
(1984) 11 AHC CK 0062
In the Allahabad High Court

Case No : Civil Miscellaneous Writ No's. 10341 and 1979 and 27 of 1980

B.K. Misra, Additional District and Sessions Judge	APPELLANT
Vs	
State of Uttar Pradesh and Others	RESPONDENT

Date of Decision : 16-11-1984

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 233(1), 233(2), 32
Uttar Pradesh Civil Services (Judicial Branch) Rules, 1951 — Rule 19, 19(1), 22, 22(2), 22(3)
Uttar Pradesh Higher Judicial Service Rules, 1975 — Rule 17, 20, 21, 23, 24
Uttar Pradesh Service of Engineer Class II (Irrigation Branch) Rules, 1936 — Rule 23, 3

Citation : (1984) AWC 358 Supp

Hon'ble Judges : V.K. Mehrotra, J; J.N. Dubey, J

Bench : Division Bench

Advocate : K.N Tripathi, S.S. Agnihotri and S.S. Bhatangar, for the Appellant; S.C. and Vinod Misra, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Mehrotra, J.—Petitioner B.K. Misra (in writ petition, No. 27 of 1980) joined as Munsif on July 14, 1952 in the U.P. Civil Service (Judicial Branch) and was confirmed on the post on July 14, 1954. His place in the gradation list was at serial No. 10 on the basis of the position obtained by him in the selection held by the U.P. Public Service Commission. While working as a Munsif, Misra was sent on deputation on the post of Competent Officer under the Evacuee Property (Separation) Act, 1951 and worked there till May, 1963. He came back from deputation the same year and worked as a Judge, Small Causes Court at Agra and thereafter as Civil Judge, Nainital till 1966. Misra again went on deputation, on the request of the Government of India, in the year 1966 and functioned as an Assistant Settlement Commissioner-Incharge Custodian of Evacuee Property till March 31, 1970. On May 1, 1970 he was appointed as Civil and Sessions Judge at Nainital. This was a post in the U.P. Higher Judicial Service. In 1974, the

cadre of Civil and Sessions Judges was merged with that of the Additional District Judges under the U.P. Higher Judicial Service (Abolition of the cadre of the Civil and Sessions Judge) Rules, 1974 framed by the Governor through a notification dated May 8, 1974. By an order dated November 14, 1977 Misra was allowed to cross the second efficiency bar in the pay scale of Rs. 1000--2000 with effect from August 1, 1977 which was the due date. The Registrar of the High Court communicated a gradation list of the District Judges, Addl. District Judges and Sessions Judges through letter No. C-1320/79 dated September 26, 1979 in which Misra was assigned seniority at serial No. 169. According to him, he should have been placed at serial No. 65 on the basis of the length of service. He made a representation to the High Court on the administrative side but when it failed to evoke any reply, he approached the Court on its judicial side seeking relief under Article 226 of the Constitution through the present writ petition. Since Misra is to attain the age of superannuation in September, 1986 he has prayed, inter alia, for being given due seniority on the basis that he is senior to the officers impleaded as respondent Nos. 3 to 104 in the gradation list. In other words, his claim is that he should be given his seniority at serial No. 65.

2. D.N. Shukla (petitioner in writ petition No. 10341 of 1979) was also appointed as a Munsif in accordance with the U.P. Nyayik Sewa Niyamavali, 1951 on September 13, 1952. He was confirmed as Munsif two years later on September 13, 1954. In July, 1961 he became a Civil and Assistant Sessions Judge. On January 15, 1970 he was appointed as a Temporary Civil & Sessions Judge and was continuing as such when on May 8, 1974 he became an Additional District Judge on account of the U.P. Higher Judicial Service (Abolition of the cadre of Civil and Sessions Judge) Rules, 1974. Shukla was confirmed as an Addl. District Judge with effect from July 23, 1977 subject to his seniority being considered later as there was some adverse entry in his character roll which was expunged on November 15, 1977. In the gradation list of September 26, 1979 he was shown at serial No. 170 having regard to the date of his confirmation as Addl. District Judge. His case is that he should have been shown, according to the seniority that he earlier had, at serial No. 78.

3. The basic ground upon which both these petitioners have approached this Court for relief is that, as far as they were concerned, the date of their confirmation as an Addl. District Judge had no relevance whatsoever in determining their inter-se seniority with the officers who were recruited to the U.P. Higher Judicial Service from amongst the members of the U.P. Civil Service (Judicial Branch). The seniority which they had as a member of the U.P. Civil Service (Judicial Branch) had to be maintained. The ground is expanded by saying that the date of confirmation is relevant only for those members of the U.P. Higher Judicial Service who were directly recruited to it under the relevant rule. The petitioners and officers like them were to be assigned their seniority, in any event, with reference to the date of their continuous officiation as Addl. District Judges. Inasmuch as, they would be deemed to be officiating as Addl. District Judges at least from May 8, 1974, the inter-se seniority cannot but be

determined with reference to their seniority in the Nyayik Sewa, treating them all to have been appointed on the same date.

4. The respondents have said in their counter affidavit that the petitioners and officers like them have been treated to be members of the Service with effect from the date of their confirmation and have been given inter-se seniority on that basis. The basis is valid, and also just, for it is only after being confirmed that the petitioners became members of the Service. The adoption of any other basis would have been unreasonable to those who were confirmed as Addl. District Judges earlier than the petitioners on the basis of better record of service.

5. The U.P. Higher Judicial Service which was created in the year 1953 and in which recruitment, in the first instance, was made to the post of Civil and Sessions Judge contemplated recruitment from two sources, namely, (i) by promotion from the members of the U.P. Civil Service (Judicial Branch) and (ii) by direct recruitment. The U.P. Civil Service (Judicial Branch) Rules, 1951 called the U.P. Nyayik Sewa Niyamawali 1951 provides in Rule 19 for preparation of a list of candidates by the U.P. Public Service Commission, while recommending them for appointment to the Judicial Service and for arranging the names of candidates in the order of merit on the basis of their general suitability. And, Rule 23 provides for the candidates being placed on probation in the first instance. Confirmation is to be made at the end of the period of probation under Rule 25. For those candidates who were appointed subsequent to the enforcement of these rules, Rule 22 of the Niyamawali envisages determination of seniority with reference to the year of competitive examination on the result of which a candidate was recruited and the position in the list prepared under Rule 19. A candidate would lose his seniority if he did not join his service, when a vacancy was offered to him, without any reason or cause.

6. The U.P. Higher Judicial Service Rules, 1953 provided in Rule 21 that "all directly recruited candidates shall on appointment to the service, be placed on probation". In Rule 23 it then provided for confirmation of a probationer in his appointment at the end of his period of probation after consultation with the court if he was fit for confirmation. No. period, however, for placing a candidate promoted to the Higher Judicial Service from amongst the members of the U.P. Civil Service (Judicial Branch) on probation on his confirmation thereafter was provided for. From it the conclusion, which the counsel for the petitioners have asked us to draw, is that as far as the appointees to the U.P. Higher Judicial Service, who entered it by promotion from the U.P. Civil Service (Judicial Branch) are concerned they became members of the service soon upon their appointment and were not dependent upon any confirmation in their appointment for being treated as members of the U.P. Higher Judicial Service under 1953 Rules.

7. The question of seniority was dealt with by Rule 20 in the 1953 Rules. That rule read:

20. Seniority--Subject to the provisions of Rule 31, seniority in each of the two

classes of posts in the service shall be determined by the date of confirmation in that class of post:

Provided that if in any class of the post, two or more persons are confirmed on the same date, their seniority will be determined according to the order in which their confirmation has been notified:

Provided further that in the case of direct recruits, their inter-se seniority will be fixed in the same order in which their names appear in list prepared by the Selection Committee under Rule 17.

Note--A candidate recruited directly may lose his seniority if he is unable to join the service when a vacancy is offered to him.

8. Rule 31 related to a different category of officers known as Judicial Officers in the State. The two classes of posts in the Service referred to in Rule 20 were the post of District and Sessions Judge and of Civil and Sessions Judge. The date of confirmation in a particular class of post was material for determining the inter-se seniority of the officers in that class of post.

9. In the year 1975 the U.P. Higher Judicial Service Rules 1975 were framed. These rules also provided for recruitment from two sources, namely, by direct recruitment of pleaders and advocates and by promotion of confirmed members of the U.P. Nyayik Sewa. We may, for the present, ignore the question of recruitment by promotion from amongst the cadre of Judicial Magistrates. The recruitment by promotion was to be made by selection on the basis of seniority-cum-merit under Rule 20 and appointments, according to Rule 22, were to be made to the service on the occurrence of substantive vacancies. Sub-rule (3) of Rule 22, however, contemplated appointment in temporary vacancies or in officiating capacity form amongst the members of the Nyayik Sewa apart from the cadre of the Judicial Magistrate for so long as suitable officers were available from that cadre. Rule 23 then contemplated a period of probation which was to be followed by confirmation. Rule 26 dealt with the question of seniority. We may read these rules:

23. Probation:

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

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

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

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

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

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

24. Confirmation: A probationer shall be confirmed in his appointment in the service at the end of the period of probation or at the end of the extended period of probation if the court is satisfied that he is fit for confirmation and his integrity is unquestionable.

Explanation : Officers confirmed on the post of Civil and Sessions Judge (now designated as Addl. District and Sessions Judge), or on the post of Addl. District and Sessions Judge, shall not be required to be confirmed on the post of District and Sessions Judge.

26. Seniority :

(1) Except as provided in Sub-rule (2) seniority of members of the service shall be determined as follows:

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

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

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

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

Officers Service.

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

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

10. The U.P. Higher Judicial Service Rules, 1977, which followed the 1975 Rules may be read to the extent of the rule relating to seniority, namely, Rule 26 alone and that rule reads thus:

26. Seniority--

(1) Except as provided in Sub-rule (2) seniority of members of the service shall be determined as follows:

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

Provided that in the case of a promotee the maximum period of continuous officiation in the service shall not, for the purpose of, determining seniority exceed three years immediately preceding the date of confirmation. Provided that where any officer is not found fit for confirmation and is not confirmed in his turn, the officiating period or the probationary period as the case may be, prior to the date of decision taken by the High Court in this behalf shall not be taken into account for purposes of computing the period of continuous officiation or for purposes of working out the date of joining of the service, as the case may be.

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

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

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

11. Sarvasri S.S. Bhatnagar and Kesri Nath Tripathi who have appeared for the petitioners before us, have attempted to cover a wide ground during their submissions. For example, it was urged that under the Constitution only one judicial service was envisaged for each State and seniority was to be fixed at the time of entry to it at the lowest level so that a fresh determination of seniority is not possible when a person joined the Higher Judicial Service by promotion from the Nyayik Sewa; that confirmation, as far as these promotees were concerned, in the Higher Judicial Service was wholly redundant for they be-came members of the service the moment they started officiating in it; that, in any case, all the officers like the present petitioners became Additional District Judges in a substantive capacity on May 8, 1974 due to abolition of the cadre of Civil and Sessions Judges so that there was No. occasion for their confirmation under the 1953 Rules and their inter se seniority had to be fixed on the footing that they were appointed the same day; that Higher Judicial Service Rules of the year 1975 and the year 1977 being prospective in nature could not apply to the determination of their inter se seniority as Additional District Judges and that the principle implicit in Rule 26 of the 1975 and 1977 Higher Judicial Service Rules for determination of inter se seniority of promotees being to fix it with reference to the date of their continuous officiation in the Higher Judicial Service, the limitation contained in the proviso by confining the maximum period, for purpose of determining seniority, to three years immediately preceding the date of confirmation, excluding the period of officiation prior to the date of the decision of the High Court where an Officer is not found fit for cofirmation, was invalid. More so, because the provisos were to be confined to cases envisaged by the " main part of the provision, namely, while, determining the inter se seniority of a direct recruit and a promotee. It is also urged that the absence of a provision in Rule 26 for determination of interse seniority of promotees from the Nyayik Sewa introduced a discriminatory factor in the rule which, in terms, provided for determination of inteise seniority amongst officers appointed to the Higher Judicial Service from amongst Judicial Magistrates in Sub-rule (2) of Rule 26.

12. It is not necessary for us to deal with all these contentions for we feel that it is possible to decide the controversy before us by taking into account only some of them.

13. We have noticed that both these petitioners, (of whom Sri D.N. Shukla who was appointed as District and Sessions Judge after we had reserved our judgment in these petitions, expired in the night of September 19/20, 1984) belong to the category of Civil and Sessions Judges who became Additional District and Sessions Judges with effect from May 8, 1974 when the cadre of Civil and Sessions Judges was abolished under the U.P. Higher Judicial Service (Abolition of Civil and Sessions Judges) Rules, 1974. What is the inference from this circumstance will be seen later.

14. The Higher Judicial Service Rules of 1953 were in operation on May 8, 1974. The 1975 Rules were effective from the date of their notification in the official

Gazettee on April 5, 1975. The rule of seniority then operative was Rule 20 of the 1953 Rules and it contemplated determination of inter se seniority in a particular class of post, namely, that of the District and Sessions Judges and of the Civil and Sessions Judges with reference to the date of confirmation in that class. And, in case two or more persons were confirmed on the same date, seniority was to be determined according to the order in which their confirmation had been notified. Civil and Sessions Judges became Additional District Judges on May 8, 1974. As such, Rule 20 could be said to envisage them too as being one of the class of posts for the (sic) principle for determination of seniority by operation of law. Confirmation under Rule 23 was to be made, at the end of the period of probation, of a probationer and it was a directly recruited candidate who was to be placed on probation on appointment to the service under Rule 21. Literally, read, the provision about confirmation would have been to be applicable in the case of a directly recruited candidate alone. Could it be said, then, that the rule of seniority mentioned in Rule 20 of the 1953 Rules was meant only for a directly recruited candidate. The answer would be a clear "no" for one cannot overlook the second proviso to Rule 20 which specifically refers to determination of inter se seniority amongst direct recruits. Confirmation in a class of post then becomes material also in the case of a promotee. The subsequent rules for the Higher Judicial Service took care not to confine the requirement of being placed on probation to direct recruits alone. Rule 23 of the 1975 Rules provided for all persons on appointment to the service in substantive vacancies to be placed on probation and then said in Rule 24 that a probationer shall be confirmed in his appointment at the end of the period of probation. Similar is the pattern retained in 1977 Rules.

15. Relating the determination of seniority to the fact of confirmation is of frequent occurrence in service Rules. The date of confirmation has been held by the Supreme Court to be a valid basis for determination of seniority. There are decisions where a somewhat different view appears to have been accepted. It is not necessary for us to notice them all. We may, however, first refer to a very recent decision of the Supreme Court in *O.P. Singla v. Union of India* AIR 1984 SC 1995, which related to the question of inter se seniority between promotees and direct recruits amongst the officers of Delhi Higher Judicial Service. Many of its earlier decisions have been noticed by the Supreme Court in this decision.

16. *O.P. Singla*, a promotee Additional District and Sessions Judge, along with some other promotee officers claimed that he should rank higher in seniority than the direct recruits appointed as Additional District and Sessions Judges after him and the contention raised was that seniority between promotees and direct recruits must be determined in accordance with the respective dates of continuous officiation as Additional District, and Sessions Judges. The decision of the case depended upon interpretation of the Delhi Higher Judicial Service Rules 1970. The Supreme Court by a majority judgment, held that the best solution to the situation which was confronting it was to apply the rule accepted by it in *S.B. Patvardhan v. State of Maharashtra* AIR 1977 SC 2051, wherein it was held that,

all other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in fixing seniority between persons who are recruited from different sources so long as they belong to the same cadre, discharge similar functions and bear the same responsibilities. While referring to various earlier decisions of the Court, the learned Judges constituting the majority referred to the case of Joginder Nath and Others Vs. Union of India (UOI) and Others, (in paragraph 35 of the Report) and said that it did not afford any assistance on the question which was in issue before them for that case arose out of a controversy between promotees inter-se and not between promotees and direct recruits.

17. Joginder Nath's case deserves notice at this stage. There also, the dispute was about the claim of seniority amongst members of the Delhi Higher Judicial Service. Rule 8 of the Delhi Higher Judicial Service Rules, 1970 prescribed the mode of determination of interse seniority of the promotees and the seniority of the direct recruits vis-a-vis promotees in the following terms:

8. (1) the inter se seniority of members of the Delhi Judicial Service promoted to the service shall be the same as in the Delhi Judicial Service.

(2) The seniority of direct recruits vis-a-vis promotees shall be determined in the order of rotation of vacancies between the direct recruits and promotees based on the quota of vacancies reserved for both categories by Rule 7 provided that the first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on.

18. The rules relating to appointment to the service were these:

7. Regular recruitment--Recruitment after the initial recruitment shall be made;

(a) by promotion from the Delhi Judicial service.

(b) by direct recruitment from the Bar.

Provided that not more than 1/3rd of the substantive posts in the service shall be held by direct recruits.

19. (1) The administrator may create temporary posts in the service.

(2) Such posts shall be filled, in consultation with the High Court, from amongst the members of the Delhi Judicial Service.

20. Notwithstanding anything contained in those rules the administrator may, in consultation with the High Court, fill substantive vacancies in the service by making temporary appointments thereto from amongst members of the Delhi Judicial service.

21. All candidates, on appointment to the higher service on regular recruitment had to be on probation for a period of two years under Rule 12(2) and there was provision for confirmation at the end of the period of probation. The Supreme Court referred to its earlier Judgment in Chandramouleshwar Prasad Vs. The

Patna High Court and Others, which was about the Bihar Superior Judicial Service Rules and in which it was held that the question of seniority had to be determined when the persons appointed either temporarily or on an officiating basis were given substantive appointments on account of Rule 16, and observed, (in paragraphs 23 to 26 of the Report) that

It would thus be seen that there are two types of appointments to Delhi Higher Judicial Service--one by regular recruitment the socure of which is by promotion from the Delhi Judicial Service and by direct recruitment from the Bar. Rule 8 prescribe the mode, of determination of seniority of such regular recruits. The interse seniority of the members of the Delhi Judicial Service promoted to the higher service has got to be the same as in the lower rank. As a matter of construction it necessarily follows that it would be the same provided the promotion from the lower to the higher service is at the same time. ...If a member of the Delhi Judicial Service is superseded at the time of recruitment under Rule 7 by his junior but gets a chance of promotion latter, it is obvious he cannot retain his seniority in the lower rank. All candidates on appointment to the higher service have got to be on probation for a period of two years under Rule 12(2) and ordinarily and generally they would be confirmed at the end of the said period of two years in accordance with Rule 13. Strictly speaking the question of determination of interse seniority under Rule 8 will crop up at the time of confirmation of the appointees....

On a parity of reasoning it follows that question of determination of seniority comes in at the time of confirmation of the appointees. Two members of the Delhi Judicial service confirmed in the higher service at the same time will retain their interse seniority as in the lower service. But if they are not confirmed at the same time then one who is confirmed earlier will be senior to the one who is confirmed later, even though they might have been appointed on probation under Rule 7 at the same time. We may, however, add that for practical purposes and for the facility of administration the High Court for the time being may consider the promoted probationers as retaining their interse seniority of the lower service if they are appointed at the same time until they are confirmed.

In our judgment members of the Delhi Judicial Service coming to the higher service on temporary appointments either under Rule 16 or Rule 17 of the Delhi Higher Judicial Service Rules cannot claim the benefit of the interse seniority under Rule 8. There are No. rules prescribing the mode of determination of inter se seniority of such temporary appointees or permitting them to count their officiation in the temporary appointments for the purpose of their seniority on their being appointed substantively. The question of determination of inter se seniority of the promotees under Rule 8(1) as already stated would crop up. only after the promotees have been substantively appointed, We may add there also that as between the temporary appointees for practical purposes and for the facility of the administration it will be open to the High Court to permit the promotees to retain their seniority in the lower judicial service after they are

temporarily appointed at the same time they continue in the temporary appointments.

The vires of Rule 8(1) of the Delhi Higher Judicial Service Rules was challenged by Mr. Tarkunde, learned Counsel for the petitioners on the ground that Rule 8(1) equates all who are promoted to the higher service and permits them to retain their seniority in the lower service irrespective of the time of their appointment. ...The attack on the constitutionality of Rule 8(1) is obliterated if by construction it is held, as it has been done above, that the question of retention of seniority in the lower service arises only when the promotion is at the same time and not otherwise. In absence of such an interpretation it would be a truism to say that Rule 8(1) would be discriminatory and violative of Article 14 of the Constitution. But with the aid of well established canons of interpretation we see No. difficulty in saving the constitutionality of the rule by interpreting it in a reasonable, sensible and just manner as we have done in this case....

22. The dictum of the Supreme Court in *Joginder Nath's* case, which has not been deviated from so far, clearly rules out acceptance of the submission that confirmation in a post, in the sense of making the appointment to that post substantive in nature, is not a relevant factor for determining the question of seniority. The decision in the case of *Baleshwar Dass v. State* AIR 1981 SC 41 may now be seen. There, it was observed that "substantive capacity refers to the capacity in which a person holds the post 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 substantative 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. ...If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the public service commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantial capacity. ...The normal rule consistent with equity is that officiating service, even before confirmation in service has relevancy to seniority if eventually No. infirmities in the way of confirmation exists. We see nothing in the scheme of the Rules contrary to that principle. Therefore, the point from which service has to be counted is the commencement of the officiating service of the Assistant Engineers who might not have secured permanent appointments in the beginning and in that sense may still be temporary, but who for all other purposes, have been regularised and are fit to be absorbed into permanent post as and when they are vacant.

23. These observations must be read in the context of the facts of the case before the Supreme Court, The question related to competing claims to seniority between three groups of engineers in the U.P. Service of Engineers (Irrigation Branch). Inter se seniority in the service was determinable according to the date

of the order of appointment to it under Rule 23 of the U.P. Service of Engineer (Class II Irrigation Branch) Rules. Member of service was defined in Rule 3(b) to mean a Government servant appointed in a substantive capacity. The contestants were (1) graduate engineers directly recruited by the Public Service Commission by competitive examination, (2) graduate engineers appointed in large numbers but later absorbed after consultation with the Public Service Commission and (3) diploma holders later promoted as Assistant Engineers. The contention which was raised before the Supreme Court was that engineers who were initially appointed to temporary posts and temporarily but had since been approved by the Government in consultation with the Public Service Commission were entitled to count the period of service rendered by them before the date on which they were actually confirmed by the Government in their post. The Supreme Court felt, in the circumstances of the case, that after consultation with the Public Service Commission and the acceptance by the Government of the recommendation made by it the period of service rendered by the engineers appointed temporarily could not be ignored for purposes of seniority, for lack of an order of confirmation because a confirmation was one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancy.

24. The present petitioners have relied heavily upon the line of reasoning accepted by the Supreme Court in the case of Baleshwar Das and that accepted earlier in *S.B. Patwardhan and Another Vs. State of Maharashtra and Others*, and *N.K. Chauhan v. State of Gujrat* AIR 1977 SC 25 . They also placed reliance upon the observations of the Supreme Court in *A. Janaradan v. Union of India* AIR 1983 SC 769; *Ajit Singh v. State of Punjab* AIR 1983 SC 494; *P.S. Mahal and Others Vs. Union of India (UOI) and Others*, and *G.P. Doval v. Chief Secretary of the U.P. Government* 1984 (2) SCC 11. These decisions need not detain us for long for they were rendered in respect of their own set of facts. *N.K. Chauhan* and *Janardan*'s case were in respect of inter se seniority between a promotee and a direct recruit. *Ajit Singh*'s case contained a challenge to an order of termination of service and did not deal with the question of seniority. In *P.S. Mahal* the dispute was about interse seniority amongst executive Engineers in the Central Engineering Service (Class I) drawn from the grade of Assistant Executive Engineers, and those from the grade of Assistant Engineers. Recruitment to the service, inter alia, was by promotion of Assistant Executive Engineers and Assistant Engineers to the extent of the quota prescribed for each of them. The main grievance centred round the circumstance of under recruitment of Assistant Executive Engineers and over recruitment of Assistant Engineers in breach of the quota rule over a period of almost 25 years. Litigation had been going on between the two groups for a very long period. The Supreme Court directed preparation of a fresh seniority list in the grade of Executive Engineers holding that the seniority between Assistant Engineers and Assistant Executive Engineers regularly promoted within their respective quota should be determined by the length of continuous officiation in service in the grade of

Executive Engineers subject to the clarification that in the case all Assistant Engineers, the length of continuous officiation was to be reckoned from the date when their promotion was regularised by absorption within the lawful quota. It is obvious that the decision in this case will not be of much help to us.

25. In G.P. Doval the dispute was about inter se seniority amongst Khandasari Inspectors. The petitioners before the Supreme Court under Article 32 of the Constitution were inducted as Khandasari Inspectors between March, 1960 and 1964. Contesting Respondents No. 4 to 19 were recruited as such, on different dates, later. The question which the Supreme Court posed for its consideration was that "where on account of exigencies of service, recruitment to a post within the purview of the Public Service Commission is made by the appointing authority but at a later date, the Public Service Commission puts its seal of approval on such an appointee whether the continuous, and uninterrupted service rendered by such appointee prior to the approval by the Public Service Commission can and should be taken into computation while determining seniority based on the principle of length of continuous officiation." The Supreme Court observed that in the absence of any specific rule of seniority, governing the cadre or a service, it is well settled that length of continuous officiation will provide a more objective and fair rule of seniority. It also said that once a person, appointed in a stop gap arrangement, is confirmed in his post by proper selection his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made and that it was well settled that where officiating appointment was followed by confirmation unless a contrary rule was shown, the service rendered as officiating appointment could not be ignored for reckoning length of continuous officiation for determining the place in the seniority list.

26. It is paradoxical to urge that co-relating determination of inter se seniority amongst promotees to the date of their confirmation is arbitrary. After all relative seniority of officers belonging to a class of posts in the service will have to be determined with reference to some point of time or event And, the Higher Judicial Service being a service higher to the one to which the promotees were initially recruited, and to which they come to be promoted, one will have to look for some point of time with reference to which seniority inter se of the promotees is to be determined. Entry to the service would undoubtedly constitute a stage most rational to do so and entry to the service for the purpose of determination of inter se seniority can best be treated to be at a time when a promotee acquires substantive status therein. And, confirmation, to acquire this status would be required is what is implicit in the scheme of the rules which we are considering We have seen earlier that recruitment to the U.P. Higher Judicial Service is from two sources. The direct recruit acquires the substantive status upon his confirmation and there is No. reason why the same yard stick should not be applied to a promotee from the lower rank. To us it appears that far from being arbitrary, the basis of confirmation envisaged in the rules is most reasonable and just. Visualise a case where some of the officers of the Nyayik

Sewa who start officiating from the same date have amongst them officers some of whom are not found suitable for being retained in the Higher Judicial Service at a particular point of time though others are. Sometime later, some amongst the former category improve. They are considered suitable for retention in the Higher Judicial Service by their subsequent improvement and it is decided to retain them. Unless these officers are treated to have become members of the service from a later date, when after improving their performance they qualify for it, than those who were initially found suitable for retention in the Higher Judicial Service and given seniority accordingly the fact that all of them started officiating in the Higher Judicial Service at the same time and their seniority being determined on that basis, would work injustice upon those who were found suitable earlier for retention in the Higher Judicial Service We are not inclined to accept the submission that co-relating seniority to the date of confirmation introduces an element of arbitrariness. Contrary to it we feel, that it promotes reasonableness.

27. Counsel for the petitioners say that there being No. specific rules for determining inter se seniority amongst promotees in the 1975 and 1977 Higher Judicial Service Rules the basis of the date of confirmation cannot be pressed into aid for doing so. We find it difficult to accept this submission. If the basis is reasonable and obviates arbitrariness, it can always be adopted for it is settled that even in the absence of rules it is possible for the appointing authority to act upon a principle laid down in exercise of executive power. See: Sant Ram Sharma v. State of Rajasthan AIR 1967 SC 1940.

28. The provisos to Rule 26, which limit the period of continuous officiation which can be considered for purposes of seniority to maximum of three years immediately preceding the year of confirmation, also introduce an element of reasonableness and do not, as canvassed on behalf of the petitioners lay down any arbitrary principle. In the case of a direct recruit, three years is the maximum period for which an appointee can be kept on probation. For those who get appointment to the Service by promotion also one cannot prescribe, as it were, a period of probation of a longer duration. The maximum of such period cannot be different for the officers recruited from the two sources. Since in the very nature of things a promotee, when officiating in the Higher Judicial Service, is not actually made to officiate on probation, a notional period of probation is envisaged for him before he is made a member of the Service, on substantive basis by an order of confirmation. Thus viewed, the provisos would tend to lay down a rational rule and not an unreasonable one, as thought by the petitioners. Confining consideration of the period upto a maximum of three years immediately preceding the date of confirmation to count the seniority, rules out the possibility of unfair advantage to a promotee over a direct recruit and also provides a reasonable basis when seniority amongst promotees themselves is to be determined. We may illustrate by taking an example of a promoted officer found fit for confirmation in the year 1980 and another officer, who started officiating in the Higher Judicial Service on the same date as the first one, who is

found fit for confirmation in the year 1984. If in either case, the entire period of officiation were to be considered for determination of their inter se seniority, the first of these officers, though he was found suitable for being made a member of the service in a substantive capacity much earlier, would always rank junior to the second who qualified for it years later. Such a situation would be most inequitable and unjust to officers of better merit. We have no hesitation in holding that the principle engrafted in the two provisos is just and proper and has rightly been applied for determination of inter se seniority amongst promotee officers.

29. Much has been said for the petitioners, by their learned Counsel, upon the nature of appointment which can be characterised as substantive. It has been said with reference to some rules contained in the U.P. Financial Handbook, Vol. II (part II to IV) that substantive does not mean permanent appointment but it means appointment on existing post with intention to fill it permanently if the incumbent is fit to occupy it on merits. And, that the petitioners answered this description. Reliance has been placed upon the observations of the Supreme Court in Balshwar Das's case ("supra"). The counsel, however, overlooked that basically the concept of substantive appointment envisaged by the U.P. Higher Judicial Service Rules, with which we are concerned, is that of an appointment when the appointee comes to acquire a right to a post in which there is a substantive vacancy. That is, the vacancy is not temporary or that only an officiating appointment thereto is to be made. In other words, the vacancy to which he gets appointed permanently is substantive in the character and upon his appointment it ceases to be available for appointment to any one else. This, under the Rules, can happen only when an appointee is confirmed in his appointment. Merely because temporary posts form part of the Service under Rule 4 of the 1975 Rules, to which appointments are contemplated, it cannot be said, as was urged by the petitioners' counsel, that confirmation of a promotee in a substantive vacancy has lost its significance or that his entry to the Service, in the context of determination of his length therein, cannot be co-related to his confirmation. Nor do we find substance in the submission that length of service, irrespective of the nature thereof, can be the only valid basis for determining seniority. If the person is temporarily appointed to a post, or is merely permitted to officiate therein, he cannot claim that he should be treated at par with a person who is occupying a post substantively after being appointed to a substantive vacancy in that capacity for determination of seniority in service.

30. It was urged that the 1975 and 1977 Rules will only apply to those who are appointed to the Service after commencement of these Rules. A look at Rule 26(2) of the Rules would, however, leave little to be said in support of this submission. The effect of that sub-rule is that the rules would apply to all those who are in service when 1975 Rules were enforced. The petitioners, undoubtedly, belong to that category. The argument that Rule 26(2) does not provide for determination of inter se seniority of officers, like the petitioners, who, as promotees, did not require confirmation under the 1953 Rules does not appeal to

us. In the 1953 Rules as well, a member of service under Rule 3(d) was one who was appointed substantively. And, appointment under Rule 19(1), which counted for seniority was only that which was made to a substantive vacancy. An appointment by confirmation, in the case of a promotee, was implicit in those rules as well.

31. Before concluding the discussion we may also deal with the submission made on behalf of the petitioners that the Constitution contemplates a single Judicial Service for the State so that the bifurcation of the Judicial service between Nyayik Sewa and the Higher Judicial Service, which was only by way of administrative convenience, could not permit determination interse seniority of the promotees from the Nyayik Sewa to the Higher Judicial Service except in accordance with the basis upon which it is determined at the initial entry of a promotee into the Nyayik Sewa. In other words, the interse seniority in the Nyayik Sewa was to continue even after the recruitment, by promotion, to the Higher Judicial Service. *Chandra Mohan v. State of U.P.* AIR 1966 SC 1987, is cited in support of this submission. We find it difficult to accept the contention. That decision, only lays down that the various Articles contained in Chapter VI of Part VI of the Constitution contemplate, inter alia, independence of judiciary from executive and constitution of Judicial Service free from executive control. We find no warrant for the inference attempted to be drawn from this decision by the counsel for the petitioners that the Constitution envisages a single Judicial Service for the State and that it was not permissible to create two different Services like the U.P. Nyayik Sewa and the U.P. Higher Judicial Service. In fact the decision recognises the fact that there can be a Higher Judicial Service, distinct from the Nyayik Sewa to which one of the sources of recruitment is by promotion from amongst the officers of the Nyayik Sewa. This becomes apparent when we look at the decision of the Supreme Court in the second *Chandra Mohan* case AIR 1976 SC 1482 in which the Supreme Court noticed that in the earlier case of *Chandra Mohan* a mandamus had been issued directing the State not to, make any appointment by direct recruitment to the U.P. Higher Judicial Service in pursuance of the selection made under the 1953 Rules and only those rules which related to recruitment/appointment of the District Judges were held to be invalid because they contravene the constitutional mandate of Article 233 (1) and (2) of the Constitution. It held that the rule relating to seniority in the 1953 Rules was separable from the Rules declared to be void by it earlier and except for the second proviso, Rule 20 was viable by itself.

32. In sum, we are inclined to up-hold the contention of Sri Vinod Misra, appearing for the contesting respondents, that in proceeding to determine the interse seniority of promotees to the U.P. Higher Judicial Service from the U.P. Nyayik Sewa on the basis of the date of their confirmation in the Higher Judicial Service, the respondents have not committed any error in law petitions deserve to be and are dismissed though we leave the parties to bear their own costs.