
(1971) 11 DEL CK 0018

In the Delhi High Court

Case No : Civil Writ Appeal No. 238 of 1970

M. Ramayya and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-11-1971

Acts Referred:

Citation : (1985) ILR Delhi 869 : (1972) RLR 71

Hon'ble Judges : T.V.R. Tatachari, J; Narain Andley, J; Jagjit Singh, J

Bench : Full Bench

Advocate : R. Gopalkrishnan, G.D. Gupta, B.B. Kishore, R.L. Tandon and J.B. God, for the Appellant;

Judgement

T.V.R. Tatachari, J.

(1) This writ petition originally came up for hearing before one of us (Jagjit Singh J.), and by his order dated 12th November, 1970, it was referred to a larger Bench. Subsequently, the writ petition came up for hearing before a Division Bench consisting of Hardayal Hardy J. (as his Lordship then was) and M. R. A. Ansari J. The Division Bench considered that in view of the general importance of the matters involved in the case, it should be decided by a still larger Bench, and passed an order accordingly on 15th March, 1971. It is thus that this writ petition has been posted before us for hearing.

(2) The writ petition was filed on 16th February, 1970. The petitioners are twelve in number. Petitioner No. 1 graduated in Civil Engineering. The other petitioners also possess similar qualifications viz., an Engineering Degree or an equivalent thereof. They were all initially appointed on different dates as temporary Section Officer in the Central Public Works Department (hereinafter referred to as the C.P.W.D.) in the Subordinate engineering Service, Class III non gazetted. They were subsequently appointed on various dates between 18th October 1958, and 9th January, 1963, to "officiate temporarily and until further orders" as Assistant Engineers in the Central Engineering Service, Class II Gazetted. A copy of the

Gazette Notification regarding the appointment of petitioner No. 1 has been filed as Annexure "A", and it is common ground that similar notifications with identical wording were issued regarding the appointments of the other petitioners also.

(3) There are 99 respondents to the writ petition. Respondent No. 1 is the Union of India through the Secretary, Ministry of Health and Family Planning and Works, Housing and Urban Development (formerly the Ministry of Works, Housing and Supply). Respondent No. 2 is the Engineer-in-Chief, C.P.W.D. Respondent No. 3 is the Union Public Service Commission (hereinafter referred to as the "U.P.S.C.") through its Secretary. Each of the respondents Nos. 4 to 61 possesses a Degree in Engineering or an equivalent thereof, and they were directly recruited as temporary Assistant Engineers in the Central Engineering Service, Class Ii Gazetted on different dates between 12th May, 1961, and 13th December, 1967 (vide Annexure F) by competitive examination in India held by the U.P.S.C. Each of the respondents Nos. 62 to 99 also possesses a Degree in Engineering or an equivalent thereof, and they were also directly recruited as temporary Assistant Engineers in the Central Engineering Service, Class Ii, on different dates between 2nd November, 1964, and 7th November, 1967 (vide Annexure "F"), but without any competitive examination.

(4) While so, by a Notification No. 9/2/66- VII, dated 13th June, 1967, excepting respondents Nos. 11, 17, 29 and 31 to 34, the rest of the respondents Nos. 4 to 37 were confirmed with effect from their respective dates of recruitment. The said confirmations were also shown in a "classified list of Class Ii Engineering Gazetted Establishment (Civil) of the C.P.W.D" (Annexure "C") published in 1968. By another Notification No. 9117167-EB VII Ec Ii, dated, 1st May, 1968, respondents Nos. 17, 33, 34, 38, 64, 74 and 80 were confirmed. Again, by a Notification No. 9/2/69-EC Ii, dated 30th April, 1971, "respondents Nos. 31, 32, 39, 43, 46, 49, 50, 52 to 57, 60 61 63 68, 69, "75, 76, 79, 82, 92 and 96 were confirmed. These particulars were furnished by Mr. R. Gapalakrishnan, learned counsel for the petitioners, during the course of the arguments, and the correctness of the same was not disputed by the learned counsel for the respondents. Thus, most of the respondents were confirmed, while the petitioners, most of whom were appointed as temporary Assistant Engineers much earlier than the former, were not confirmed. Aggrieved by the same, the petitioners made representations to the Government through their Association. Failing to get any redress, they filed the present writ petition on 16th February, 1970, praying mainly,

(1) that the confirmation of the respondents mentioned above be held to be illegal;

(2) that the petitioners and other persons who are similarly situated like them and who had joined the service earlier should be directed to be confirmed first according to the dates of their joining the service as Assistant Engineers after giving weightage in preference to the aforesaid respondents;

(3)that the appointment of respondents Nos. 62 to 99 be held to be illegal; and

(4)that respondents 1 to 3 be directed to revise the provisional classified list published in January, 1968.

(5) We may state here that although nine prayers were set out in the writ petition, some of them are more in the nature of contentions rather than of prayers, and the nine prayers can be condensed into the four categories mentioned above. We may also state that in the course of his arguments, Mr. Gopalakrishana stated that he does not contend that the appointments of any of the respondents should be quashed, and that his main contention was that the petitioners were entitled to be confirmed before those of the respondents who were appointed subsequently could be confirmed.

(6) In opposition to the writ petition, a counter affidavit of Mr. Kailash Prakash, Director of Administration, C.P.W.D., was filed on behalf of respondents Nos. 1 to 3. Respondent. No. 19, Mr. Durgadas Karna, filed his own affidavit. In reply to the said affidavits, an affidavit of Mr. P. Gopalan, petitioner No. 3. was filed by way of rejoinder. The petitioners filed an application, C.M. No. 1874 of 1970, for production of certain files by respondents Nos. 1to 3. In opposition to the said application, a counter affidavit of Mr. C. P. Malik, Engineer-in Chief, C.P.W.B. was filed, and in reply thereto, an affidavit of Mr. P. Gopalan, petitioner No. 3, was .filed by way of rejoinder. The said application was directed to be heard along with the main writ petition. At the time of the hearing of the main writ petition. Mr. Brijbans Kishore, learned counsel for respondents Nos. I to 3, agreed to give inspection of the files, and Mr. Gopalakrishnan, learned counsel for the petitioners, and Mr. R. L. Tandon, learned counsel for some of the other respondents Nos. 4 to 99, inspected the files. After inspection, both Mr. Gopalakrishnan and Mr. Tandon filed copies of some extracts there from as Annexures P-3-A to P-3-L and R-79-A to R 79 . respectively .No separate order on C.M. No. 1874 of 1970 is. Therefore, necessary.

(7) Mr. Gopalakrishnan contended firstly that the appointment. of the petitioners were made under Rule 3(b) read with Rule 23 in Part Iv of the Central Engineering Service, Class II. Recruitment Rules, 1954 (hereinafter referred to as the "Rules"). On the other hand, the case of the respondents Nos. I to 3 is that the appointments of the petitioners were not made under the aforesaid provisions. It is common ground that the said Rules were promulgated on 21st May, 1954. under the proviso to Article 309 of the Constitution of India, Part I of the Rules contains general provisions. Rule 2(c) in Part I defines "the Service" as meaning the Central Engineering Service, Class II. Part Ii of the Rules consists of Rules 3 to 5 which deal with "Methods of Recruitment", Rules 3 and 4 which are material for the purposes of this case, are as follows :__

"3.Recruitment to the Service shall be made by any of the following methods :

(a) By competitive examination in India in accordance with Part Iii of these rules.

(b) By direct appointment in" accordance with Part Iv of these Rules of persons

selected in India otherwise than by competitive examination. (c) By promotion in accordance with Part V of these Rules. (d) By transfer in accordance with Part VI of these Rules. 4. (a) All appointments to the Service or to posts borne upon the cadre of the Service shall be made by the Government. (b) No appointment shall be made to the Service or to any post borne upon the cadre of the Service by any method not specified in Rule 3. (c) Subject to the provisions of sub-rule 03), the method or methods of recruitment to be employed for the purpose of filling any particular vacancies in the service or such vacancies therein as may be required to be filled during any particular period and the number of candidates to be recruited by each method shall be determined by the Government."

Rule 3 provides that recruitment to the Service has to be made by any of the four methods set out in clauses (a) to (d) of the Rules. Recruitment by competitive examination has to be made under Rule 3(a) read with Part III. Recruitment by direct appointment otherwise than by competitive examination has to be made under Rule 3(b) read with Part IV. Recruitment by promotion has to be made under Rule 3(c) read with Part V. Recruitment by transfer has to be made " under Rule 3(d) read with Part VI.

(8) Rule 4(a) requires all appointments to the Service or to posts borne upon the cadre of the Service to be made by the Government of India. Rule 4(b) prohibits appointments to the Service or to any post borne upon the cadre of the Service being made by any method not specified in Rule 3. Rule 4(c) requires the Government of India to determine (i) the method or methods of recruitment to be employed for the purpose of filling any particular vacancies in the Service or such vacancies as may be required to be filled during any particular period and (ii) the number of candidates to be recruited by each method.

(9) As stated above, Rule 3(b) provides for recruitment by direct appointment otherwise than by competitive examination and the same has to be made in accordance with Part IV of the Rules which consists of only Rule 23, and this Rule runs as follows :

"23(1) recruitment by selection shall be made from among temporary Engineers and Temporary Section Officers employed on the Civil Engineering side of the Central Public Works Department after consultation with the Commission. Provided that it shall not be necessary to consult the Commission, in the case of any person, if the Commission were consulted in connection with his temporary appointment to the Service. (2) No person shall be eligible for selection under sub rule (1) unless he would, but for age, be qualified for admission to the Service under Part III of these "" rules, and his age at the time of appointment to the Service is not more than 40 years. (3) Merit shall be the primary consideration in determining a person's fitness for selection under this rule and no officer shall have any claim to appointment under this rule as of right."

(10) Rule 3(b) read with Part IV (Rule 23) shows that direct appointment otherwise than by competitive examination has to be made by selection from

among either temporary engineers or temporary Section Officers employed on the Civil Engineering side of the C.P.W.D. after consultation with the U.P.S.C. In other words, while Rule 3(a) read with Part III provides for recruitment by competitive examination conducted by the U.P.S.C., Rule 3(b) read with Part IV (Rule 23(1)) requires only a consultation with the U.P.S.C. The proviso to Rule 23(1) provides that such consultation shall not be necessary in the case of a person who was initially appointed temporarily to the Service, and the U.P.S.C. was consulted in connection with the said temporary appointment. Rule 23(2) requires a person, for being eligible for selection under Rule 23(1), to be not more than 40 years in age at the time of his appointment, and to have the same qualifications, but for age, as are prescribed for admission to the Service under Rule 3(a) read with Part III of the Rules. Rule 23(8) states that the selection under the Rule has to be primarily on merit, and that no officer shall have any claim to appointment under this Rule as of right.

(11) Rule 3(c), as stated above, provides for recruitment by promotion in accordance with Part V of the Rules, and Part V, which consists of only Rule 24, requires such promotion to be made by selection on the basis of merit from among permanent Section Officers employed in the Civil Engineering side of the C.P.W.D. .

(12) Rule 3(d) read with Part VI provides for recruitment by transfer of an officer in Government service, but we are not concerned with this provision in the present case.

(13) It may be stated here that on 1st May, 1965, the President of India made the Central Engineering Service. Class 11 recruitment (Amendment) Rules, 1965, whereby a proviso was added to Rule 4(b) reserving 50 per cent of the permanent vacancies in the cadre of Assistant Engineers. Class II, for certain Graduate engineers commissioned in the Armed Forces.

(14) The petitioners, as already stated, were only temporary Section Officers before they were appointed as Assistant Engineers. It is, Therefore, clear that their appointments as Assistant Engineers could not have been made under Rule 3(c) read with Part V which provides for selection from among permanent Section Officers in the Civil Engineering side of the C.P.W.D. It is also clear that their appointments could not have been made under clauses (a) and (d) of Rule 3 read with Parts III and VI of the Rules, as the said appointments were not made by competitive examination or by transfer. So, in view of the prohibition in Rule 4(b) against an appointment to the Service or to any post borne upon the cadre of the Service by any method not specified in Rule 3, the appointment of the petitioners as Assistant Engineers could only be under Rule 3(b) read with Part IV. It is the case of the petitioners that their appointments were made under Rule 3(b) read with Part IV, and it has, Therefore, to be examined whether the requirements of Rule 3(b) and Part IV (Rule 23) were satisfied in their case.

(15) The orders of appointment (Annexure A) state that the petitioners were

appointed "to officiate temporarily and until further orders as Assistant Engineers in the C.E.S., Class II". They were thus appointed to the Service in question. Rule 3(b) speaks of direct recruitment in contradistinction with Rule 3(c) and Rule 3(d) which refer to promotion and transfer. It cannot be disputed that the appointments of the petitioners were not by promotion or transfer within the meaning of Rule 3(c) and Rule 3(d), and since there could be no appointment .is Assistant Engineers otherwise than by any of the methods mentioned in clauses (a) to (d) of Rule 3, the appointments of the petitioners could only be made under clause (b) of Rule 3. So far as the consultation with the U.P.S.C. required under Rule 230(1) is concerned, it was averred in paragraphs 12 and 13 of the writ petition that they were in fact appointed in consultation with and approval by the U.P.S.C. In answer to the said averment, it was stated in paragraph 13 of the counter affidavit of Mr. Kailash Prakash filed- on behalf of respondents 1 to 3 that no consultation was made with the U.P.S.C. before the appointments of the petitioner were made, as such consultation was not necessary in view of the provisions of the U.P.S.C. (Exemption of Consultation) Regulations, 1958. Mr. Gopala krishnan, however, drew our attention to the reply filed on behalf of respondents 1 to 3 to the application. C. M, No. 1874(W),of 1970, which was filed by the petitioners for inspection of documents. In paragraph 1 of the said reply, it was admitted that the .appointments of the petitioners to the post of Assistant Engineers were made on the recommendation of a Departmental Promotion Committee of which a Member of the U.P.S.C. was the Chairman. In paragraph 8 of the rejoinder filed on behalf of the petitioners to the counter affidavit of Mr. Kailash Prakash, it was stated that the U.P.S.C. (Exemption of Consultation) Regulations, 1958. were not applicable to the case of the petitioners. because Rule 23 of the Recruited Rules which specifically requires consultation with the U.P.S.C. was saved by clause 3 of the aforesaid Regulations. It was further stated that Shri J. S. Pillai, Member of the U.P.S.C, was in fact the Chairman of the Departmental promotion Committee which selected the petitioners for appointment as Assistant Engineers, and that by virtue of paragraph 7 of the Home Ministry instructions. O.M. No. 33/46-Ests(R), dated 17th June, 1946 (Annexure P-III), recommendations made by the Departmental Promotion Committee on which the U.P.S.C. is represented have to be taken as recommendations having the approval of the U.P.S.C. The said instructions do support the contention of the petitioners, as it is clearly stated in paragraph 7 thereof that "recommendations made by the Departmental Promotion Committee on which the Commission is represented should be treated as recommendations having the approval of the Commission , and since a Member of the U.P.S C. was a Chairman of the- Departmental Promotion Committee which recommended the appointment of the petioners, the requirement as to consultation with the U.P.S.C. in Rule 23(1) has to be regarded us satisfied. The prosiest to Rule 23(1) contemplates temporary appointments nd the temporary appointments of the petitioners as Assistant Engineers were, Therefore, quite in accordance with the said proviso to Rule 23(1). Thus, the petitioners, who were temporary Section Officers on the Civil Side of the

C.P.W.D., were appointed as temporary Assistant Engineers in consultation with the U.P.S.C.. and the requirement in Rule 23(1) was satisfied in their case. Admittedly, the petitioners were not over 40 years of age at the time of their appointment as Assistant Engineers, and all of them possessed the qualifications necessary for admission to the Service under Part III of the Rules. As such, the requirement of Rule 23(2) also has to be held to have been satisfied in their case. It is thus clear that the requirements of Rule 3(b) and Part IV (Rule 23) were satisfied in their case. It follows that the contention of the petitioners that their appointment "were made under Rule 3(b) read with Part IV has considerable force.

(16) The case of respondents 1 to 3 is that the petitioners were not directly appointed as Assistant Engineers, and that their appointments were not made under Rule 3(b) read with Part IV. It was averred in Paragraph 12 of the counter affidavit of Mr. Kailash Prakash that under Rule 4(c) it was for the Government to determine the method or methods of recruitment to be employed for the purpose of filling any particular vacancies in the Service or such vacancies therein as may be required, to be filled during any particular period, and the number of candidates to be recruited by each method, and -that accordingly in consultation with the U.P.S.C.. it was determined by the Government that posts of Assistant Engineers may be filled up in the manner mentioned in a letter of the Ministry of Work, Housing & Supply, dated 2nd October, 1954, addressed to the U.P.S.C. and the Commission's reply thereto, dated 7th September 1955. The two letters have been filed as Annexure R-1 collectively. By the letter, dated 2nd October, 1954, the Ministry proposed that the following proportions should be fixed for filling vacancies of Assistant Engineers (Civil) and Assistant Engineers (Electrical) in the Central Engineering Service, Class and the C.E.E.S., Class 11 by the different modes of recruitment :

"A Permanent Vacancies : (i) 50 percent by direct recruitment by competitive examination under Part III of the Recruitment Rules for the Class It Services. (ii) 25 per cent by promotion of permanent Section Officers under Part V of the Recruitment Rules (ii) 25 per cent by permanent appointment of temporary Assistant Engineers recruited by competitive examination through the Union Public Service Commission and by transfer under Part VI of the Recruitment Rules. B - Temporary Vacancies : (i) 50 percent by direct recruitment by competitive examination through the union Public Service Commission and by transfer under Part VI of the Recruitment Rules. (ii) 50 percent by departmental promotion from amongst : (a) Permanent Graduate Section Officers. (b) Permanent Non-Graduate Section Officers: and (c) Temporary Graduate Section Officers: in accordance with the ratio which may be fixed by the Departmental Promotion Committee the time of making the selection. Provided that if at any given time, candidates which are : . successful at the Union Public Service Commission competitive examination are not available in sufficient numbers for filling 50 per cent of the temporary vacancies that might be available, the residual vacancies may be filled temporarily by departmental promotion, subject

to the condition that persons so promoted against such vacancies, shall be reverted later, if necessary, to make room for the candidates who may qualify at subsequent examinations to be held by the Commission, as and when they become available. 2. I am to request that the approval of the Commission to the above proposals may be communicated to the Ministry as early as possible."

(17) By their reply, dated 7th September 1995. the U.P.S.C. approved the percentage quota for various modes of recruitment suggested by the Ministry in the letter, dated 2nd October, 1954. Thus. the case of the respondents 1 to 3 is that a determination was made as provided for in Rule 4(c) in the manner set out in the aforesaid letter, dated 2nd October, 1954. It was submitted in paragraph 12 of the counter affidavit of Mr. Kailash Prakash that the appointments of the petitioners were not direct appointments under Part Iv of the. Rules as alleged by them. but were made against temporary vacancies by promotion under B(ii)(c).set out above, whereas the appointments of respondent Nos. 4 to 99 were made by direct recruitment through the U.P.S.C. against vacancies under A(i) and B(i) set out above read with Part Iii of the Rules of Recruitment.

(18) The aforesaid averments in the counter affidavits were controverted in the rejoinder affidavit filed on behalf of the petitioners. In paragraph 7 of the rejoinder it was denied that the two letters (Annexure R-1) were a determination such as is contemplated under Rule 4(c) of the Rules, and that even otherwise the said determination amounted to a discrimination in-as much as no permanent vacancies were earmarked at all for persons like the petitioners, whereas 75 per cent of the permanent vacancies were earmarked for persons recruited under Part Iii of the Rules. Certain other contentions were also raised in the rejoinder, viz.. that in any case Rule 4(c) confers wholly arbitrary, uncanalised, unguided and uncontrolled discretion in the authorities and hence the :-same is liable to be struck down, that the said Rule is void because of excessive delegation, that the Rules do not permit any distinction between permanent vacancies and temporary vacancies and both types of vacancies have to be distributed reasonably amongst the different methods which may be decided to be resorted to at a particular time, and that the alleged determination by the Government in Annexure R-1 amounts to an amendment of the Rules, and since the said amendment was not made by the President and due procedure of publishing the same in the Gazette has not been followed, the same has to be held to be invalid. It was further averred that the petitioners came to know of the said Annexure R-1 for the first time through the counter affidavit of Mr. Kailash Prakash, that the said determination was never acted upon and it was only now, in order to contest the claim of the petitioners, the respondents Nos. 1 to 3 have. by an altered thought, taken shelter under the said determination.

(19) In view of the above averment of the parties, it has to be examined whether there was a determination by the Government such as is contemplated by Rule 4(c) - A", stated above, the Ministry of Works, Housing and Supply proposed the proportions set out in the letter, dated 2nd October. 1954.. for filling vacancies

of Assistant Engineers by the different methods of recruitment. The said proposal was approved by the U.P.S.C. by their letter, dated 7th September, 1955. The petitioners, however, filed an affidavit, dated 30th April, 1971, after inspection of the files produced by the respondents Nos. 1 to 3, in which it was averred that Mr. M. R. Sachdev, the then Secretary to the Ministry of Works, Housing & Supply, as well as Mr. Swaran Singh, the then Minister for Works, Housing Supply, on 23124-9-54, stated categorically that after consultation with the U.P.S.C. and their concurrence the case will have to be shown to the Home Ministry again who wanted to see those papers after the views of the U.P.S.C. have been obtained. It was also averred that the Department, by their letter No. E. 15(3)155, dated 7th November, 1955, had itself proposed as follows :

"SINCE these vacancies have occurred as a result of conversion of posts from "temporary" to "permanent" and since the C.P.W.D. has a large number of officiating Asstt. Engineers who have been promoted from the grade of Section Officer, it is considered that the officiating Assistant Engineers have a prior claim to these posts. Ministry of Home Affairs also share this view."

Relying on the aforesaid averments. Mr. Gopalakrishnan coincided that the C.P.W.D. as well as the Home Ministry had rejected the concurrence of the U.P.S.C... and that there was thus no final determination in terms of the Rules.

(20) Subsequent to the filing of the aforesaid affidavit by the petitioners. Mr. Gopalakrishnan and Mr. Tandoni were given an opportunity to inspect the files asked for by them. The said files were made available and were inspected and copies of extracts were submitted as Annexure R-79-A to R-79-Q and P-3-A to P-3-L. Annexure R-79-A, dated 23 24-9-1954, contains the remarks of the Minister already referred to viz., that after the concurrence of the U.P.S.C. for the proposed determination is obtained the case should be shown to the Home Ministry. The said observation of the Minister means that, according to him, the proposed determination, even after the approval by the U.P.S.C., was not to be treated as final and effective unless and until the Home Ministry also considers the same. The question is whether there was such a consideration by the Home Ministry in the present case. None of the aforesaid Annexures mentions about such consideration by the Home Ministry. Some of the Annexures contain references to the determination of the methods of recruitment contained in the letter, dated 2-10-1954 (Annexure R-1), and it appears from them that the Ministry of Works, Housing and Supply requested the U.P.S.C. on some occasions to relax the quotas prescribed in the aforesaid determination (Annexure R-1). Mr. Tandoni urged that it should be assumed from the said requests of the Ministry that the determination was treated by the said Ministry as final, and that in any case, they show that the determination was acted upon. We are unable to accept the argument. The determination, as proposed by the Ministry of Works, Housing Supply, though approved by the U.P.S.C., was to be considered by the Home Ministry as stated by the Minister. There is nothing on the record to show that the Home Ministry had considered the proposed determination. Annexure R-79-F

contains the minutes of a meeting held in the Ministry of Home Affairs. The said minutes refer to orders issued in 1955 according to which recruitment to the grade of Assistant Engineers in the C.P.W.D. was to be made by modes similar to those mentioned in the proposed determination (Annexure R-I). But, no such orders have been produced by any of the respondents even after an inspection of the files. The learned counsel stated that none of the files produced by respondents Nos. 1 to 3 contained any such orders. In the absence of clear proof that the Home Ministry had considered the matter, the proposed determination has to be taken to have been remained as a proposal. The mere fact that the Ministry of Works, Housing & Supply asked for relaxation of the quotas in the proposed determination on some occasions cannot be a basis for an inference that the proposed determination was considered by the Home Ministry. As the question is whether the proposed determination had become final and effective after consideration by the Home Ministry, the said consideration by the Home Ministry has to be desirably proved, and the same cannot be decided by resorting to inferences. It has, Therefore, to be held that there was no final and effective determination under Rule 4(c) of the Allies.

(21) MI. Gopalakrishnan also contended that the determination amounts to an amendment of the Rules, and referred us to Annexure R.-79-B, an office note of the Ministry. in which it was stated that the determination necessitated .amendment of the Rules. The learned counsel argued that there could be no valid determination except by an amendment of the Rules It is not necessary to go into this argument in the view.-. taken by us that there was not final and effective determination under Rule 4(c). For the same reason, we need not go into . the other contentions raised by the petitioners in their rejoinder-affidavit and urged by Mr. Gopalakrishnan regarding the validity of the determination and the validity of Rule 4(c).

(22) It was averred in the counter-affidavit of Mr. Kailash Prakash that the appointments of the petitioners. were made against temporary vacancies. But, no document has been .produced to substantiate the same. If it, were fact. there must have been some record showing the nature of the vacancies to which the petitioners were appointed. As no such record has been produced, it cannot be assumed that the petitioners were appointed against temporary vacancies.

(23) On the finding that there was ao final and effective determination under Rule 4(c). it follows that the convention of the respondents that the petitioners were appointed in temporary vacancies under clause B(ii)(c) of the alleged determination (Annexure R-I) cannot be accepted, and as contended by the petitioners, the petitioners should be considered to have been appointed under Rule 3(b), read with Part Iv (Rule 23) of the Rules. Tn this connection, the petitioners filed two Annexures (Annexure P-I and P -II) along with their rejoinder to the was petition. The said annexures contain certain questions put in Parliament to the Minister of Health and Family Planning and Works, Housing and Urban Development and the answers given by the Minister to the said question .

A specific question (unstarred question No. t97) was put to the Minister whether (a) it was a fact that under Part V of the Recruitment Rules only permanent Sectional Officers could be promoted and (b) if so, the Rules under which the temporary Sectional Officers were being promoted. It appears that the first part of the question (a) was answered in the affirmative and the second part (b) was answered by saying that temporary Sectional Officers, who are graduates, are selected for appointment to the grade c.f Assistant Engineers under Part Iv of the Recruitment Rule. The conclusion arrived at by us above is thus in accord with the above answer.

(24) The next contention of the petitioners was that. since they were appointed as Temporary Assistant Engineer under Rule 3(b) read with Part Iv (Rule 23) . they were entitled to be considered for confirmation before or along with the respondents who were appointed as Temporary Assistant Engineer subsequent to the appointments of the petitioners. The contention of the respondents on the other hand was that the petitioners were appointed, not under Rule 3(b) read with Part Iv, but under the clause B(ii)(c) of the alleged method of recruitment determined under Rule. 3(c) against temporary vacancies ,and as such they were not entitled to be considered for confirmation against permanent vacancies. But. we have held above that. there was no valid and effective determination under Rule 4(c). and that the petitioners should be considered to have been appointed under Rule 3(b) read with Part Iv (Rule 23). As stated in paragraph 12 of the writ petition, the petitioned and the respondents have the same qualifications. It was admitted in paragraph 12 of the counter-affidavit of Mr. Kailash Prakash that the duties and responsibilities and pay scales, etc. of the holders of the posts of Assistant Engineer recruited by any of the methods were the same. Thus. as averred in paragraph 14 of the-writ petition, the petitioners were in no way interior to the respondents, and on the other hand. the petitioners had an additional advantage in that they, after graduation in. Engineering, had put in a number of years .of service h the C Public Witness D. and thus had considerable experience. It has. Therefore, to be held that the petitioners were as much entitled if not more, as the respondents for being considered for confirmation as Assistant Engineers. The petitioner": who were appointed as temporary Assistant Engineers on various .dates between 18th October, 1958, and 9th January, 1983, have remained as such for more than a decade without even being considered for confirmation, while many of the respondents who were appointed as temporary Assistant Engineers between 12th May, 1961, and 13th December, 1967 and between 2nd November, 1964, and 7th November, 1967, were confirmed a. Assistant Engineers Though they were .appointed subsequent to the appointment of most of the petitioners.

(25) Mr. Brijbans Kishore. learned counsel for respondents Nos. 1 to 3, contended that the orders of appointment of the petitioners show that the petitioners were appointed only to officiate as temporary Assistant Engineers until further orders, and that as Scull they have to be regarded, not as having been appointed under the Rules but as having; been appointed de hors Rules,

and they were. Therefore, not entitled to be confirmed. the learned counsel also laid emphasis on the appointments being only to officiate arid, agreed that officiating appointees are not the same as temporary appointees, and that while the batter are eligible; to be considered for confirmation , the former are not so entitled. As rewards the first part of the Contention, seems to us to he quite plain that when once Rules were framed regarding, recruitment to the Service, the Government could not in exercise, of its executive .power, act outside the Rules or ad hoc basis unless, of course, the Rules themselves provided or the same. Otherwise, the very purpose for which the Rules have been framed would be defeated.

(26) Thus, it. cannot be assumed that the Government appointed the petitioners de hors the Rules. A responsible body like the Government, in the absence of a clear indication to the contrary. cannot be assumed to have. notwithstanding the Rules Framed deliberately acted de hors the Rules. The orders of appointment (vide Annexure "A") did not mention the provision under which they were made. Since it cannot be assumed that the Government acted without power, and there is a provision under which it could make the orders of appointment, the power conferred by that provision has to be linked with the said orders of appointment [(vide P. Balakotaiah Vs. The Union of India (UOI) and Others, . We have already considered this aspect earlier and pointed out that under the Rules the Government could appoint the petitioners only under Rule 3(b) read with Part Iv (Rule 23).

(27) As regards the .second part of the contention of Mr. Brijbans Kishore. it has to be noted that an officiating appointment also is a temporary appointment. Both the words -officiate" and temporary were used in the orders of appointment of the petitioners. In the context, the word "officiate" has, in our opinion, no particular significance, and the petitioners, who have been officiating for the last eleven or twelve years, are just temporary appointees so far as their eligibility turn being considered for confirmation is concerned. We are, Therefore, unable to accept the contention of Mr. Brijbans Kishore

(28) Mr. Brijbans Kishore as well as Mr. Tandon contended also that there was considerable delay in filing the writ petition as some of the respondents were confirmed in 1.967 with effect from earlier dates, and the petitioners filed the writ petition on 16th February, 1970. They referred to the decision in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, , in which the Supreme Court, in dealing with a petition under Article 32 of the Constitution of India, observed in paragraph 10 at page 902 that utmost expedition is the sine qua nun for claims, that the party aggrieved must. move the Court at the earliest possible time and explain satisfactorily all semblance of delay, and that each case will have to be considered on its own: tacts, In the present case, this ground of delay was not raised as such in the counter affidavit of Mr. Kailash Prakash filed on "behalf of respondents Nos. 1 to 3. . It was, however, raised in the counter affidavit of Mr. Durgadas Kama, respondent No. 19. Answering the same. Mr. P.

Gopalan explained in his rejoinder affidavit that the list showing the confirmations of some of the respondents was published on 13th-1967 and the official seniority list was published in 1968, that the petitioners, through their Association, made several representations to the Government for the redress of their grievances, that one of the petitioners, Mr. K. L. Bhillani, made a representation on 14-2-1969 and the respondents communicated their rejection (if the representation only on 27-2-1969, and that the present writ petitioners was filed in February, 1970. On those facts, we are of the opinion that it cannot be said that there was such an inordinate delay in filing the writ petition as to disentitle the petitioners to invoke the jurisdiction of this Court under Article 226 of the Constitution.

(29) For the foregoing reasons, we hold -that the petitioners were appointed as temporary Assistant Engineers under Rule 3(b) read with Part Iv (Rule 23), and were entitled to be considered for confirmation as Assistant Engineers when many of the respondents were confirmed. Since they were not so considered. it would normally follow that the confirmations of the said respondents will have to be set aside, if the vacancies available at the relevant time were less than the eligible persons including the petitioners and the confirmed respondents. We have already pointed out that Mr. Gopalakrishnan stated before us on behalf of the petitioners that they do not question the validity of the appointments of any of the respondents Nos. 4 to 99, but that the petitioners question the validity of the confirmations of those of the respondents who have been confirmed. However, we consider that it is not necessary to set aside the said confirmations for the following reasons. Mr. Gopalakrishnan stated before us that out of the sanctioned number of posts of Assistant Engineers, a large number of posts have remained vacant and they would be more than sufficient to accommodate the petitioners in case they are confirmed." The correctness of this statement was not disputed by the counsel for the respondents. In other words, there are a sufficiently large number of vacant posts for accommodating the petitioners, if they are considered and confirmed. It is thus not necessary. and we are not inclined, to disturb the existing situation by setting aside or quashing the confirmations of those respondents who have been confirmed.

(30) In the result, we allow the writ petition partly and direct the respondents 1 to 3 To consider the petitioners for confirmation as Assistant Engineers, and to adjust the inter se seniority of such of the petitioners as might be confirmed after consideration by the respondents in accordance with law.

(31) In the circumstances of the case, we direct the parties to bear their own costs in the writ petition.