factors that a firm decision can be arrived at. As was pointed out by the Supreme Court in *State of U.P. v. Dr. M.J. Siddiqui* (1980) 3 S.C. 174 .

In order, therefore, to determine the nature of appointment, we have to look into the heart and substance of the matter, the surrounding circumstances, the mode, the manner and the terms of appointment and other relevant factors.

15. I may now summarise my views as follows:

(a) Question of seniority is limited to persons in the cadre. There is no competition with holders of ex-cadre post.

(b) The Rule 1934 apply at the stage of temporary appointment, when the appointment is made on consideration of merit. Rajib Ranjan's case in so far as it holds that the rule is applicable at the stage of temporary appointment has been rightly decided.

(c) Ad hoe temporary appointment on account of administrative exigency, unrelated to the consideration of merit, is not to be taken into account for the purpose of reckoning seniority or when the question of promotion is decided.

(d) The aforesaid rule is also applicable when nonsubstantive appointments are made substantive, Rajib Ranjan's case, in so far as it takes a contrary view, has in my respectful opinion, been wrongly decided.

(e) In case of substantive promotions at the same time the seniority shall be determined according to the two rules of 1944.

(f) Where substantive appointments/promotions are not made at the same time, a person who has been substantively appointed/promoted earlier would be reckoned senior to a person who has been substantively appointed/promoted at a later stage. The only exception would be where the service rules are to the contrary.

(g) When can a person be said to be substantively appointed has to be determined in the light of what has been explained in paragraph 14 of the

judgment.

15-A. Having dealt with the point on which reference was made to the Full Bench, I proceed to consider these two writ applications on merit and shall deal with the contentions which have been raised.

CWJ.C. No. 1880/1970:

16. In this writ application the petitioner prays for quashing of Annexures-10, 11 and 12. By Annexure-10 dated 28-10-1970 respondent Nos. 4 and 5 have been declared to be senior to the petitioner as permanent Assistant Engineers in view of the decision of the High Court in Rajib Ranjan's case. Annexure-11 dated 13-4-1972 shows the petitioner as junior to respondents 6 to 12. Under Annexure-12 respondents 4, 5, 7 and 8, who according to the petitioner are junior to him, have been promoted as Executive Engineers Incharge.

17. The petitioner was appointed in the cadre of Subordinate Engineering Service P. W. D. earlier than respondent Nos. 4 and 5. He is admittedly senior in that cadre. Respondents 4 and 5 were promoted as temporary Assistant Engineers with effect from 1-8-1959. The petitioner on the other hand were promoted by an order dated 10-7-1961. By a notification dated 2-11-1967 the petitioner, respondent Nos. 4 and 5, and some others were appointed as permanent Assistant Engineers on probation for one year. Subsequently by a notification dated 19-6-1968 all those who were on probation, were confirmed as Assistant Engineers. By Annexure-9 date 17-2-1969 the question of seniority as permanent Assistant Engineer was decided and the petitioner was shown senior to respondents 4 and 5. Subsequently after the decision in Rajib Ranjan's case the seniority has been revised. Since respondent Nos. 4 and 5 started officiating as temporary Assistant Engineers before the petitioner they were shown to him under Annexure-10, although all the three were promoted substantively on the same day or at the same time. I have already discussed the import of the rules of 1934 and the two Rules 1944. I have held that 1934 Rules are also applicable to substantive appointments. Moreover, in view of July, 1944 Rules reaffirmed in September 1944 Rules, the position is clear that on substantive promotion as Assistant Engineer, the petitioner carries his seniority as in Bihar Subordinate Engineering Services. It is, therefore, clear that the petitioner has to be held to be senior to respondents 4 and 5 on substantive promotion as Assistant Engineer. So far as respondent No. 10 is concerned, he has not yet been confirmed as Assistant Engineer, He cannot therefore be reckoned senior to the petitioner.

C.W.J.C. No. 534/1972:

18 In this writ application the petitioners pray for quashing of Annexure-9 This is a notification dated 13-4-1972 fixing the inter-se seniority of Assistant Engineers in Public Works Department (hereinafter to be referred to as P.W. D.) In this annexure respondents 2 to 8 have been shown senior to the petitioners.

19. The relevant fact giving rise to the filing of this writ application may now be briefly stated. The petitioners, who are four in number, were all recruited as temporary Assistant Engineers in the year 1960. Respondents 2 to 8 were promoted as temporary Assistant Engineers by a notification dated 10-7-1961 (Annexure-7). Later another notification was issued stating that the said promotion is to take effect from 11-4-1961. A copy of this notification is Annexure-8 to the writ application. Thus the petitioners claim to be senior to respondents 2 to 8 who were appointees of 1961. Their case is that the notification (Annexure-9) which shows the respondents aforesaid as senior to the petitioners, is illegal and arbitrarily interferes with the vested right of the Petitioners. It appears that during the pendency of this writ application the Government issued an order dated 29-12-1979 confirming Assistant Engineers named therein from various dates as mentioned in the Government Order. By this order respondents 5, 7 and 8 were confirmed as permanent Assistant Engineers with effect from 2-11-1967. It is also not in dispute that respondent 6 has been confirmed from the same date. Petitioners 1, 2 and 3 were confirmed in the year 1975 with effect from 1-3-1970, 1-9-1971 and 5-1-1972 respectively. Petitioner 4 and respondent No. 3 have not been confirmed. So far as respondents 2 and 4 are concerned they have both retired and hence there is now no dispute in relation to seniority so far as they are concerned. At the time of admission of this writ application it was ordered that any action taken on the basis of the impugned Annexure-9 will be subject to the final result of the writ application. Learned Counsel for the petitioners challenging the order of confirmation aforesaid and contends that this order has been passed on the basis of the seniority as fixed under Annexure-9 which is under challenge. If Annexure-9 is quashed, he learned Counsel says that the order of confirmation cannot also stand.

20. Counter-affidavit has been filed on behalf of respondent Nos. 6 and 8. But curiously enough no counter-affidavit has been filed on behalf of the State. The stand of contesting respondents 6 and 8, broadly speaking, is three-fold. It is first said that according to the Rules of 1934 appointment of the direct recruit (petitioners) and respondent-promotees had taken place at the same time "within the meaning of the said expression as used in the Rules of 1934. The promotee-respondents would, therefore, be senior to the petitioners in conformity with the said Rules. It was next urged that the quota has been fixed by the Governor in conformity with Rule 2 of the rules, regulating the recruitment to the Bihar Engineers Service Class-II for P. W. D. The respondents are within the promoters quota. The petitioners, who were in the quota of direct recruits, cannot have precedence over the promotees.

21. I have already quoted in extenso the Rules of 1934. In order to appreciate the argument based on the Recruitment Rules, it is necessary to refer to the relevant rules. Rule 1 states that the recruitment to the service shall be by direct recruitment as also by promotion to transfer of officers already in Government Service. Rule 2 states that the Governor shall decide in each year the number of

vacancies in the service to be filled in that year by direct recruits and by promotion. It is stated in the counter-affidavit that the number of vacancies of temporary Assistant Engineers required to be filled up in the year 1959 was 120. Out of these, 90 were decided to be filled up by direct recruitment and 30 posts were to be filled up by promotion from Subordinate Engineering Services. Although the decision was, as stated above, under some confusion it was wrongly stated in the letter of the Deputy Secretary, P. W. D., dated 28-4-1959 that only 23 posts of temporary Assistant Engineers have to be filled up. Since only 23 vacancies out of the quota of 30 vacancies were filled up, it was decided subsequently that seven more vacancies of 1959 should be filled up by promotion of Subordinate Engineers. The promotion of the respondents under notification dated 10-7-1961 was against the seven vacancies of 1959 earmarked for the promotees. Respondents 2 to 8 are therefore, promotees of 1959. Thus the petitioners and the respondent Engineers being recruits of 1959 quota, the promotees, it was contended, have to be treated as senior to the direct recruits. Lastly, it was contended that since respondents 5 to 8 have been confirmed from a date earlier to the date of confirmation of petitioners 1 to 3 (petitioner No. 4 not having been confirmed,) they were senior to the petitioners.

22. I take up the first contention. Learned Counsel for the respondents' contention really amounts to this that the expression "same time" in the Rules of 1934 has the same meaning as expression "same transaction". If the decision is that specified number of vacancies have to be filled up by promotion and a specified number by direct recruitment, then although the selection takes place subsequently, the appointments must be taken to have been made at the same time. During the course of argument three Bench decisions of this Court were brought to our notice. They are *Gaya Prasad Pandey and Anr. v. The State of Bihar and Ors.* 1969 Pat. 311 *Awadheshwar Prasad v. The State of Bihar* ILR Pat. 1033 and *Bajinath Singh v. Secretary Department of Appointment, Government of Bihar* 1972 B.L.J.R. 205. The earlier two decisions take the same view, namely, that the expression "same time" is not synonymous with the "same transaction". The observation in the third case is to some extent helpful to the contention of the petitioners.

23. In *Gaya Prasad Pandey's* case Bench of this Court considered Bihar Finance Service Rule (1963). Rule 39 dealt with the seniority of the officers appointed substantively to the service. The proviso to the rule stated that, if more than one officer is substantively appointed at the same time, seniority inter se has to be fixed according to rules as stated therein. The question for consideration was as to what was the meaning of the expression "at the same time" in the aforesaid rules. It was held relying on the meaning of the expression as given in the Shorter Oxford Dictionary that the expression meant "during the same period, at the same moment, not before and after."

24. In *Awadheshwar Prasad v. State of Bihar* (supra), it was held, giving the expression its ordinary and natural meaning, that it could not be held that if

promotion has taken place on different dates, they could be treated to be at the same time.

25. In Baijnath Singh's case the question of appointment to the Bihar Civil Service (Executive Branch) by promotion of Sub-Deputy Collector was under consideration of the Government. A select committee constituted for the purpose recommended 142 names for promotion. The same was sent to the Public Service Commission. The Commission wanted that the records of 162 officers proposed to be superseded be sent to the Commission. This was refused by the Board of Revenue in view of Rule 23 of the Recruitment Rules. The Commission, therefore, refused to give opinion even in respect of the names recommended. In this situation the Government issued a notification on 1-2-1967 promoting 142 officers, whose names were recommended to the Commission. In the notification, express reservation was made in respect of determination of seniority. The State Government amended the rules aforesaid. Thereafter the cases of 162 officers were referred to the Commission, recommended the names of 55 out of these for promotion. Out of the 142 names, referred to the Commission earlier, the Commission did not find only 6 fit for promotion. The Government took the decision not to disturb the promotion of those 6 officers as well and issued another notification promoting 55 officers recommended by the Commission by a notification dated 5-8-1962. By a later notification it was clarified that the seniority of these officers will be considered separately in due course. Subsequently by a notification dated 13-8-1969 seniority of the promoted officers was fixed and the date of their probation on promotion was allotted, This was challenged by the petitioners, as the seniority had been fixed on the position held by the promoted officers in the service from which they were promoted. The action of the Government in so fixing the seniority was held to be legal and valid. It was held that the promotion of 142 officers in 1957 was subject to certain reservation. The reservation was that the actual date of commencement of the probationary period would be determined later. It was in view of this reservation that the promotion of 142 officers by notification dated 1-2-1967 (which notification contained the reservation aforesaid) and the promotion by notification dated 5-8-1968 was held to be at the same time. The decision, in my opinion, is on the basis of the special facts of the case. From this decision it is not possible to call out as a general proposition that the expression "same time" has the meaning as contended to by the respondents.

26. The contention of the respondents that the expression "appointed at the same time" should be construed as the "same transaction" is difficult to accept. It is well settled that if the expression used by the law-makers has only one meaning, it has to be given effect to, irrespective of the consideration of hardship or even injustice. It is only when two meanings can be ascribed to the expression used, that the Court has a choice. If "X" is appointed by a notification of an earlier date and "Y" by a Government notification of a later date, and a question is put to an ordinary reasonable person as to whether they have been appointed at the same time, the answer and the only answer one would expect is in the

negative. The Courts should not answer the same question differently. A distinction has to be made between appointments made at the same time, and the decision to fill up specified number of vacancies at the same time. The earlier case deals with actual appointment while the latter with only a decision as to the number of persons to be appointed from different sources. As a matter of pure construction, therefore, I do not think that there is justification for departing from the view taken by the two earlier Bench decisions of this Court.

27. It is true that the interpretation put earlier by this Court on similar expression and now put by me may lead to hardship, if not injustice in certain cases. Ordinarily when a decision is taken to promote a fixed number of officers and also to appoint through direct recruitment specified number of officers, the process of appointment through promotion is quicker than the process of appointment by direct recruitment. But sometimes it does happen that cases of officers eligible for promotion cannot be considered because of some technical difficulties. To illustrate, if a representation for expunction of adverse remark is pending decision by the appropriate authority the promotion of an officer may be deferred or delayed. The cause for deferment or delay may not be on account of delay or lapses on the part of the officer concerned. Yet the whole process of consideration may take such a long time that direct recruitment takes place in the mean time. Thus, although even if the adverse remarks is expunged and the impediments in respect of promotion disappears, yet the officer concerned may lose his place in the seniority list as direct recruits have been appointed in the mean time. In such a situation the promotee suffers for no fault of his. Expunging of adverse remarks shows that the remark was not justified. One is inclined to ask as to what is the fault of the promotee for which he has become junior to the direct recruits ? The answer must be "none". Yet, if the rule is applied as interpreted he has to be reckoned as junior to the direct recruits. This is so, although the decision to promote a specified number of officers within which the officer concerned was also included was taken at the same time as the decision to appoint specified number of officers by direct recruitment. But the mere possibility of hardship in some case cannot change the actual meaning of the words used in the rules.

28. In my view, the remedy for such a situation may lie by adopting either of the two courses. The first is that while promoting an officer in the situation similar to what has been discussed by me the appointing authority may appoint him from a retrospective date, so that he does not lose his seniority vis-a-vis a direct recruit. Such an action, in my view, would be free from any legal vice as long as the choosing of the retrospective date is not arbitrary and is based on some rationale. The other course and perhaps a better course is to amend the rules themselves so as to provide for contingence similarly to what has been stated. During the course of argument our attention was drawn to Government notification being memo No. 5805 dated 27-4-1966 which seeks to bring about certain changes in the rules of 1934 and 1944. It was drawn shown during the course or argument that no notification had force of a rule under Article 309 of

the Constitution. I entertain grave doubts whether this notification can bring about changes in the Rules 1934 and 1944 which are, as a ready held, rules under Article 309 of the Constitution. Our attention was also drawn to Government Circular No. 3/BI-106/72-P. 15784 dated 26-8-1972 which in note to paragraph 3, states that the expression "at the same time" means "in the same transaction". This notification has also not been shown, during the course of argument, to have force of rule under Article 309 of the Constitution. The Government would, therefore, be well advised to bring about the desired changes by framing proper rules under Article 309 of the Constitution and not by merely issuing departmental circulars. It is well settled that where the rules under Article 309 of the Constitution are silent, The departmental circular may supplement them. But where there is any change brought about by the circular which is in contradictions to the rules the circular cannot prevail over the rules. The Executive instructions may supplement but not supplant the rules. Having observed that the change in rules may be made, it is pertinent to notice the second Gaya Prasad Paday's case. After the decision in the first Gaya Prasad Pandey's case, the Bihar Finance Service Rules were amended. The amendment was challenged before the High Court giving rise to decision in Gaya Prasad Pandey's case, the Bihar held that the amendment was violative of Article 16 of the Constitution in so far as its retrospective operation was concerned. The correctness of the decision does not fall to be considered in this case and we were told that an appeal from the decision of the High Court is still pending in the Supreme Court. If that be so the State would be well advised to move for an early hearing of the case so that the law in relation to retrospective applicability of the rules made under Article 309 of the Constitution is further clarified by the decision of the Supreme Court. For the present purposes, I would be content to observe that the mere fact that the rule made under Article 309 of the Constitution operates retrospectively, so as to affect some right which the person has under unamended rules does not lead to the inference that the constitutional guarantee under Article 16 of the Constitution has been violated, Indeed, the very purpose of retrospective amendment is to undo the effect of the unattended rules. The mere fact that a civil right is affected does not, in my respectful view, necessarily lead to an inference of infraction of the constitutional guarantee.

29. It was next urged that the quota of the promotes and that of the direct recruit had been fixed. In the year 1959 it was decided that out of 120 available posts 90 should go to direct recruit and 30 to the promotees. The respondents are within the promotees' quota of 30, although the notification of their appointment was issued later than the notification of their appointment of the direct recruits. Consequently all the promotees, irrespective of the date of appointment, must be reckoned as senior to the direct recruits. But it has to be observed that there is nothing in the Bihar Engineering service rule which states that the seniority should be fixed with reference to the date of the decision regarding the filling up of the post by direct recruitment and promotion. In the absence of any specific provision in those rules the general rule, namely, the

rules of 1934 and 1944 have to be applied. So applying the rules, the seven promotees cannot be treated as senior to the direct recruits, not having been appointed at the same time.

30. During the course of argument, reference was made to the decision in *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, . In the that case it appears that some appointments were made outside he quota. Such appointments were held to be illegal and incapable of conferring seniority on the basis of such appointments. This case is distinguishable on facts, as here the appointment is admittedly within the quota. Reference was also made to the case of *B.S. Gupta v. Union of India AIR 1972 S.C. 2677*. I do not find anything is this case which helps the present contention of the respondents. In *A.K. Subraman and Others Vs. Union of India (UOI) and Others*, , it was held that if assistant engineers are recruited as Executive Engineers in excess of their quota in a particular year they will be pushed down to later years for absorption when due within their quota. As already indicated there is no infringement of the quota fixed in the instant case. This decision is also not helpful in deciding the present controversy.

31. It was contended that the quota would operate both at the stage of temporary appointment as also at the state of confirmation. Reference in this connection was made to the decision in *Paramjit Singh and Others Vs. Ram Rakha and Others*, . In my view, it is not necessary to decided this controversy. Suffice it to say or the stage of confirmation or both the stages, depends on the interpretation of the relevant rules. On the one hand we have the case of *Pramjit Singh*, where the quota rule was held applicable both at the stages of initial recruitment as also the confirmation. On the other, we have *Subraman''s* case where the quota rule was held to be enforceable at the time of initial recruitment in officiating capacity and not at the time of confirmation. It all depends on the language of the concerned rule.

32. The last contention advanced on behalf of the respondents is that at least four of the respondents were confirmed earlier than the petitioners and as such they rank senior to them. The confirmation of three, namely, respondents 5, 7 and 8 admittedly took place by an order dated 29-12-1975 issued during the pendency of this writ application. Only respondent No. 6 (who is petitioner in *C.W.J.C. 1880/1970*) was confirmed by an order passed in the years 1968. At the time of decision the prayer of interim relief was granted in these terms that any action taken on the basis of the impugned Annexure-9 will be subject to the result of the writ application. The State as already noticed has not filed any counter-affidavit. The position has, therefore, not been clarified as to what was the basis of confirmation, whether it was seniority as fixed under Annexure-9 or whether it is on some other basis. It therefore not proper to defeat the petitioners on the basis of the order of confirmation passed during the pendency of this writ application. So far as respondent No 6 is concerned the position is different. His confirmation is earlier to the petitioners by an order passed before the filing of the writ application. I, therefore do not propose to take into

consideration the order of confirmation of respondents 5, 7 and 8 and would confine my decision to the right as existed on the date of filing of the writ application and the legality of Annexure-9.

33. Learned Counsel for the State in support of the gradation list (Annexure-9) referred to the entries in the Bihar Civil List according to which all the temporary posts of Assistant Engineers in the Public Works Department were extra cadre or non-cadre posts, But no affidavit, as already stated, has been fixed on behalf of the State. The writ application alleges that the petitioners were recruited as direct recruits on the basis of the quota fixed under the Bihar Engineering Service Class II Rules. Taking, however into consideration the ambiguity in the affidavits filed, and certain relevant factual aspects not having been clarified during the course of hearing, I would direct that the question whether the petitioners are senior to the respondents (or any of them) and the question as to the dates from which the petitioners and the respondents should be confirmed, should be reconsidered by the State, in the light of the law as clarified in this judgment. If the petitioners are found senior to the respondents, Annexure-2 should be modified accordingly. Thereafter it should be considered whether the order of confirmation passed during the pendency of this writ application requires to be varied or recalled. If the Government comes to the decision that any modification is necessary, it should pass suitable orders and issue necessary notification.

34. In the result, C.W.J.C. 1880 of 1970 is allowed and Annexures 10 to 12 are quashed to the extent indicated in the judgment of my learned brother S. Narain, J., and C.W.J.C. 534 of 1972 is allowed to the extent as indicated above. In the circumstances, there will be no order as to costs.

Hari Lal Agrawal, J.

I entirely agree.

Shivanugraha Narain, J.—I have read with care and attention the Judgment proposed to be delivered by my learned brother Ah J. for whose opinion I have the highest respect but I regret my inability to concur in the construction but upon the expression "appointed to a service occurring in memo No. 6509 dated 12-12-1934 of the Government of Bihar and the order proposed to be delivered in C.W.J.C. No. 534 of 1972 by my learned brother.

2. These two cases raise questions of inter se seniority in the Bihar Engineering Service class II (Public Works Department) of some of the Assistant Engineers of the Public Works Department of the Government of

The Government of the State of Bihar, hereinafter called "the Government" has framed statutory rules for recruitment to the Bihar Engineering Service Class II of the Public Works Department which consists of Assistant Engineers Part 1 of the aforesaid rules, hereinafter called the B. E. S. Class II Rules, so far as is relevant, runs thus:

1. The Service (Bihar Engineering Service Class II) shall be recruited-(i) by direct recruitment in accordance with the rules in Part II, or

(ii) by promotion or transfer of officers already in Government service; permanent or temporary in accordance with the rules in Part III.

2. The Government shall decide in each year the number of vacancies in the Service to be filled in that year by direct recruitment and by promotion respectively.

There is nothing in the B.E.S. Class II Rules to indicate whether the sanctioned strength, i.e., the cadre of the Bihar Engineering Service, Class II consists of permanent posts only or of both permanent and temporary posts.

3. Admittedly, the Bihar Engineering Service Class II Rules do not lay down any principles for determining the inter se seniority of members of the said Service. It is also the admitted position that the only Rules regarding fixation of inter se seniority which govern the petitioners and the respondents whose seniority is impugned are contained in the following three memorandi of the Appointment Department of the Government:

(i) Memo No. 6509-A dated the 12th December, 1934 (hereinafter called "the 1934 Rules").

(ii) Memo No. 2765-A dated the 15th July, 1944 (hereinafter called the "July 1944 Rules").

(iii) Memo No. 328-A R. dated the 9th September, 1944 (hereinafter called the "September 1944 Rules").

The aforesaid memorandi of the Government inasmuch as they lay down the principles for determination of seniority are Orders regulating the conditions of service of persons holding posts under the Government. As they were in force immediately before 26-1-1950, in view of Notification No. 3555-31-27/-50-A, dated 15 April, 1950 of the State Government they must be deemed to have been made under the proviso to Article 309 and they continue to be in force as no provision in this behalf has been made by or under any Act of the State Legislature. All the three aforesaid Rules have been set out in the judgment of brother Ali and need not be set out again. The 1934 Rules lay down the principles for determination of inter se seniority of officers of a service, other than the State Civil Service (Judicial Branch) "when more than one officer is appointed to a service "at the same time." Clause (a) of the Rules lays down that officers promoted to a service rank senior to officers directly appointed to the service at the same time. And Clause (b) provides that officers promoted to the Service at the same time retain the seniority which they held in the Service from which they were promoted. The two 1944 Rules lay down that on substantive promotion to a Service, the length of officiating service in the higher service shall not be the criterion for determining seniority in the higher service and that all those promoted substantively at the same time shall retain their seniority inter

se in the service from which they were promoted irrespective of when they first officiated in the higher post,

4. The principle controversy in this case rages round the interpretation of the words "appointed to the service at the same time" occurring in the 1934 Rules. Now what does the aforesaid expression "appointed to a service at the same time" mean? The words "at the same time" in their ordinary natural sense mean "during the same period, at the same moment, not before and after" Shorter Oxford Dictionary quoted in Gaya Prasad Pandey's case Construed in accordance with the Rules of grammar, the adverbial clause at the same time governs the verb appointed. For the application of the 1934 Rules, therefore, what must happen at the same time i.e. at the same moment, not before and after is the appointment to a service of two or more officers. If what happens at the same time is not their appointment to the service but something else, they cannot be said to be "appointed to a service at the same time". Two or more officers can, therefore, be said to be appointed to a service at the same time only if, they have been appointed to a service at the same moment not before or after, i.e., on the same date. As brother AH has shown there are no adequate grounds for departing from the plain, ordinary, grammatical meaning of the words "at the same time" as referring to the time of appointment to the service and the precedents also are in favour of the plain, grammatical construction. The contention on behalf of respondent Nos. 6 and 8 in C.W.J.C. No. 534 of 1972 and the petitioner in C.W.J.C. No. 1880 of 1970 that two officers appointed on different dates can be said to have been appointed at the same time if the decision to fill up the posts against which they were appointed was taken at the same time, cannot, therefore, be accepted. Indeed, the words "at the same time" in the expression "appointed to a service at the same time" are not reasonably capable of being construed to refer to the time at which or the transaction in which the decision to fill up the posts against which they were appointed was taken. To so interpret the words and hold that two officers are "appointed to a service at the same time, within the meaning of the expression— as used in the 1934 Rules, if the decision to fill up the posts against which they were appointed was taken at the same time would amount to importing a fiction for which there is no warrant in the words used.

5. In B.L. Goel Vs. State of Uttar Pradesh and Others, , respondent Nos. 3, 4 and 5 before the Supreme Court joined the U.P. Higher Judicial Service on certain dates in 1966 although they had been recommended for appointment to the Government by the Selection Committee of the High Court earlier. The delay in their appointment was because by an ad interim order the Allahabad High Court had, upon a writ petition by one Chandra Mohan restrained the U. P. Government from giving effect to their appointments and they could join duty only after that order was vacated in 1966, The argument advanced on behalf of these respondents before the Supreme Court was that the delay in joining the Service being not due to any fault on the part of these respondents, for the purposes of confirmation and determination of seniority, it would be but fair to take as the

date of their appointment, the date on which they were selected by selection Committee in 1964 for recruitment to the Service. The argument was negated by the Supreme Court speaking through Sarkaria, J. in these words :--

We are unable to accept Shri Andley's argument that the date of the Respondent's entry into service should be assumed as the date in 1964, when the Selection Committee selected them for appointment. There is no warrant for importing such a fiction. The stark fact remains that respondents 3, 4 and 5 joined the service in May/June 1966." (at p. 232 of the report).

Now, if there is no warrant for importing the fiction that a person must be deemed to be appointed at the time when he was selected by the Selection Committee for appointment, there is still less warrant for importing the fiction that persons must be deemed to have been appointed on the date when the vacancies on which they were subsequently appointed were decided to be filled up.

6. The interpretation of the expression "appointed to a Service" presents more difficulty. The expression used is "appointed" and is not qualified by the expression "substantively, or "permanently" and therefore, is prime facie wide enough to include in its ambit "appointment to a temporary post" or "temporary appointment to a permanent post". It can be urged that to limit the operation of the words "appointed to a Service, to persons who have been appointed to the Service substantively would be, to use the words of S.R. Das, C.J. in Dhingra's case "to add qualifying words which will be contrary to sound principles of interpretation". This reasoning underlies the decision of this Court in C.W.J.C. No. 290 of 1969 (disposed of on 28-4-1970) in which it was held that by being directly recruited or promoted in accordance with the rules, assistant engineer whether temporarily, or permanently, a person becomes a member of the Bihar Engineering Service Class II and the date for determination of seniority is the date of his initial appointment whether temporary or permanent and a person who is appointed to a temporary post in the aforesaid Service is senior even to a person who has been appointed to a permanent post in the Service earlier but on a date later than the temporary appointment of that person.

7. On the other hand, it can also reasonably be urged that an officer can be said to be appointed to a Service only when he has been appointed substantively or on probation to a permanent post in the service. In *Union of India (UOI) and Another Vs. K.R. Tahiliani*, the Supreme Court had to construe Rule 56(j)(i) of the Fundamental Rules which empowers Government to retire "any Government servant in Class I or Class II Service or post" in certain specified circumstances. The question that the Supreme Court had to decide was whether Rule 56(j)(i) will apply to a Government servant who was only officiating in Class I or Class II post or Service. The Supreme Court held that it would not apply to such an officiating Government servant. The reasons for this conclusion were given by the Supreme Court, speaking through Krishna Iyer, J. in these words:

An officiating hand has no right to the post and is perhaps a fleeting bird who may have to go back to the substantive post from which he has been promoted on an officiating basis. What is more to the point, a person who has been appointed *de novo* may begin his service on an officiating basis or on a temporary basis and it is obvious that he has no right to the post and cannot be strictly said to be in that service or post as a member of that service. In short, an officiating Government servant does not really belong to Class I or Class II Service until he acquires a right thereon. Even viewed closely and meticulously, the structure of the clause, namely, "if he is in Class I or Class II Service or post" emphasises the nature of the service or post vis-a-vis the Government servant concerned. We need not go into the semantic shapes, lexical niceties or linguistic nuances but only go through the meaning and purpose of the provision. When a Government servant belonging to a Class I or Class II Service or post on a regular basis has to be retired compulsorily, Rule 56(j)(i) comes to the rescue of the Government servant. But if he is only a temporary hand he has no right to the post and can always be reverted to the post, if any on which he has a lien. Similar is the position of an officiating hand. Thus, we have reached an inevitable conclusion that Rule 56(j)(i) is meant to cover only those who are in a post on a regular basis, i.e. in a substantive capacity, and not on officiating basis only (at page 954 of the report).

If a Government servant can be held to be in Class I or Class II Service only if he is in a post in that Service "on regular basis" i.e., in a substantive capacity, not on officiating basis only, it can reasonably be urged that a person can be said to be appointed to a Service only if he has been appointed to that Service in a substantive capacity.

8. Thus, the expression "appointed to a Service" is ambiguous and fairly open to diverse meaning. A problem of interpretation, therefore, arises. As Viscount Simonds, L.C. reminded us "words...cannot be read in isolation, their colour and contents are derived from their context" *R. G. v. H.R. Prince Augustus* (1957) 1 All E.R. 49 at 53. We have therefore to examine the context in which the expression "appointed to a Service" occurs. And I use the term "context" in its widest sense, as explained by Viscount Simonds in that case, "as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia* and the mischief which I can. by those and other legitimate means discern that the statute (in this case the Rule) was intended to remedy" (the words in brackets are mine), The principles of interpretation of statutes also apply to statutory rules like the 1934 Rules.

9. Now the expression "appointed" is not used *simpliciter*. It forms part of the expression "appointed to a Service". A person can be said to be "appointed to a Service, only if and when he is appointed to a post in the Service. Now every service is a separate unit and consists of a certain number of posts which is its sanctioned strength. The sanctioned strength constitutes the "cadre" of the service vide Rule 11 of the Bihar Service Code which defines "cadre" as meaning

"the strength of the Service, or a part of the Service, sanctioned as a separate unit". It is, therefore obvious that no person can be said to be "appointed to a Service" unless he is appointed to a post borne on the cadre of the service. This assumption underlies the decision of the Supreme Court that a person who is not appointed to a post borne on the cadre of the establishment cannot claim seniority in that office Nohiria Ram Vs. The Union of India (UOI) and Others, .

10. A cadre may consist of permanent posts only and "sometimes, as is quite common these days, also of temporary posts" Subramaniam's case. A permanent post means a post carrying a definite rate of pay and sanctioned without limit of time-Rule 38 of the Bihar Service Code. A temporary post means a post carrying a definite rate of pay and sanctioned for a limited time Rule 48 of the Bihar Service Code. As pointed out by S.R. Das, C.J. in Dhingra's case "the appointment of a Government servant to a permanent post may be substantive or on probation or on officiating basis...likewise an, appointment to a temporary post in a Government service may be substantive or on probation or on officiating basis (at page 42 of the report). As also in that case by S.R. Das, C.J. the substantive appointment to a permanent post in public service confers normally on the servants so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post. This lien is defined in Rule 28 of the Bihar Service Code as meaning title of a Government to hold substantively either immediately or on termination of a period or periods of absence, a permanent post including a tenure post to which he has been appointed substantively"". To use the words of S.R. Das, C.J. in that case again, "an appointment to a permanent post in Government service on probation means, as in the case of a person appointed by a private employer, that the servant so appointed is taken on trial. An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. According to Rule 32 of the Bihar Service Code "a Government Servant officiates in a post when he performs the duties of a post on which another person holds a lien, A Government Servant may, however, be appointed to officiate in a vacant post on which no other person holds a lien.... "The incident of the various categories of appointment were thus summed up by S.R. Das, C.J. "In the absence of any contract, substantive appointment to a permanent post gives the servant so appointed a right to hold the post until under the rules he attains the age of superannuation or he is compulsorily retired or the post is abolished.... "" "An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold his post for the entire period of his tenure.... Except in these two cases, the appointment to a post permanent or temporary, on probation or on officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post..." (at page 42 of the report)

11. Now can it be said that in every case when a person is appointed to a post borne on the cadre of the Service, whether his appointment is against a

permanent post or temporary post or substantive or on probation or on officiating basis, he must be held to have been appointed to a Service, in Dhingra's case it was no doubt held that the expression "a member of a Civil Service" occurring in Article 311(i) is wide enough to include within its ambit all persons appointed to the Civil Service, whether against a permanent or temporary post or whether on a substantive or officiating basis or on probation. But the meaning of the expression "member of a Civil Service" in Article 311(1) is not a safe guide to the meaning of the expression "appointed to a Service" occurring in the 1934 Rules because the context in which the two expressions occur is not the same. The expression in Article 311(1) was construed by the Supreme Court in Dhingra's case in the context of the same expression occurring in Article 310, in which it was obvious that the expression included all members of the Civil Service, whether they were appointed substantively or, on probation or on officiating basis. Further, the expression in Article 311 was construed as occurring in a provision enacted for providing constitutional protection to Government servants and the classes of Government servants who were appointed on officiating or temporary basis or on temporary posts "require", according to the Supreme Court, "the constitutional protections as much as the other classes do". Now, there is no corresponding provision in the 1934 Rules in which the same expression "appointed to a Service" obviously includes within its ambit all types of appointment. Further, the object of the 1934 Rules is not to provide any protection to Government servants but to lay down a principle for determination of their inter se seniority in certain cases. The necessity for such a principle exists obviously only in the case of Government servants who are in the Service and are reasonably expected to continue in the Service for a not inconsiderable period of time. There is no necessity for determining the inter se seniority of a person who is appointed to a post in the Service for a period of very limited duration and is a "fleeting bird" to use the expression of Krishna Iyer, J. in Tehillani's case who holds a post in the service today and would be put of it after a few days. A fortuitous appointment to a post in the Service, e. g. during the absence of the permanent incumbent on leave or otherwise, or pending regular appointment to the post in the Service in accordance with the rules, cannot be regarded as appointment in the Service. This position was not seriously contested on behalf of any party including the petitioners of C.W.J.C. No. 534 of 1972.

12. We have, therefore, to determine to what category or categories of appointment the expression "appointed to a Service" must be confined. In construing the expression "appointed to a Service" in the 1934 Rules which, as I have said, is "ambiguous and open to diverse meaning" we are entitled, and indeed bound, to take into consideration the two Rules of 1944 which also deal with the subject of the determination of inter se seniority and, therefore, are in pari materia. As stated by Lord Mansfield : "Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as on system and as

explanatory of each other". In *R. v. Loxdale* (1958) 97 E.R. 394. Or, as Ramaswami, J. speaking for the Supreme Court in *State of Bihar Vs. S.K. Roy*, , stated : "It is a well recognised principle in dealing with matters of construction that subsequent legislation may be looked at in order to see what is the proper interpretation to be put upon the earlier Act where the earlier Act is obscure or ambiguous or readily capable of more than interpretation."

13. Now, in July 1944 Rule which have already been quoted the question for consideration before the Government was "whether the seniority of an Inspector or Sergeant Major on substantive promotion to the rank of Deputy Superintendent of Police should depend upon his seniority in the gradation list of Inspectors or Sergeant Majors". The Government decided that "length of officiating service should not be the criterion for deciding seniority on promotion to the higher service" and after laying down that a "definite decision regarding the fitness of officers for promotion to the higher service should be taken not when the officers are promoted to officiating vacancies, but when substantive vacancies occur" illustrated the decision taken thus; "Thus, if more than one officer has to be promoted to the post of Deputy Superintendent of Police on the same day, their seniority inter SB should depend on their seniority as Inspectors or Sergeant Majors provided all of them satisfy the criterion of fitness". Though the decision was taken specifically with regard to the seniority of Inspector or Sergeant Major on promotion to the rank of Deputy Superintendent of Police, it was specifically stated in the July 1944 Rules that the above "principles should also be followed by other departments of Government while making promotions to the services under their administrative control." It is, therefore, manifest that, according to the July 1944 Rules, if two officers are substantively promoted to the higher service on the same day, their seniority inter se should depend on their seniority in the lower service from which they were promoted, that is to say, promoted officers shall keep the position inter se which they held in the service from which they were promoted the rule laid down in Clause (b) of the 1934 Rules and the length of officiating service should not be the criterion of deciding seniority on substantive promotion to the higher service. The principle was reiterated in the September 1944 Rule in which it was stated specifically that "all those promoted substantively at the same time will retain their seniority inter se irrespective of when they first officiated in the higher post".

14. I do not think that the 1944 Rules intended to amend and, thereby, change the Rules for determination of seniority laid down in the 1934 Rules which laid down be principles for determination of seniority when the officers were appointed to a service at the same time. On the question when officers can be said to have been appointed to a service by promotion at the same time, there were two conflicting views possible. Two officers, on one view, could, on one view, be said to have been appointed to the service by promotion at the same time only when they were both substantively promoted to the service against a substantive vacancy at the same time. On the other view, they could be said to have been appointed to the service at the same time by promotion, also if they

were both promoted to the service on an officiating basis against a temporary vacancy At the same time. The expression "appointed to a service" as I have said, was ambiguous and susceptible of both the meanings. A clarification was, therefore, necessary and the clarification was made by declaring that for the application of the rule in Clause (b), i. e., the rule that promoted officers appointed to a service at the same time shall keep the position inter-se. which they held in the service from which they were promoted, officers must be held to have been appointed to the service at the same time, only if they were substantively promoted at the same time and not merely promoted on an officiating basis at the same time. The farther instruction that the test of merit should be applied as and when substantive vacancies-occur became necessary because of this declaration of the meaning of the expression "appointed to a service at the same time" occurring in the 1934 Rules. If the test of merit was applied while making promotion against an officiating vacancy, and an officer was selected for officiating promotion earlier than an officer senior to him in the substantive grade, it would obviously have been improper to lay down the rule that upon substantive promotion they should keep the position inter-se which they held in the service from which they were promoted. The 1944 Rules was, therefore, to use the words of Ramaswami, J. in *State of Bihar v. S.K. Roy* (supra)- "not meant to bring about a change of law in this respect, but was meant to fix a proper interpretation upon the earlier Rule, viz. the 1934 Rules", the interpretation fixed upon the expression "appointed to a service" in the 1934 Rules, in a case of appointment by promotion being appointed to a service substantively, i. e., in a substantive capacity against a substantive vacancy. And, if the expression "appointed to a Service" so far as appointment by promotion is concerned, must, as already held, be construed as appointed to a Service substantively i. e. in substantive capacity against a substantive vacancy, it would be wholly unwarranted to give the same expression which is used in the 1934 Rules for both the categories of appointment, namely, appointment by promotion as well as appointment by direct recruitment, a different meaning, so far as appointment by direct recruitment is concerned. If the expression "appointed to a Service" so far as appointment by a promotion is concerned, is confined to appointment on a substantive basis against substantive vacancy and the expression, so far as appointment by direct recruitment is concerned, is interpreted as including within its ambit even appointments of officiating basis grave anomalies would result. Suppose, A and B both are appointed to a Service in an officiating capacity on 2-4-1960, A by promotion from a lower service and B by direct appointment, and subsequently C who is senior to A in the lower service is also appointed to the higher service in an officiating capacity and all the three officers are appointed in the higher service in substantive capacity on the same date, for example by confirmation in the service from the same date. C would rank senior to A in the higher service because both having been promoted substantively to the service at the same time, their seniority would be determined in accordance with their seniority in the lower rank. But C would be junior to B; B and C having been appointed to the service in an officiating

capacity on different dates cannot be said to have been appointed to a service at the same time and, therefore, the 1934 Rules would be inapplicable, and the date of appointment of B being earlier than the date of C, B would rank senior in C, seniority being determined from the date of appointment, even though he would rank junior to A in accordance with Clause (a) of the 1934 Rules as he and A were appointed to the service at the same time. We may not ascribe such an absurd intention to the author of the 1934 Rules. The interpretation which would avoid this anomaly and be conducive to the smooth working of the system should be preferred. Therefore, the expression "appointed to a Service" in the 1934 Rules must be construed to have the same meaning, irrespective of the fact that whether the appointment is by direct recruitment or by promotion. It, therefore, follows that the expression "appointed to a Service" in the 1934 Rules must be construed to mean "substantively appointed to the Service" i. e. appointed in a substantive capacity against a substantive vacancy.

15. Now, what does the expression "appointed in a substantive capacity against a substantive vacancy" mean ? The words "substantive vacancy" occurring in the expression "appointed in a substantive capacity" in Clause (b) of Rule 3 of the 1936 U. P. Engineering Service Rules were thus construed by Krishna Iyer, J. speaking for the Supreme Court in *Baleshwar Dass's* case. "We may describe a capacity as substantive if it has "independent existence or is of "considerable amount of quantity". What is independent in a substantial measure may reasonably be described as substantive. On a parity of reasoning, therefore, a vacancy to be regarded as a substantive vacancy must be an independent vacancy that is to say, a vacancy not caused by some officer proceeding on leave etc. and must endure for a considerable period. So far as a permanent post is concerned, an independent vacancy would be a vacancy in respect of a post on which no person has a hen. So far as a temporary post is concerned, it must be a vacant post which is likely to continue for a considerable period.

16. Next, what does "appointed to a post in a substantive capacity" mean ? There is no doubt that a person is appointed in a substantive capacity in the service when he is confirmed against a permanent post in the service for thereby he acquires, as pointed out in *Dhingra's* case "a right to the post". But must, the expression "appointed in a substantive capacity" be confined to the appointment of a person who has been confirmed against a permanent post and has thus acquired a right to the post ? In my opinion, it may not be so confined. As stated above, in its literal sense substantive capacity means capacity "which has independent existence and is of considerable amount or quantity". An appointment against a substantive vacancy when the appointment is likely to endure for a considerable period because having been made in accordance with the rules governing recruitment, there is no impediment to its continuing indefinitely can, therefore, well be regarded as substantive.

17. The expression substantively appointed would, therefore, also include appointment to a permanent post on probation and appointment to a

temporary post if the post is likely to continue for an indefinite and considerable period and the appointment thereto has been made on consideration of merit in accordance with the rules governing the recruitment to the service including consultation with the State Public Service Commission, where so required.

18. Further, if the expression "appointed to a service" is interpreted to mean "appointed substantively to a service" and the expression "appointed substantively to a service", is confined to appointment to a permanent post on confirmation, then the rule, in a case where the cadre of the service consists both of permanent and temporary posts will, after the coming into force of the Constitution, become ultra vires Articles 14 and 16 of the Constitution. If a person can be said to be appointed to a service only if he has been confirmed therein seniority has to be determined. Solely with reference to the date of confirmation in the service and the period of officiating appointment of a person regularly appointed to a temporary post on consideration of merit would have to be disregarded for the purposes of seniority even if the appointment to the temporary post was not fortuitous. And that, where the cadre of the service consists both of permanent and temporary posts, would make the rules ultra vires Article 16 of the Constitution. In Patwardhan's case the Supreme Court struck down as ultra vires Article 16 of the Constitution the service rule which fixed the seniority of the officers of the service, the cadre of which consisted of temporary posts as well as permanent posts, solely with respect to their dates of confirmation, irrespective of the length of their continuous officiation in the service not in merely fortuitous circumstances. The ratio of that decision is, as pointed out in Baleshwar Dass's case, (at page 51 of the report), that where the cadre of service consists of both of permanent and temporary posts, "confirmation cannot be the sole touch-stone of seniority as that will be indefensible" and therefore ultra vires Article 16.

19. Now, one of the principles of construction of old Service Rules like the 1934 Rules was thus expressed by Krishna Iyer, J., in Baleshwar Dass's case "If a dated rule of colonial times is to be applied today, that meaning which sustains it as constitutionally valid must be preferred to another which may be appealing, going by officialese or literal sense.... We must re-interpret the rules to compose with Articles 14 and 16 by constitutionally acceptable construction" not rigid connotation given to expressions in the vintage vocabulary of British days.... We must strive to salvage the rules, if need be, by assigning a fresh sense, language permitting, which will fit the rules into the "fundamental rights" mould" (at page 46 of the report). This principle favours the interpretation that the expression substantively appointed must be interpreted to include within its ambit all appointments to substantive vacancies in the cadre of a service which have been made in accordance with the rules regulating the recruitment to the service including appointments to temporary posts which are not of short duration and are expected to continue for a considerable period.

20. This conclusion flows from and is indeed imposed by the decision of the Supreme Court in Baleshwar Dass's case. In that case, speaking for the Supreme Court. Krishna Iyer construed the expression "appointed in a substantive capacity" in Rule 3 of the 1936 U. P. Engineering Service Rules as follows:

Thus we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation (at page 52 of the report).

In my opinion, the expression "holds it on probation subject to confirmation" in the aforesaid passage points to the other circumstances in which a person can be said to hold a post in a substantive capacity and does not qualify the word "person" occurring after the words "in contradistinction to". We must read the expression not in isolation but having regard to its context. Earlier, his Lordship had said "we see no reason to hold that when engineers are appointed to temporary posts but after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, they are not appointments in a substantive capacity", (at page 50 of the report). Appointment on probation is made against a substantive vacancy after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission where so prescribed. A person who holds a post on probation is on trial and may have to quit the post if he is not found suitable, but he does not hold the post for a definite or short period. His appointment is independent, as his appointment is not dependent on the continued absence from the post of some other person. Therefore, there is no reason why a person appointed on probation should not be held to be appointed in a substantive capacity. I may further point out that in memo No. 3/R-1-107/75 P. 18990 dated 22 October, 1975 of the Personnel Department of the State Government, it is stated that for the purpose of seniority, appointment on probation is regarded as a substantive appointment and that a person appointed on probation earlier ranked senior to a person appointed on temporary basis even though his confirmation took place later than the confirmation of the person appointed on temporary basis. Therefore, appointment in a substantive capacity includes appointment against a substantive vacancy on probation and also appointment to a temporary post for a long duration, when the appointment is made on considerations of merit in accordance with the rules for regular appointment, including consultation with the Public Service Commission where the rules of recruitment so require.

21. I am unable to regard the decisions of the Supreme Court in Chandramouleshwar Prasad Vs. The Patna High Court and Others, relied upon by Shri Mukherjee, on behalf of the petitioner in C.W.J.C. No. 1880 of 1970 as compelling this Court to hold that the expression "substantively appointed" must be limited to appointment to a permanent post on confirmation in the Service "which gives a right to the incumbent to hold the post. Though in the passage in

Tahillani's case quoted earlier, Krishna Iyer, J. observed that "a person who has no right to the post cannot be strictly said to be in that service or post as a member of that service", the actual decision in that case was that "Rule 56(j)(i) was made to cover only those who held posts on regular basis, that is to say, on substantive capacity and not officiating basis only". "Substantive capacity" in the context of a rule for determination of seniority was held by Krishna Iyer, J., himself in Baleshwar Dass's case to include appointment to a temporary post which is of long duration, where the appointment is made in a regular manner in accordance with Service Rules as also appointment on probation. Further, a person may not be regarded as appointed to a service for the purpose of Rule 56(j)(i) considered in Tahillani's case which conferred a power upon the Government to compulsorily (sic) an officer before the normal age or superannuation. But he may be regarded as a member of the service for the purpose or determination of seniority. The object of the rules in the two cases is different. There is no necessity for empowering the Government to compulsorily retire, before his attaining the normal age or superannuation, an officer who has no right to the post. The service of such an officer can be terminated at any time without following any particular procedure except when the termination is by way of punishment. It would, however, be necessary to determine the seniority even of persons who have no right to the post for such person in many cases continue in service for a long time and their seniority has to be determined for the purpose of confirmation on promotion.

22. In Chandramuleshwar Prasad's case, the Supreme Court had to interpret Rule 16(b) of the Bihar Superior Judicial Rules 1951 which laid down that inter se seniority of promoted officers shall also be determined in accordance with the date of the substantive appointment to the service. The Supreme Court held that the question of determining inter se seniority of promoted officers was intertwined with the question of their confirmation in the service and, therefore, can be regarded as holding that their seniority is to be determined in accordance with the dates of their confirmation in the service. The expression dates of their substantive appointment to the service" in Rule 16(1) of the said Rule , was in State of Bihar Vs. Madan Mohan Prasad and Others, , also similarly interpreted as meaning the dates of their confirmation in the service. It appears, however, that the cadre of the Bihar Superior Judicial Service consisted only of permanent posts, viz., the post specified in the Schedule thereto, and the expression "substantive appointment to the service" was construed with reference to a service, the cadre of which consisted only of permanent posts.

23. I am conscious that in 1934 when the 1934 Rules were issued temporary posts were very few and, therefore, it can well be said that when the 1934 Rules were framed, appointments to temporary posts were, to use the words of Sandhawalia J. in Surjit Singh Vs. The State of Punjab and Others, "hardly within the ken of these provisions" and, that therefore, the rules visualise only appointment by direct recruitment or by promotion to the service on a permanent basis against permanent posts. Undoubtedly, one of the principles of

interpretation of statutes, and therefore of statutory rules or any document, is that "that the interpreter should place himself, as far as possible, in the position of those whose words he is interpreting, and the meaning or certain words and terms used in an ancient document or a statute can be properly explained only by reference to the circumstances existing at the time when the statute was enacted or the document was written" per Mukherjee, J., as he then was, quoting Maxwell on Interpretation of Statutes, page 23 (9th Edn.) in AIR 1949 153 (Federal Court) But this rule applies only to ancient statutes and is comparatively modern statute the rule of construction which has been validity is that "unless contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them" -per Subba Rao, J., as he then was, speaking for the Supreme Court in The Senior Electric Inspector and Others Vs. Laxmi Narayan Chopra and Others, . In that case, the Electricity Act. 1910 was held not to be an ancient statute. The 1934 rules - cannot be also held to be ancient to which the principles of contemporanea expositio should be applied. The words used "appointment to a service" are capable of comprehending regular appointments to temporary posts of considerable duration borne in the cadre of the service and there is no contrary indication in the rules aforesaid.

24. I am also aware that the Memo No. A-805 dated 27-4-1966 it is stated that the 1934 rules "prescribed the mode of fixation of inter-se seniority of persons appointed directly or promoted at the same time to permanent posts on substantive basis." For the reasons given earlier, I am unable to accept the executive interpretation of the expression "appointed to a service" in the 1934 rules as being confirmed to appointments on substantive basis to permanent posts only.

25. I, accordingly, hold that the expression "appointed to a service" in the 1934 Rules means "substantively appointed to a service" and that substantively appointed to a service means appointed in a regular manner, i.e. on consideration of merit in accordance with the rules for recruitment to the service, including consultation with the State Public Service Commission when the rules so require, to a post borne on the cadre of the service, which post may also be temporary post, but of indefinite or considerable duration, against a substantive vacancy. Thus, substantive appointment to a service is not confined to appointment against a permanent post on confirmation thereto.

26. I am unable to share the view, and I say so with great respect, that the expression "appointed to a service" in the 1934 Rules includes both substantive appointment to a permanent post and also temporary appointment, if the temporary appointment is not a fortuitous appointment unrelated to the merits of the appointee and is made on considerations of merit, and that the 1934 rules have to be applied both at the time of the initial temporary appointment and also at the time when the temporary appointee is substantively appointed to the post. The necessary consequence of this interpretation would be that in the case of a

person who is first appointed temporarily to the post and is, thereafter, appointed substantively to a permanent post, regard would have to be to two different dates or appointment for the purpose of fixation of seniority, and he would be held to have been appointed to the same post in the same service twice on two different dates. It is incongruous that a person should be held to have been appointed to the same post in the same service twice if there has been no break in his service. How can a person already in the service be appointed to that service on the post for a second time ? When a person already appointed to a service and continuing in that service is confirmed in that service, either on successful completion of his period of probation or otherwise, he cannot be said to have been appointed to the service. Appointment is not a continuing process. If a certain act results in the appointment of a person to a service, the appointment is complete and, thereafter, if he continues in the service, he cannot be appointed again in the same service in the same post. This reasoning receives support from the decision of the Supreme Court in *The High Court of Punjab and Haryana and Others Vs. The State of Haryana and Others*, . In that case, it was argued on behalf of the State of Haryana that the power of appointment of District Judges which under Article 233 of the Constitution was vested in the Governor of the State carried with it the power of confirmation of District Judges, because confirmation is the last step in the process of appointment and confirmation is nothing but substantive appointment to service. This argument was negated by the Supreme Court, speaking through Subba Rao, J., as he then was, in these words:

When persons are appointed to be or pro-noted to be District Judges, the act of appointment as well as the act of promotion is complete and nothing more remains to be done. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment. Such a meaning of confirmation would make appointment a continuing process till confirmation(at page 622 of the report).

27. Secondly, as the rules will apply also at the time when the temporary appointee is substantively appointed to the post, the curcial date for the determination will be his date of substantive appointment and the earlier date would become wholly irrelevant. For example, in C.W.J.C. No. 1880 of 1970, the petitioner would after confirmation become senior to the respondent Nos. 4 and 5 even though prior to confirmation, as the date of temporary appointment has also to be taken into consideration respondent Nos. 4 and 5 were senior to the aforesaid petitioner. It is difficult to believe that the authorities would lay down principles for determination of seniority with respect to a date which would cease to be relevant for that purpose after a short time. Further, if after confirmation, the relevant date for determination of seniority would be the date of confirmation only, the entire period of service rendered on a temporary post or in a temporary capacity would become wholly irrelevant and will have to be disregarded for the purpose of determining seniority. Such an interpretation would, in a case where the cadre of the service consists both of permanent and temporary posts, and

there are no specific rules laying down precisely the time at which a person acting on a temporary post must be confirmed, would, for the reasons given earlier, make the rule ultra vires Articles 14 and 16 of the Constitution, in view of the decision in Patwardhan's case.

28. I am unable to agree that if the 1934 Rules are not interpreted to apply twice, then any vacuum would be created. It is true that then there would be no criterion laid down in the rules for determination of seniority of a person appointed to a post on a temporary basis and not substantively in the sense explained above. But if he is not appointed at all, he is not a member of the service. There is no necessity for determining the seniority of a person who is not a member of the service at all. Of course, in appointing substantively persons to a post in the service regard may be different to the circumstance that a person had worked in a temporary post of a similar nature.

29. Nor can I agree that if the expression "appointed" is so interpreted, and is confined to substantive appointment only, it would amount to inserting the expression "substantive" before the word "appointed" in the 1934 Rules. The expression "appointed" in the context of the words "in the service" and regard being had to the object of the rules, may well be given a restricted meaning and confined to substantive appointment only. Further, as it is common ground that the expression "appointed to a service" excludes fortuitous appointments to a temporary post, the objection that certain words are being inserted in the rules applies even to the interpretation which excludes fortuitous or purely temporary appointments from the ambit of the rules.

30. The 1934 Rules, in terms lay down the criteria for determination of seniority of officers only when they have been appointed to the service at the same time. The rules do not specifically lay down the principles for determination of inter-se seniority of persons appointed to the service at different times. It cannot, however, be doubted that the necessity for laying down the principles for determination of seniority of persons appointed to a service at the same time would only arise, and rules laying down such principles would only be made, if the seniority of persons appointed to a service has to be determined with reference to the time of appointment, i.e., the date of appointment in the service. Rules laying down principles for determination of seniority of persons appointed at the same time have relevance only in a case where the rule prevails that the persons appointed to a service earlier in point of time shall rank senior to a person appointed to the same service later. The 1934 Rules, therefore, postulate the existence of the rule that seniority in the service would be determined with reference to the date of appointment in the service, i.e., the persons appointed earlier would rank senior to a person appointed to the service later. Such a rule, therefore, is a necessary intendment of the 1934 Rules. Even if it were not so, the result would be the same. In the absence of any statutory rules or executive instructions on the point, the ordinary normal rule for determination of seniority would apply. And as has been pointed out by the

Supreme Court in Paramjeet Singh's case, "seniority is ordinarily determined from the date of entry into the cadre of the service on the principle of continuous officiation." The date of entry into the cadre is the same as the date on which a person is appointed to the service. The expression "appointed to the service" in the context of the principle that seniority of members of a service is determined with reference to the date of entry into the service, will have the same meaning as it bears in the 1934 Rules. This position is not contested by any party. It, therefore, follows that the seniority of officers of the B.E.S. Class II Service has to be determined with reference to the dates of their substantive appointment to the service-substantive appointment being understood in the sense explained above-and the officer substantively appointed to the service on an earlier date shall rank senior to those substantively appointed on later dates and an officer not substantively appointed cannot claim seniority over an officer substantively appointed to the service.

31. As I have stated earlier, Rule 2 of the B.E.S. rules require the Government to decide in each year the number of vacancies in the service to be filled in that year by direct recruitment and by promotion respectively. Thus, appointments to the B.E.S. Class II Service are made in each year from two sources direct recruits and promotees in accordance with their yearly quotas.

Now it is well settled that if appointments to a service have to be made from two sources in accordance with quota prescribed for each of the two sources, appointments made in any year from a source in excess of its prescribed quota is illegal and incapable of conferring seniority on the basis of the said appointments and persons appointed in a particular year from one source in excess of the quota for that source will be pushed down to later years for purposes of their absorption into the service and for determination of their seniority, *S.J. Jalsinghani v. Union of India* (supra), *A.K. Subraman v. Union of India* (supra).

32. Subject to the aforesaid special principle, the principles for determination of inter se seniority of officers of the B.E.S. Class II (P.W.D.), so far as these two cases are concerned, may, therefore, be thus summed up:

(a) The seniority of officers of the B.E.S. Class II Service has to be determined with reference to the dates of their substantive appointment to the Service and the officers substantively appointed to the Service on an earlier date shall rank senior to those substantively appointed on later dates.

(b) Officers who have not been substantively appointed to the B. E. S. Class II Service cannot claim seniority in the said service and certainly not over officers who have been substantively appointed to the said service.

(c) When two or more officers are substantively appointed to the service at the same time, their seniority shall be determined in the following manner:

(i) The promoted officers shall rank senior to officers directly recruited.

(ii) The promoted officers shall keep the position inter-se which they held in the

Service from which they were promoted, that is to say, the seniority inter se of promoted officers shall depend on their seniority in the lower rank from which they were promoted, the length of officiating service in the higher service being ignored.

(d) An officer is said to be substantively appointed to the service when he is initially appointed against a substantive, i.e., independent vacancy, to a post, which may even be temporary if the post is of indefinite or considerable duration, borne on the cadre of the service when his appointment to such a post is either permanent or of considerable or indefinite duration and has been made on consideration of merit in accordance with the rules for recruitment to the service including consultation with the State Public Service Commission when the rules so require. Appointment to a permanent post on confirmation thereto is certainly substantive appointment but substantive appointment to the Service includes appointment to a permanent post on probation as also appointment to a temporary post in the manner and of the character described above.

(e) Two or more officers are said to have been substantively appointed to the service at the same time when both, or all of them, have been substantively appointed to the service on the same date.

33. In the light of the aforesaid principles, I now proceed to consider the reliefs claimed in the two cases with reference to the facts of each case.

C.W.J.C. No. 1880 of 1970;

34. In this case, the petitioner Bishundeo Mahto prays for quashing the gradation list of officers of the B. E. S. Class II (P. W. D.) issued under letter dated 28-10-1970, copy whereof is Annexure "10" in the case of the Deputy Secretary of the Government of Bihar to the Accountant General fixing the inter se seniority of officer promoted with effect from 2-11-1967 and the subsequent gradation list issued in continuation of the earlier gradation list by notification dated 13-4-1972, copy whereof is Annexure "11, and for directing the authorities, namely, the State of Bihar, the Secretary to the Government of Bihar, P. W. D. and the Chief Engineer. P. W. D. (Buildings and Roads) who are respondent Nos. 1 to 3 to the writ petition to fix his seniority in accordance with the rules. The petitioner further prays for quashing of the notification dated 24-4-1972, copy whereof is Annexure "12" to the writ application, by which respondent Nos. 4, 5, 7 and 8 were appointed Assistant Engineers Incharge of certain divisions of the Public Works Department. According to the impugned gradation list, the serial number of the petitioner is 139 whereas the serial number of respondent Nos. 4 to 12 is 122 to 130, respectively. Though in the writ application, the petitioner claimed to be senior to all the aforesaid respondents namely, respondent Nos. 4 to 12, at the time of final hearing of the writ application, the petitioner confined his claim to seniority over respondent Nos. 4, and 5 and 10 only. Admittedly, the petitioner as well as respondent Nos. 4 and 5 and 10 were promoted as Assistant Engineers from the Subordinate Engineering Service and in the cadre of

Subordinate Engineering Service, the petitioner Bishundeo Mahto was senior to respondent Nos. 4 and 5 but junior to respondent No. 10. The petitioner as well as respondent Nos. 4 and 5 were promoted as Assistant Engineers by a common notification dated 2-11-1967, copy whereof is Annexure "5", and were placed on probation for a period of one year and were all confirmed with effect from the same date namely, 2-11-1967 by a subsequent notification dated 15-6-1968, copy whereof is Annexure "6". Admittedly, respondent No. 10 has not yet been appointed Assistant Engineer on probation and of course, he has not been confirmed as Assistant Engineer. Though the petitioner and respondent Nos. 4 and 5 were placed on probation and confirmed at the same time, i.e., with effect from 2-11-1967, respondent Nos. 4 and 5 were promoted to "act as temporary Assistant Engineers in B. E. S. Class II in P.W.D." earlier than the petitioner viz., by a notification dated 1-8-1959, copy whereof is Annexure "5" (to the writ petition in C.W.J.C. No. 534 of 1972), whereas the petitioner along with respondent No. 10 and others was "promoted to act as temporary Assistant Engineer" by notification dated 10-7-1961, copy whereof is Annexure "3", and by a subsequent letter dated 8-12-1961 addressed by the Deputy Secretary to the Government and to the Accountant General, Bihar, copy whereof is Annexure "4", it was decided that these promotions of the petitioner and respondent No. 10 and some others would take effect from 11-4-1961.

35. In view of the principles laid down above, there can be no doubt that the petitioner and respondent Nos. 4 and 5 were all substantively appointed on 2-11-1967, and, therefore, at the same time, if it is held that they were not substantively appointed earlier. It is not in dispute that prior to their appointment on probation, the petitioner as well as respondent Nos. 4 and 5, as also respondent No. 10 had been appointed to act as temporary Assistant Engineers against vacancies which were not permanent or substantive though they were likely to become permanent. As the officiating appointment of petitioner or of respondent Nos. 4, 5 and 10 as temporary Assistant Engineers was not against a substantive vacancy, they cannot be held to have been substantively appointed to the B. E. S., Class II Service i.e. "appointed to a Service" within the meaning of expression as used in the 1934 Rules at the time of their appointment as temporary Assistant Engineers. That being so, it must be held that the petitioner as well as respondent Nos. 4 and 5 were substantively appointed to the Service to the B.E.S., Class II Service on 2-11-1967, the date from which they were appointed on probation and the date from which they were confirmed in the Service, and, therefore, must be held to have been "appointed to a service at the same time" within the meaning of the expression as used in the 1934 Rules. That being so, these three promoted officers shall keep the position inter se which they held in the service from which they were promoted, viz. in the Subordinate Engineering Service in which the petitioner was admittedly senior to respondent Nos. 4 and 5.

36. As respondent No. 10 has not yet been appointed substantively to a post in Bihar Engineering Service Class II whereas the petitioner has been so appointed,

respondent No. 10 cannot be held senior to the petitioner-36, Even, if in view of the earlier officiating promotion of respondent Nos. 4 and 5, the petitioner and these respondents were not held appointed to the higher service at the same time, and the 1934 Rules were inapplicable, the petitioner would still be senior to these respondents. Admittedly, the petitioner as well as these respondents were all substantively promoted on 2-11-1967. Therefore, as provided in the September 1944 Rule which reiterated the rule laid down in the July 1944 Rule, these three officers "will retain their seniority irrespective of when they first officiated in the higher post". The validity of the 1944 Rules has not been impugned before us, I may state that though a counter-affidavit showing cause why the writ petition be not allowed was filed on behalf of the respondent Nos. 1 to 3. Sri T. Dayal, the learned Government Pleader very fairly, and in my opinion, rightly conceded that the petitioner should rank senior to respondent Nos. 4 and 5 in the B. E. S. Class II Service. Respondent Nos. 4, 5 and 10 have, therefore, been wrongly made senior to the petitioner and the impugned gradation lists (Annexures 10 and 11) must, therefore, be quashed to that extent and it be declared that the petitioner is senior to respondent Nos. 4, 5 and 10. And respondent Nos. 1 to 3 must be directed to fix the seniority of the petitioner and respondent Nos. 4, 5, and 10 afresh in accordance with this judgment. And I order accordingly.

37. By the notification dated 24-4-1972, copy whereof is Annexure "12" respondent Nos. 4 and 5 and some others have been, during the pendency of this case, appointed Assistant Engineer ? Incharge of certain P. W. D. Divisions. The position in the gradation list of the persons so appointed, except one, is 113 to 119, 121 to 123 and 125 and 126 whereas that of the petitioner is 131. It is, therefore, manifest that respondents have been put incharge of the divisions in preference to the petitioner primarily, if not solely, because in the impugned gradation lists they are senior to the petitioner. With the quashing of the gradation lists, so far as it concerns the petitioner and these respondents, the basis for their appointment as incharge of divisions, in preference to the petitioner, disappears and their appointment becomes arbitrary and contravenes Articles 14 and 16 of the Constitution. It is true that these respondents have been merely placed incharge of the office of the Executive Engineer of the divisions but there can be no doubt that the petitioner has been adversely affected by their aforesaid appointment. Assistant Engineer incharge of a Division enjoys wider powers and greater prestige and is vested with greater responsibility than an Assistant Engineer who is not incharge of division and perhaps he is entitled to an extra allowance for the same. He acquires an additional qualification for promotion as Executive Engineer. The appointments have continued for more than 8 years and will, if not quashed, continue till their seniority is not re-adjusted, which regard being had to the dilatory procedure in the Government Offices, may well take a year. I would, therefore, also quash the notification, copy whereof is Annexure 12, so far as the appointment of respondent Nos. 4 and 5 is concerned, and direct that appointments of Assistant

Engineer incharge of division be made keeping in view the seniority of the petitioner over respondent Nos. 4 and 5.

38. In the circumstances of the case, I would make no order as to Costs.

C.W.J.C. No. 534 of 1972:

39. In this writ application, the petitioner prays for quashing the notification dated 17-4-1972, copy whereof is Annexure 9. According to the gradation list, all the petitioners are junior to respondent Nos. 2 to 8. Respondent Nos. 2 to 5 of this case are respondent Nos. 9 to 12 while respondent No. 6 in this case is petitioner in C.W.J.C. No. 1880 of 1970. The petitioners of this case and others numbering in all 90 were directly appointed as Assistant Engineers sometime in 1960, against the quota of direct recruits which was determined as 90 out of the total 120 vacancies at that time, whereas the respondent Nos. 2 to 8 of this case were appointed to act as temporary Assistant Engineers only in the year 1961. Respondent No. 6, as already stated, as confirmed by a notification issued in the year 1968 with effect from 2-11-1967. Respondent Nos. 5 7 and 8 have also been confirmed with effect from the same date 2-11-1967, but by a subsequent notification dated 29-12-1975, copy whereof is Annexure 8/D, issued during the pendency of this case in this Court, by which the petitioner Nos. 1 to 3 were also confirmed with effect from 1-3-1970, 1-9-1971 and 5-1-1972, respectively. The petitioners as I have already stated, are direct recruits, whereas the respondents were all appointed as Assistant Engineers by promotion from the Subordinate Engineering Service. The petitioners and respondent Nos. 2 to 8 having, admittedly, been appointed Assistant Engineers on different dates, cannot, in view of the interpretation placed on the expression, "at the same time" in the 1934 Rules, be held to have been appointed to the service at the same time and the 1934 rules will, in terms be inapplicable.

40. If the petitioners are held to have been appointed to the B. E. S. Class II Service in the year 1960 when they were appointed temporary Assistant Engineers against temporary posts, they would, in accordance with the principles laid down, certainly rank senior to respondent Nos. 2 to 8 of this case who were all appointed to the service even temporarily later than the petitioners. Now, there is no doubt that the posts against which the petitioners were appointed in 1960 though temporary were of indefinite and considerable duration. It is also clear that the petitioners were appointed temporary Assistant Engineers in 1960 on considerations of merit, on the recommendation of the State Public Service Commission, in accordance with the provisions of Part II of the B. E. S. Class II Rules. It is also clear that in 1960, the petitioners were appointed against independent vacancies. However, there is no material to indicate that the posts against which the petitioners were appointed in 1960 were posts borne on the cadre of the B E. S, Class II Service, The learned Government Pleader supporting the validity of the gradation list referred to the entries in the Bihar Civil List according to which all the temporary posts of Assistant Engineers, P. W. D.. in the Government of Bihar in 1959 and 1969 were extra cadre or non-cadre posts, i.

e., posts not borne on the cadre of the B. E. S. Class II Service. But no affidavit has been filed by the State Government on this point nor any affidavit on this point has been filed by the petitioners. In these circumstances, it is not possible to hold affirmatively that these petitioners were or were not appointed in 1960 to posts borne on the cadre of the B.E.S. Class II (P.W. D.) Service. Consequently, it cannot be held to have been established that the petitioners were appointed substantively to the Bihar Engineering Service Class II, P. W. D. in 1960. That being so, the petitioners have failed to discharge the burden which lay upon them of proving that the impugned gradation list in so far as it fixes the seniority of these petitioners in the B. E. S. Class II Service below respondent Nos. 2 to 8 is illegal. This application must, therefore.

41. I would, however, state that I am unable to accept the argument of Sri Prabha Shankar Misra appearing on behalf of respondent No. 8, which was adopted on behalf of respondent No 6 also, that the seniority of the petitioners should be pushed down below respondent Nos. 6 and 8 as they were also appointed against the vacancies of the same year as the petitioner. For the application of the rule regarding pushing down to subsequent years, the number of persons appointed from one source of recruitment must have been in excess of the quota fixed for the source from which they were recruited. The 90 appointments of direct recruits, including the petitioners, were within the quota for the year fixed for the direct recruits.

42. I would, accordingly, dismiss this application but in the circumstances of the case, without costs. I would, however, make it clear that despite this dismissal, it would be open to the competent authority to re-fix the seniority of these petitioners in accordance with the principles laid down above with consequential changes in the placement in the gradation list of other Assistant Engineers, if it is found that the temporary posts to which the petitioners were appointed in 1960 were posts borne on the cadre of the Bihar Engineering Service Class II. Of course, before re-fixing the seniority, the competent authority shall give an opportunity of showing cause against the re-fixation to the officers whose seniority is likely to be adversely affected by the relaxation.