

(1997) 07 AHC CK 0217
In the Allahabad High Court
Case No : C.M.W.P. No. 24190 of 1994

Harihar Prasad and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 16-07-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144
Constitution of India, 1950 — Article 14, 16, 226
Criminal Procedure Code, 1973 (CrPC) — Section 25
Uttar Pradesh (Appointment of Assistant Public Prosecutors) Rules, 1974 — Rule 3
Uttar Pradesh Prosecuting Officers Service Rules, 1991 — Rule 22
Uttar Pradesh Regularisation of Ad hoc Appointments (On Posts Within the Purview of the Public Service Commission) Rules, 1979 — Rule 2, 4, 4(2), 4(5), 5

Citation : (1997) 07 AHC CK 0217

Hon'ble Judges : S. Rafat Alam, J; R.A. Sharma, J

Bench : Division Bench

Advocate : Sudhir Chandra, R.G. Padia, Prakash Padia, Rakesh Kumar and V.K. Jaiswal, for the Appellant; Sudhir Agarwal, R.C. Srivastava, S.C. Budhwar, Rajesh Pathak, B.D. Mandhyan, V.S. Singh, Rajesh Srivastava, A.K. Singh and Rakesh Dwivedi, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

R.A. Sharma, J.—What are the dates with reference to which the seniority of ad hoc Assistant Prosecuting Officers appointed in 1977/1978 and the temporary Assistant Prosecuting Officers appointed in 1984/1985, is to be determined, is the question involved in this writ petition.

2. Before the commencement of the Code of Criminal Procedure, 1973, Public Prosecutors used to be appointed under the Police Act and the Regulations framed thereunder. Section 25 of the said Code banned the appointment of the police officials as Assistant Public Prosecutors. The Government of U.P. accordingly framed rules known as the Uttar Pradesh (Appointment of Assistant Public Prosecutors) Rules, 1974 (hereinafter referred to as the 1974 Rules). Rule

3 provided for absorption of the existing Public Prosecutors and Assistant Public Prosecutors. Rule 4 deals with the appointment of Assistant Public Prosecutors in future. The post of Assistant Public Prosecutors was re-designated as Assistant Prosecuting Officers (hereinafter referred to as A.P.Os.). The Government appointed a number of Assistant Prosecuting Officers on ad hoc/temporary basis. Vide order dated 8.2.1977, 192 ad hoc/temporary Assistant Prosecuting Officers were appointed by the Government and vide another order passed on 24.12.1977, 51 more such officers were appointed on similar terms and conditions. Respondents No. 4 to 222 to this writ petition are the Assistant Prosecuting Officers appointed in 1977/1978 by the aforementioned orders. All these appointments were made initially for a period of one year or till regularly selected candidates Join the posts, whichever is earlier. But the periods of their appointments were extended from time to time. In 1980 temporary posts of Assistant Prosecuting Officers were confirmed and on 27.11.1980 Directorate of Prosecution was constituted by the State Government. Earlier the Assistant Prosecuting Officers posts were not within the purview of the U.P. Public Service Commission (hereinafter referred to as the Commission), but on 27.1.1980 they were brought within the purview of the Commission.

3. On requisition of the State Government, the Commission on 14.5.1982 advertised 460 Posts of Assistant Prosecuting Officers which Included the posts on which the Respondents No. 4 to 222 were appointed on ad hoc basis in 1977/1978. Some of the ad hoc Assistant Prosecuting Officers filed Writ Petition No. 6157 of 1982 before this Court challenging the above advertisement and seeking direction for regularisation of their service. While entertaining the writ petition, this Court passed the following interim order:

Process of the selection may go on but the services of the Petitioners shall not be terminated on the ground of the new selection.

As this Court did not stay the examination, the Commission conducted the written test in 1982, the result of which was declared on 26.11.1983. By letter dated 16.1.1984, the Government informed the Commission that it has decided to regularise the service of the ad hoc Assistant Prosecuting Officers appointed in 1977/1978. The Commission was accordingly requested to declare the result of 253 candidates instead of 460. In February and March, 1984 the Commission interviewed the candidates who were successful in the written test and on 24.3.1984 it declared the result of the examination of Assistant Prosecuting Officers, on the basis of which the Commission recommended the names of 450 candidates instead of 253, as required by the Government, vide its letter dated 16.1.1984.

4. In 1979 the Government of U.P. framed the Uttar Pradesh Regularisation of Ad Hoc Appointments (On Posts within the Purview of Public Service Commission) Rules, 1979 (hereinafter referred to as the Regularisation Rules). Rule 4 of these Rules casts an obligation on the Government to consider the claims of the Government servants appointed on ad hoc basis on or before 1.1.1977, for

regularisation of their service before making regular appointments. These Rules were amended vide notification dated 22.3.1984 changing the cut-off date from 1.1.1977 to 1.5.1983, giving benefits of regularisation of service to those ad hoc appointees also who were appointed on or before 1.5.1983.

5. As before the declaration of the result of the examination of Assistant Prosecuting Officers by the Commission, the Regularisation Rules have been amended giving benefits of regularisation of service to all ad hoc appointees, who were appointed before 1.5.1983, the Government did not make any appointment on the basis of the recommendation of the Commission dated 24.3.1984. On 17.4.1984 the Government constituted a Selection Committee for considering the cases of regularisation of ad hoc Assistant Prosecuting Officers appointed In 1977/1978. However, the Selection Committee could not do much in the matter initially due to non-availability of the service records and thereafter because of the interim orders granted by this Court in several writ petitions filed from time to time, reference of which has been given in the counter-affidavit filed on behalf of the State. Reference of some of the writ petitions has also been given in the writ petition as well as in the counter-affidavit filed by private Respondents. As illustration, It may be mentioned that Writ Petition No. 1146 of 1984 was filed in which an interim order was passed staying the appointments under the Regularisation Rules. Yet another Writ Petition No. 1483 of 1985 was filed on 15.4.1985 in which similar interim order was passed. The stay order in Writ Petition No. 1146 of 1984 was vacated on 3.9.1985, but the stay order in other writ petition remained In force. On 21.1.1987 another Writ Petition No. 491 of 1987 was filed in which also stay was granted, which was vacated on 5.5.1993. As the service of ad hoc Assistant Prosecuting Officers could not be regularised in view of the interim orders passed by this Court in writ petitions filed from time to time, the Government appointed on 28.12.1984, 178 candidates from the list of the candidates sent by the Commission on temporary basis, subject to the orders which may be passed by this Court in pending writ petitions. It was further mentioned in the appointment order that the question of their seniority will be decided later on. On 25.1.1985 and 5.2.1985, 30 and 8 more such appointments were made on similar conditions.

6. After the Interim order against the regularisation of service of ad hoc Assistant Prosecuting Officers was vacated by this Court on 5.5.1993, the Government of U.P. on 15.3.1994 regularised the service of ad hoc Assistant Prosecuting Officers appointed in 1977/1978. After regularising their service, the Government passed an order dated 7.7.1994 laying down the criteria for determining seniority of the Assistant Prosecuting Officers on the basis of which a draft seniority list was prepared. By the same order, the Government also invited objections against the draft seniority list. The Petitioners, who were appointed as temporary Assistant Prosecuting Officers in 1984 and 1985 have filed this writ petition challenging the said order dated 7.7.1994.

7. Dr. R. G. Padia learned Counsel for the Petitioners has made the following

submissions in support of the writ petition:

(i) In view of the provisions contained in Rule 7 of the Regularisation Rules, the seniority of the ad hoc appointees whose service has been regularised, is to be counted from the date of regularisation/appointment orders passed under Rule 5.

(ii) No artificial date of appointment for the purpose of fixing the seniority can be fixed by the Government.

(iii) Officiating service of the ad hoc appointees cannot be taken into consideration for determination of their seniority.

8. Sri S.C. Budhwar and Sri Sudhir Agarwal, learned Counsel for the Respondents, apart from disputing the above contentions, have made the following submissions:

(i) As the ad hoc appointments made in 1977/1978 were made in accordance with the 1974 Rules, seniority of these appointees is liable to be counted from the dates of their ad hoc appointments; and

(ii) The Petitioners and Ors. who were appointed in 1984 and 1985, could not have been appointed before deciding the question of regularisation of service of the ad hoc appointees and the appointments of the Petitioners and their batch mates, being contrary to Rule 4 of the Regularisation Rules, cannot confer any right on them to claim seniority over the ad hoc appointees of 1977/1978 batch.

Learned counsel for the Respondents have also raised a preliminary objection about the maintainability of the writ petition on the ground that by the impugned order, the Government has merely prepared and published a draft seniority list for inviting objections and, therefore, such an order cannot be challenged under Article 226 of the Constitution of India, because the Petitioners should raise their grievances in the form of objections against the said order before appropriate authority.

9. Before dealing with the controversy on merit, it is appropriate to decide the preliminary objection regarding maintainability of the writ petition at the threshold. By the impugned order dated 7.7.1994, the Government has accepted the following criteria formulated by a Committee appointed by it for determining the seniority of the ad hoc appointees of 1977 and 1978 and those who were appointed on the basis of the recommendation of the Commission:

(i) The date for determining seniority of the ad hoc appointees will be 22.3.1984 on which date the Government issued a notification amending the Regularisation Rules by which the Government changed the cut off date from 1.1.1977 to 1.5.1983.

(ii) The seniority of those who were appointed on the basis of recommendation of the Commission will be counted from the date of their appointments.

On the basis of the said criteria, the Government prepared and published a draft

seniority list inviting objections. By the said order, the Government has not merely prepared and published a draft seniority list for inviting objections, but it has also laid down the criteria for fixing the seniority. Petitioners' challenge is to the criteria adopted by the Government. If this criteria is accepted, the filing of the objection against the draft seniority list will be empty ritual. In such a case, the writ petition is maintainable. In this connection, reference may be made to the *General Manager, South Central Railway v. A.V.R. Siddhanti and Ors.* AIR 1974 SC 1755, wherein the Supreme Court has laid down as follows:

As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile grain-shop departments. The Respondents-Petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of Government servant is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the Petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the readjustment of the Petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952, were, at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition.

In *A. Janardhana v. Union of India* AIR 1983 SC 769. the Supreme Court has reiterated the same rule as under:

In this case, Appellant does not claim seniority over any particular individual in the back ground of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing up the impugned seniority list are invalid and illegal and the relief is claimed against the Union Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as Respondents. We may in this connection refer to *General Manager, South Central Railway, Secundrabad v. A.V.R. Sidhanti* (1974) 3 SCR 207 at 212 : AIR 1974 SC 1755 at p. 1759. Repelling a contention on behalf of the Appellant that the writ Petitioners did not implead about 120 employees who were likely to be affected, by the decision in the case, this Court observed that the Respondents (original Petitioners) are impeaching the validity of those policy decisions on the ground of their being

violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating to seniority of Government servants is assailed. In such proceedings, the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court.

Recently in *V.P. Shrivastava and Ors. v. State of Madhya Pradesh and Ors.* JT 1996 (2) SC 374, the same principle was reiterated holding that "in other words, the very principle of determining seniority made by the State Government is under challenge and in such case, the State is necessary party, who has been impleaded." in this case, the Supreme Court has placed reliance on its aforesaid two decisions in *General Manager, South Central Railway v. A.V.R. Sidhanti and A. Janardhana v. Union of India*.

10. As the Petitioners have challenged the very criteria adopted by the Government for fixing seniority, their writ petition is maintainable and it cannot be dismissed merely on the ground that by the same order Government has prepared and published the draft seniority list inviting objections. As long as the criteria for determination of seniority remains intact, filing of the objection against the draft seniority list may not be of much utility. The preliminary objection is accordingly rejected. Hence the decision on merits becomes necessary.

11. The settled legal position is that the temporary/ad hoc appointee is entitled to seniority from the date of his temporary/ad hoc appointment only if his appointment is in accordance with relevant service rules. if temporary/ad hoc appointment is de hors the service rules, the period of service of such appointee cannot be taken into consideration for the purposes of seniority. The Supreme Court in *Direct Recruits Class II, Officers Association v. State of Maharashtra* AIR 1990 SC 1607, and various other cases following that decision, has laid down that if the ad hoc/temporary appointments are made in accordance with relevant rules, the entire period of temporary service of such appointees is to be counted for determining their seniority, but if such appointments are made de hors the service rules the entire period of their service is liable to be ignored. It is not necessary to refer all the cases decided by the Supreme Court after the *Direct Recruits Class II Officers Association* case (supra) and it is sufficient to refer to the following three cases:

(1) *State of West Bengal v. Aghore Nath Dey and Ors.* (1993) 3 SCC 371. In this case, the Supreme Court explained the conclusions (A) and (B) of *Direct Recruit* case (supra) as under:

There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the

post has to be initially appointed "according to rules." The corollary set out in conclusion (A), then is, that where the Initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop-gap arrangement. The case of the writ Petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, "if the initial appointment is not made by following the procedure laid down by the rules "and the latter expression "till the regularisation of his service in accordance with the rules". We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest.

(2) In *V.P. Srivastava v. State of Madhya Pradesh and Ors.* JT 1996 (2) SC 374,

the Supreme Court has laid down as follows:

In the direct recruits case the Constitution Bench of this Court summarised the legal position in paragraph 44 as follows:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken in account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

We are not concerned with the other propositions laid down by this Court in the present case. In the case in hand the initial appointment of the Respondents on promotion not having been made following the procedure laid down by the Recruitment Rules of 1965 and even though they are continuing in the post uninterruptedly but the Public Service Commission having not approved their appointments as yet, proposition B above will have no application. Consequently applying proposition A above, the Appellants direct recruits must be held senior to the Respondents-private Respondents ad hoc promotees. The Tribunal obviously erred in law in not following the aforesaid authoritative pronouncement of this Court for determination of the inter se seniority between direct recruits and the promotees.

In the three Judge Bench decision this Court in the case of State of West Bengal and Ors. v. Agnore Nath Dey and Ors. (1993) 3 SCC 371. this Court held:

That to enable his seniority to be counted from the date of initial appointment the incumbent of the post has to be initially appointed "according to rules". Thus where initial appointment is only ad hoc and not according to rules and made as stop-gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority:

It was thus held that conclusions A and B of the Constitution Bench in Direct Recruits case have to be read harmoniously and conclusion B cannot cover cases which are expressly excluded by conclusion A.

In a more recent case of V. Sreenivasa Reddy and Ors. v. Government of Andhra Pradesh and Ors. 1995 (Supl.)(1) SCC 572, where one of us (brother Ramaswamy, J.) was a member, all the decisions of this Court on the point have been considered and it has been laid down that temporary or ad hoc appointments are not appointments in accordance with the rules and the temporary service cannot be counted towards the seniority.

(3) In *State of U.P. and Ors. v. Dr. R.K. Tandon and Ors.* (1995) 3 SCC 616, the Supreme Court reiterated the same rule in paragraph 4 of its judgment, which is reproduced below:

It is settled law that all ad hoc appointments made de hors the rules do not confer any right to permanency or seniority. They acquire the rights only from the date of their regular appointment according to rules. If, however, the initial appointments are according to rules, though on ad hoc or temporary basis, then the seniority would be counted from the date of initial appointment. The ad hoc appointments here were de hors the rules. It would thus be clear that though the doctors have put in more than 33 years, they are ad hoc hands. All would not get seniority from the respective dates of appointments. It is seen that some of the doctors have retired and some had the benefit of direction given by the courts to regularise their services with effect from the dates on which they were appointed and the orders have become final. So, they are entitled to count their seniority from the respective dates of initial appointments.

Therefore, the question is as to whether the ad hoc/temporary appointments of the Respondents made in 1977 and 1978 were in accordance with service rules. Relevant service rules are 1974 rules. Rule 4, which deals with future appointment, is reproduced below:

4. Future appointments to the post of Assistant Public Prosecutors, senior Grade, First Grade and Second Grade. Further appointments to the posts of Assistant Public Prosecutors, Senior Grade, Assistant Public Prosecutors, Second Grade shall be made by the State Government in accordance with such Rules or general orders as the State Government may from time to time make in that behalf.

Rule 4, has itself not laid down the method/mode for making appointments, but has left it to the Government to regulate it by Rules or General Order which may be issued by it from time to time. It is admitted case of both the parties that the Government has not issued any rule, pursuant to Rule 4 for appointment of Assistant Public Officers. But according to the Respondents, the Government has issued order for future appointments. Learned Counsel for the Petitioners has disputed the same saying that there is no "general order" issued by the Government in exercise of the power conferred by Rule 4 for making appointments of Assistant Public Officers, in future.

12. "General Order" is different from. Individual order. By the "general order", source of recruitment, eligibility qualifications, method/mode of selection and the matters connected therewith are laid down for making appointments in future. Such an order unlike individual order is not confined to any particular selection or vacancies. The "general order" contemplated by Rule 4 is not a statutory order of the kind of subordinate legislation, but it is an order Legislative in character laying down norms and other requisites for future appointments.

13. In support of their claim that the Government has passed general order under Rule 4, reliance was placed by the Respondents on a document which has

been filed as Annexure 2 to the counter-affidavit of Sri K.M. L. Srivastava filed on behalf of the Government. But it is an order dated September 23, 1976 Issued by the Police Head Quarter, U.P., Allahabad and is not a Government Order. Neither the Government nor the private Respondents could produce any Government Order passed under Rule 4 till the arguments were concluded on 9.9.1996 on which date we reserved the judgment. While reserving the judgment, we gave liberty to the learned Counsel for the parties to bring it on record if they find any Government order issued under Rule 4. On 1.10.1996 a supplementary affidavit containing four orders issued by the Government alongwith an application, was filed in the Court by Respondent No. 113 through Sri Sudhir Agarwal, Advocate. We, therefore, directed the case to be listed for further hearing and when the case was so listed, we granted time to learned Counsel for Petitioners and the State Government to file their reply to the aforementioned supplementary affidavit. An affidavit in reply was filed on behalf of the Petitioners disputing the above orders filed by Respondent No. 113. We, therefore, directed the learned standing Counsel to produce the original record before the Court in order to verify the correctness of those documents. Learned standing counsel, however, did not produce the original record and we after hearing the learned Counsel for the parties again reserved the judgment on 21.3.1997. While reserving the judgment, we directed the learned standing counsel to produce the original record in our Chamber in presence of learned Counsel for the parties. Learned standing counsel thereafter produced the original record in the Chamber in presence of learned Counsel of all the parties. From perusal of the original record, we found that the four orders filed by the Respondent No. 113 along with supplementary affidavit are correct orders excepting that there is mistake in numbers of those orders. We, therefore, directed the learned standing counsel to file photostat copies of those orders along with an affidavit. Learned standing counsel has accordingly filed those orders along with supplementary counter-affidavit (II) which has been placed on record. A rejoinder-affidavit, in reply to the supplementary counter-affidavit filed by the State, has also been filed along with an application by the Petitioners.

14. The four Government Orders filed by the Respondents cannot be said to be "general orders" under Rule 4 of 1974 Rules. Two of these orders are the Radiograms dated November 15, 1976 sent with reference to the Government Order dated 3rd November, 1976 regarding selection of Assistant Public Officers for second ad hoc appointments, against the existing and 167 contemplated vacancies. Third is a letter dated November 24, 1976 written by the Deputy Secretary, Home Department, to the Deputy Inspector General of Police, Police Headquarters, U.P., Allahabad, regarding short-term ad hoc appointments of Assistant Public Officers in the existing vacancies. In this letter, it was mentioned that the Government has no objection if four names from each district are sent for short-term appointments on ad hoc basis. There was also reference of reservation for Scheduled Caste and Scheduled Tribes. The last letter is dated December 7, 1976, which also relates to short-term ad hoc appointments against

the existing vacancies regarding which Police Headquarters was informed that a Selection Committee consisting of District Magistrate, Superintendent of Police and Senior Prosecuting Officer to be constituted in each district for making selection for such appointments. By the aforesaid four letters/orders of the Government, directions were issued to the State police for making selection for short-term ad hoc appointments against existing vacancies only. These orders have nothing to do with the appointments other than the short-term ad hoc appointments in existing vacancies. Such orders, therefore, cannot be treated to be "general orders" under Rule 4 of 1974 Rules. Any appointment made pursuant to such orders cannot be said to be the appointments made in accordance with the Rules and the "general orders" issued thereunder. Consequently, the seniority of the ad hoc appointees cannot be counted from the dates of their ad hoc appointments. The first submission of Sri. S.C. Budhwar learned Counsel for the Respondent is, therefore, rejected. The third submission of Dr. R. G. Padia learned Counsel for the Petitioners also stands disposed of accordingly.

15. The first submission for Dr. R. G. Padia and the second submission of Sri S.C. Budhwar, being interlinked with each other, are being dealt with together as under:

Under the Regularisation Rules, the Government is required to constitute a Selection Committee for considering the ad hoc appointees appointed on or before 1.5.1993 for regular appointments in permanent or temporary vacancies on the basis of their record and suitability before making any regular appointment. Persons so selected by the Selection Committee are given substantive appointments under Rule 5 and such appointments are treated to be the appointments made under the relevant service rules. Rules 4, 5 and 6 of these Rules, being relevant, are reproduced below:

"4. (1) Any person who:

(i) was directly appointed on ad hoc basis before January 1, 1997 and is continuing in service, as such, on date of commencement of these rules;

(ii) possessed requisite qualifications prescribed for regular appointment at the time of such ad hoc appointments; and

(iii) has completed or as the case may be, after he has completed three years continuous service;

shall be considered for regular appointment in permanent or temporary vacancy as may be available on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

(2) In making regular appointment under these rules, reservation for the candidates belonging to the Scheduled Caste, Scheduled Tribes, Backward Classes and other categories, shall be made in accordance with the orders of the Government in force at the time of recruitment.

(3) For the purpose of Sub-rule (1), the appointing authority shall constitute a Selection Committee and consultation with the Commission shall not be necessary.

(4) The appointing authority shall prepare an eligibility list of the candidates, arranged in order of seniority as determined from the date of order of appointment and, if two or more persons are appointed together from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with their character rolls and such other records, pertaining to them, as may be considered necessary to Judge their suitability.

(5) The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in Sub-rule (4).

(6) The Selection Committee shall prepare a list of selected candidates, the names in the list being arranged in order of seniority and forward it to the appointing authority.

5. The appointing authority shall, subject to the provisions of Sub-rule (2) of Rule 4, make appointments from the list prepared under Sub-rule (5) of the said rule in the order in which their names stand In the list.

6. Appointments made under these rules shall be deemed to be under the relevant Service Rules or orders, if any.

If an ad hoc appointee is not selected by the Selection Committee, his service is liable to be terminated forthwith under Rule 2. Rule 7 has laid down that a person appointed under these rules will be entitled to seniority from the date of the order of appointment under Rule 5 and will be placed below the persons appointed in accordance with relevant service rules or regular prescribed procedure, prior to the appointment of such person under these Rules. Rule 7 is quoted below:

7. (1) A person appointed under these rules shall be entitled to seniority only from the date of order of appointment after selection in accordance with these rules and shall, in all cases, be placed below the persons appointed in accordance with the relevant service rules, or as the case may be, the regular prescribed procedure, prior to the appointment of such person under these rules.

(2) If two or more persons are appointed together, their seniority inter se shall be determined in the order mentioned in the order of appointment.

16. As mentioned earlier, the Commission on requisition from the State Government advertised 460 posts of Assistant Public Officers which included the posts against which ad hoc appointments have been made in 1977/1978. This position is not disputed and it is also clear from the Government letter dated January 16, 1984, by which the Commission was asked to select candidates for 253 instead of 460 posts, as the Government has decided to regularise the

services of ad hoc. P.Os. appointed before 1.5.1983. As Rule 4 has cast statutory duty on the Government to consider ad hoc appointees for regular appointments in permanent or temporary vacancies before making any regular appointment in such vacancies, it was not open to the Government to make regular appointments before deciding claims of the ad hoc appointees for regularisation of their services. This is also the stand taken by the Government, in its counter-affidavit. In paragraph 16 of the said counter-affidavit, it has been stated that on 22.3.1984 the Government has issued an order (Annexure CA-12) directing to regularise the service of ad hoc appointees appointed before 1.5.1983 at the earliest. In paragraph 17 of the same counter-affidavit. it has been stated that the Government has also issued a circular dated 16.7.1985 (Annexure CA-13) directing that the appointment on the basis of the recommendation of the Commission be made only after granting regularisation to the ad hoc appointees. It has further been stated that as a special case the Government has also relaxed the requirement and has permitted the appointments from the list of the candidates recommended by the Commission in the vacancies which may arise in future in the next two years. Therefore, on account of Rule 4 and the Government orders prohibiting regular appointments until the question of regularisation of ad hoc appointees has been decided, the Petitioners and others who were selected by the Commission, could not have been appointed on regular basis before the question of regularisation of the service of ad hoc Assistant Public Officers has been decided.

17. The contention of the learned Counsel for the Petitioners to the effect that if the vacancies are more than the ad hoc appointees, regular appointments can be made against the vacancies which remain after reserving and keeping apart the vacancies for the ad hoc appointees, cannot be accepted. Rule 4 has not only imposed the duty on the Government to consider the ad hoc appointees for regularisation of their services but has also restricted its power to make regular appointments till the question of regularisation of service of ad hoc appointees has been decided. The object of this Rule is that the ad hoc appointees should be considered for regularisation of their service before any regular appointment is made irrespective of the number of vacancies. Even when the vacancies are more than the ad hoc appointees, the question of regularisation of service of ad hoc appointees has to be considered first before any regular appointment is made. If the submission of the learned Counsel for the Petitioner is accepted, the very object of Rule 4 will be frustrated to a great extent. Delay on the part of the Government, deliberate or otherwise, in considering the claims of the ad hoc appointees for regularisation of their services, will seriously prejudice them as regards seniority and future prospects in service. It will also lead to manipulation and unfair practice for getting the consideration of the claims of the ad hoc appointees for regularisation of their services postponed.

18. In this connection, it may be mentioned that Rule 4 only prohibits appointment before considering the cases of ad hoc appointees for regularisation of their services, but it does not ban the recruitment for regular appointments.

Supreme Court in Prafulla Kumar Swain v. Prakash Chandra Misra and Ors. JT 1993 (1) SC 360, has pointed out the distinction between the appointment and "recruitment", as under:

At this stage, we will proceed to decide as to the meaning and effect of the words "recruitment" and appointment". The term recruitment" connotes and clearly signifies enlistment, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradiction, the word "appointment" means an actual act of posting a person to a particular office.

Although no exception can be taken to the selection of the Petitioners and others by the Commission, but they could not have been appointed on regular basis before the claims of ad hoc Assistant Public Officers were considered for regularisation under Rule 4.

19. In the instant case, it is quite clear that the Government was conscious of the aforesaid legal position and, therefore, it did not make any regular appointment on the basis of selection made by the Commission. Instead the Government appointed on 17.4.1984, a Selection Committee under Rule 4 for considering the cases of regularisation of ad hoc Assistant Public Officers. Immediately after its constitution, the Selection Committee could not proceed with the consideration of the claims of ad hoc Assistant Public Officers for regularisation of their service for want of relevant record, but after it has received the record, it could not pass any effective order for regularising their service because of the interim orders passed in the various writ petitions. Reference of these writ petitions has been given in the Government's counter-affidavit as well as in the affidavits filed by the other parties. In paragraphs 21, 28 and 29 of the counter-affidavit of the Government, it has been stated that the Selection Committee met and made recommendation on 17.4.1985 for regularising the services of the ad hoc Assistant Public Officers, but in view of the stay order passed by this Court, the result of the same could not be declared. Although in some writ petitions, the stay orders were vacated and/or modified, but the stay order passed in the last writ petition remained in operation upto to May 5, 1993 on which date that order was vacated. The Government thereafter passed the order dated March 15, 1994 regularising the service of the ad hoc Assistant Public Officers.

20. As the Government was not able to consider the claims for regularisation of the ad hoc Assistant Public Officers in view of the stay orders passed by this Court and there was dire necessity for more Assistant Public Officers to conduct the criminal cases in the Courts of the Magistrates, the Government vide order dated 28.12.1984 appointed 178 Assistant Public Officers from the list sent by the Commission, purely on temporary basis with the condition that their appointments are subject to the orders which may be passed in the pending writ petitions and the question of their seniority will be decided later on. By two other orders dated 25.1.1985 and 5.2.1995, 30 and 8 more appointments of Assistant Public Officers were made on similar conditions, it appears that subsequently

some more Assistant Public Officers were appointed on the same conditions. The appointment of the Petitioners and others by the aforementioned orders were purely fortuitous temporary appointments by way of interim arrangements during pendency of the writ petitions in this Court in order to copy with the work in the Magistrates' courts. These appointments were not made in accordance with the service rules. Such appointments do not confer any right on the appointees to claim seniority from the dates of those appointments. The Petitioners, therefore, cannot claim seniority over the ad hoc Assistant Public Officers, on the basis of such appointments.

21. That apart, it is well settled that the act of the Court shall prejudice no one. In *Gursharan Singh and Ors. v. New Delhi Municipal Committee and Ors.* JT 1996 (1) SC 647, the Supreme Court has laid down as follows:

In view of the legal maxim "*actus curiae neminem gravabit*" which means that an act of court shall prejudice no man. N.D.M.C. is justified in making a claim for interest over the arrears which have remained unpaid for more than 12 years because of the interim orders passed by this Court. This aspect of the matter has been examined by this Court in the case of *Raj Kumar Dey and Ors. v. Tarapada Dey and Ors.* JT 1987 (3) SC 555 : (1967) 4 SCC 398.

Same rule was reiterated in *Kerala State Electricity Board v. M.R.F. Limited* (1996) 1 SCC 597, wherein it was laid down as under:

Mr. Poti has also referred to another decision of the Privy Council in *Jai Borham v. Kedar Nath Marwari*. In the said decision, the earlier decision of the Privy Council in *Rodger* case was referred to and relied upon and it has been held by the Privy Council that one of the first and highest duties of all the courts is to take care that act of the court does not cause injury to any of the suitors. It would be inequitable and contrary to Justice that the judgment debtor should be restored the property without making good to the auction-purchaser the money which has been applied for his benefit.

Mr. Poti has also referred to another decision of the Privy Council in *L. Guran Ditta v. T.R. Ditta*. In that case also, the decision in *Rodger* case was referred to and it has been held by the Privy Council that the duty of the Court when awarding restitution u/s 144 of the CPC is imperative. The Court shall place the applicant in the position in which he would have been if the order had not been made and for this purpose the Court is armed with powers.

Recently in *M/s. Kanoria Chemicals and Industries Ltd. v. U.P. State Electricity Board and Ors.* JT 1997 (3) SC 545, the Supreme Court has held thus:

It is equally well-settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the Court in such a case to put the parties in the same position they would have been but for the interim orders of the court. Any other view would result in the act or order of the court

prejudicing a party (Board in this case) for no fault of its and would also mean regarding a writ Petitioner inspite of his failure. We do not think that any such unjust consequence can be countenanced by the courts.

The Respondents, therefore, cannot be made to suffer on account of the interim orders passed by this Court in several writ petitions filed against their regularisation from time to time. The Petitioners and others who were appointed in 1984/1985 on temporary basis cannot be permitted to take advantage of their own acts of filing writ petitions and obtaining interim orders therein against the regularisation of ad hoc Assistant Public Officers which have already been vacated. In a case like the present one, equities are to be adjusted. When the consideration of the ad hoc appointees for regularisation of their service is held up on account of the orders of the Court, it is the duty of the Government as well as of this Court to put the parties in the same position they would have been, but for the interim orders of the Court. As held by the Supreme Court, any other view would result in the act or order of the Court prejudicing a party for no fault on its part. Rule 7 of the Regularisation Rules does not contemplate to cover a case like the present case, where the process of regularisation has been stopped/held up for considerable long time due to the order passed by the Court and the order of regularisation could be passed only after vacation of the interim order. Therefore, the seniority of the Respondents cannot be determined with reference to the date on which the order was passed under Rule 5. The Government has, therefore, passed the impugned order laying down criteria for determination of seniority which is in consonance with equity and is quite fair and reasonable.

22. That apart, as mentioned hereinbefore, the appointments of the Petitioners and their batch mates were fortuitous temporary appointments made by way of interim arrangement in order to cope with the work in the Magistrates' Courts. Such appointments not being in accordance with the service rules, the Petitioners and their colleague cannot get their seniority counted from the dates of these appointments. The Petitioners should thank the Government for passing the impugned order directing the fixation of their seniority from the dates of such appointments.

23. For the reasons given above, the first submission of Dr. R. G. Padia is rejected. Consequently, the second submission of Sri S.C. Budhwar has to be accepted.

24. In this connection, it may be mentioned that the Government of U.P. has framed U.P. Prosecuting Officers Service Rules, 1991. These rules are prospective in operation and there is no dispute between the learned Counsel for the parties on this issue. Although these rules will not affect the seniority of the Assistant Public Officers appointed before their enforcement, but presuming that these Rules will apply in the present case also, the Petitioners cannot get any benefit from them, because Rule 22, which deals with the seniority, states that the seniority of the appointees made in substantive capacity shall be determined in accordance with the U.P. Government Servants Seniority Rules, 1991. The

appointments of Assistant Public Officers, from the list of the Commission made in 1984/1985 were not in substantive capacity and in fact they were appointed by way of interim arrangement on temporary basis. But it is not necessary to go into this matter any further, because learned Counsel for the parties have agreed that the seniority of the parties in the present case cannot be determined on the basis of these rules.

25. In principle, there is no difficulty in accepting the second submission of Dr. Padia, but in the instant case, it cannot be applied. On account of nonavailability of record at the initial stage after Constitution of Selection Committee under Rule 4 of the Regularisation Rules and thereafter in view of the interim orders passed by this Court in writ petitions filed from time to time, the Government could not carry out its statutory obligation of regularising the service of ad hoc appointees before making any direct appointment. The Government has already written letter dated 22.3.1984 directing for considering ad hoc appointees for regularisation of their service before making regular appointments. The Government's further orders dated 16.7.1985 and 5.11.1985 to the same effect could not be of any help to the ad hoc Assistant Public Officers, even though by those orders the concerned authorities were directed to grant regularisation to them before making fresh appointments. But as mentioned hereinbefore the Government's efforts failed because of the interim orders passed by this Court in several writ petitions. The ad hoc Assistant Public Officers were not at fault and, therefore, they cannot be made to suffer on account of the interim orders obtained by the Petitioners and their colleagues which were ultimately vacated. In view of the facts and circumstances of the case and the provisions of the Regularisation Rules, the Government has to adjust equities between the parties and for this reason, it had fixed 22.3.1984 as the date with reference to which the seniority of the Respondents is to be counted. By the same order, the Government has directed that the seniority of the Petitioners and their colleagues is to be determined with reference to the dates of their appointments. As the service of the ad hoc Assistant Public Officers, has to be regularised first before making any regular appointment, the date with reference to which their seniority is to be determined must be prior to the date with reference to which the seniority of the Petitioners and others like them is to be determined. In view of the facts and circumstances of the case, the impugned order is quite fair and reasonable and it is not a fit case to interfere with under Article 226 of the Constitution of India.

26. For the reasons given above this writ petition is dismissed. In view of the facts and circumstances of the case there shall be no order as to costs.