

(2004) 04 SC CK 0018

In the Supreme Court Of India

Case No : Civil Appeal No's. 4907 and 4908 of 1999

M. Subba Reddy and Another

APPELLANT

Vs

A.P. State Road Transport Corporation and Others

K.V.N. Acharyulu and Others Vs A.P. State Road
Transport Corporation

RESPONDENT

Date of Decision : 12-04-2004

Acts Referred:

Andhra Pradesh State Road Transport Corporation Employees (Recruitment)
Regulations, 1966 — Regulation 17, 18, 20, 30, 30(1)
Employees Service Regulations, 1964 — Regulation 3
Road Transport Corporations Act, 1950 — S

Citation : AIR 2004 SC 3517 : (2004) AIRSCW 3374 : (2004) 4 ALD 71 : (2004)
102 FLR 235 : (2004) 1 JT 250 Supp : (2004) 4 SCALE 824 : (2004) 6 SCC 729 :
(2004) SCC(L&S) 887 : (2004) 2 SCR 7 Supp : (2004) 3 SLJ 125 : (2004) 4
Supreme 666 : (2004) 3 UPLBEC 2300

Hon'ble Judges : V. N. Khare, C.J.;S. H. Kapadia, J;S. B. Sinha, J

Bench : Full Bench

Advocate : Rakesh Dwivedi, Abhishek Chaudhary, Vimla Sinha and D. Mahesh
Babu, for the Appellant; G.R.K. Prasad, Wasay Khan and T.V. Ratnam, for the
Respondent

Final Decision : Allowed

Judgement

S.H. Kapadia, J.—The civil appeals herein raise a common point of law i.e. fitment of the promotees in the integrated seniority list. The posts of Assistant Traffic Manager (for short "ATM") and Assistant Mechanical Engineer (for short "AME") are Class-I Junior Scale Officers posts. It is the case of the appellants that for several years, due to ban on recruitment, promotions were made from lower feeder posts even in excess of the ratio of 1:1 under A.P. State Road Transport Corporation Employees (Recruitment) Regulations, 1966 (hereinafter referred to as "the recruitment regulations"). It is the case of the appellants that whenever direct recruitment was not possible within a short period and when administrative exigencies warranted the filling of posts, like the one in the instant case,

promotions were made either on ad hoc or on temporary basis and in course of time they were regularized. M. Subba Reddy, appellant herein, was appointed as a Traffic Apprentice on 10.8.1971 in the Corporation. He was promoted temporarily on 31.1.1983 as ATM vide Office Order dated 10.1.1983 and regularized on 27.12.1986 vide order dated 9.9.1988. He was confirmed on 1.4.1987 as ATM. It is the case of the appellants that while they were senior to direct recruits, who entered the above posts in 1988, 1990 etc., in the impugned integrated seniority list dated 10.11.1994, they have been placed below the direct recruits. The appellants contend that when their promotions were regularized, the direct recruits were not even born on the cadre of ATMs/AMEs and, therefore, there was no reason for placing them below the direct recruits. Per contra, it is the case of direct recruits that the integrated seniority list is in consonance with the quota rule of 1:1 under the statutory rules mentioned supra.

2. Before coming to the arguments advanced on both sides, we notice the relevant provisions of recruitment regulations framed by the corporation u/s 45 of the Road Transport Corporation Act, 1950. For the purposes of deciding this matter, we quote herein below the relevant provisions of the recruitment regulations:-

"3. Appointment and qualifications:

1) Appointment to the posts in the Corporation shall be made -

a) by direct recruitment; or

b) by promotion; or

c) by transfer or deputation of an official already in the service of a Department of the Central or State Government or a State Transport Undertaking.

2) The method of recruitment to each post specified in column 2 of Annexure-A shall be as shown in the corresponding entry in column (3) thereof and the qualifications prescribed for each such post shall be as shown in the corresponding entry in column (4).

3) Notwithstanding anything in Clause (2) the Corporation may at any time, appoint suitable officers of the State or Central Government or any State Transport Undertaking to any of the posts specified in Annexure-A on 'Foreign Service' terms.

4) Where suitable departmental candidates are not available for promotion to any of the posts specified in Annexure-A where the posts are to be filled by promotion only, such posts may be filled by direct recruitment by selection provided that recruitment to all the higher posts from the lower posts shall be made by way of promotion and resort had to direct recruitment only when suitable and qualified persons are not available for promotions.

17). Temporary appointment:

(1) Where it is necessary in administrative interests owing to an emergency which has arisen, to fill immediately a vacancy in a post borne on the cadre of a service and if it is likely that there would be undue delay in making any appointment in accordance with these regulations, the appointing authority may appoint a person temporarily otherwise than in accordance with these regulations, until a person is appointed in accordance with these regulation, provided the post is not one which is reserved to be filled by promotion.

(2) No appointment under clause (1) shall ordinarily be made of a person who does not possess the qualifications, if any, prescribed for the said post. Every person who does not possess such qualifications and who has been or is appointed under this clause shall be replaced as soon as possible by an approved candidate.

(3) Where it is necessary to fill a short vacancy in a post borne on the cadre of a service and the appointment of the person entitled to such appointment under the regulations or orders in force would involve excessive expenditure on travelling allowance or exceptional administrative inconvenience, the appointing authority may appoint any other person who possesses the qualifications, if any, prescribed for the said post.

(4) A person appointed under clause (1) shall, whether or not he possess the qualification prescribed for appointment to the post to which he is appointed, be replaced as soon as possible by an employee or an approved candidate as the case may be, who is qualified to hold the post under the regulations or orders in force.

(5) A person appointed under clause (1) or clause (3) shall not be entitled by reason only of such appointment to any preferential claim to future appointment to such post or category of posts.

(6) Notwithstanding anything in these regulations, if and when a temporary post is created as an addition to the cadre of a service and the holder thereof is required by the corporation to possess any special qualifications, knowledge or experience, any person who possesses such qualifications, knowledge or experience, and is considered to be the best suited to discharge the duties of such post may, irrespective of other considerations, be appointed to that post by the appointing authority but the person so appointed shall not by reason only of such appointment be regarded as a probationer in such service, class, category nor shall be acquired thereby any preferential right to future appointment to such service, class, category or posts.

18). Date of Commencement of probation of persons appointed temporarily:

If a person, having been appointed temporarily under clauses (1), (3) or (6) of regulation 17 to a post borne on the cadre of any service, or having been appointed to any services otherwise than in accordance with the regulations governing appointment thereto is subsequently appointed to the service in

accordance with these regulations, he shall commence his probation from the date of such subsequent appointment or from such earlier date (not being earlier than the date of his first appointment on a temporary basis) as the appointing authority may determine. He shall also be eligible to draw increments in the time scale of pay applicable to him from the date of commencement of his probation but shall not be entitled to arrears of pay unless otherwise ordered by the corporation.

30). Temporary Promotion :

(1)(i) Where it is necessary in the administrative interest to fill emergently a vacancy in a post borne on the cadre of a higher category in a service or class by promotion from lower category and if the filling of such vacancy in accordance with these regulations is likely to result in undue delay, the appointing authority may promote a person temporarily otherwise than in accordance with these regulations.

(ii) No person who does not possess the qualifications, if any, prescribed for the said service, class, or category shall ordinarily be promoted under sub-clause (i). Every person who has been or is promoted under sub-clause (i) shall be replaced as soon as possible by promoting a person possessing such qualifications.

(2) Where it is necessary to fill a short vacancy in a post borne on the cadre of a higher category in a service or a class, by promotion from lower category and the appointment of a person who is eligible for such promotion under these regulation, would involve excessive expenditure on traveling allowance of exceptional administrative inconvenience, the appointing authority may promote any other person possessing the qualifications, if any, prescribed for the post.

(3) A person promoted under sub-clause (i) of clause (1), whether or not he possesses the qualification prescribed for the service, class or category to which he is promoted shall as soon as possible be replaced by a member of the service who is eligible to hold the post under the regulations or orders in force.

(4) A person promoted under clauses (1) or (2) of regulation 30 shall not be regarded as a probationer in the higher category or be entitled by reason only of such promotion to any preferential claim to future promotion to such higher category.

(5) The appointing authority shall have the power to revert to a lower category or post any person promoted under clause (1) or (2) of regulation 30 at any time without assigning any reason and without notice.

(6) If any person referred to in clause (4) is subsequently promoted to the higher category in accordance with these regulations, he shall commence his probation in such category from the date of such subsequent promotion or from such earlier date as the appointing authority may in its discretion determine. He shall also be eligible to draw increments in the time scale of pay applicable to him from the date of commencement of his probation but shall not be entitled to

arrears of pay unless otherwise ordered.

34. If in any of the following categories a sufficient number of approved candidates who have successfully completed their training is not available for filling posts reserved to be filled by direct recruitment such posts may be filled temporarily by departmental promotion until approved candidates who have successfully completed their training become available to replace the promotees and the reverted person shall subsequently be considered for re-promotion against the quota of vacancies reserved for being filled by promotion.

(a) Asstt. Mechanical Engineer and Asstt. Works Manager.

(b) Asst. Traffic Manager

(c) Chargeman

(d) Traffic Inspector Grade II and Head Depot Clerk.

(e) Artisans.

Item-3 of Annexure 'A' (Section-B) Class-I Jr. Scale Service :

"3. Assistant Traffic Manager. -- In a unit of four:-

1) The first and third vacancy shall be filled in by appointing of an officer under training, who has successfully completed his training and the second and fourth by promotion of a Chief Inspector.

2) If a suitable candidate is not available in a particular category for filling up a vacancy reserved for that category, the vacancy may be filled in by a suitable candidate from the other categories.

3) If no suitable candidate is available in any of the categories mentioned above, the post may be filled in by direct recruitment by selection.

Qualifications:

1) For Promotion:

The Chief Inspector must have put in not less than 5 years of service as such.

For Direct Recruitment: The Candidate -

a) must hold a degree in Mechanical Engineering from a recognised University or have passed sections 'A' & 'B' of the Associate Membership Examination of the Institution of Engineers (India) or hold a diploma or a certificate recognized by the Institution of Engineers (India) as exempting him from Section 'A' & 'B' of their Associate Membership Examination.

b) must have had experience for not less then four years as Traffic Executive in large size passenger road transport organization exclusive of the period of training, if any, preference will be given to a candidate who is a graduate member of the Indian Institution of Road Transport or any other recognised

Institution of Transport; and

c) must not be above 30 years of age as on 1st July of the year in which the recruitment is made."

3. We also quote herein below regulation 3 of Employees Service Regulations, 1964 (hereinafter referred to as "the service regulations"):-

"3. Seniority:

(a) The "Seniority" of a person in service, class, category or grade shall unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such service, class, category or grade. If any portion of the service of such person does not count towards probation his seniority shall be determined by the date of commencement of his service which counts towards probation.

(b) The appointing authority may, at the time of passing an order appointing two or more persons simultaneously to a service fix the order of preference among them; and where such order has been fixed seniority shall be determined in accordance with it.

(c) The transfer of a person from one category or grade of a service to another category or grade carrying the same pay or scale of pay shall not be treated as a first appointment to the latter for purposes of seniority and the seniority of a person so transferred shall be determined with reference to the date of his first appointment to the category or grade from which he was transferred. Where any difficulty or doubt arises in applying this regulation, seniority shall be determined by the appointing authority.

(d) Where a member of any service, class, category or grade, is reduced to a lower service class, category or grade, he shall be placed at the top of the latter unless the authority ordering such reduction directs that he shall take rank in such lower service, class, category or grade next below any specified member thereof."

4. A bare reading of the above regulations indicate that under service regulation 3, the seniority is reckonable from the date of appointment to a service or a grade. On the other hand, regulation 3 of the recruitment regulations deals with the method and manner in which the appointments shall be made to various posts. It states that appointments can be made by direct recruitment, promotions and transfer. The method of recruitment to each post is specified in column 2 of Appendix- A to the recruitment regulations as shown in the corresponding column 3. Therefore, one has to read regulation 3 of the recruitment regulations with Appendix-A in order to ascertain the method of recruitment to each post. Item 3 quoted above relates to method of recruitment to the post of Assistant Traffic Manager (ATM). Under item-3 (1), it is stipulated that in a unit of four vacancies, the first and third vacancies shall be filled by direct recruits whereas the second and fourth vacancies shall be filled by

promotees. It further provides that if a suitable candidate is not available in a particular category for filling up a vacancy reserved for that category, the vacancy may be filled in by a suitable candidate from the other category. Regulation 17 of the recruitment regulations deal with temporary appointments, the sole criteria being undue delay in making of regular appointments. Regulation 18 specifies that if a person appointed to a temporary post under regulation 17 is subsequently appointed to the service in accordance with the regulations, his probation shall commence only from the date of such subsequent appointment in accordance with the regulations. Regulation 17 deals with power to make temporary appointments whereas regulation 30 deals with the power to make temporary promotions. Regulation 30(1) stipulates that the appointing authority may promote a person temporarily, otherwise than in accordance with the regulations, in cases where administrative exigency requires the appointing authority to immediately fill in a vacancy in the cadre of a higher category. Regulation 30(3) specifies further that the temporary promotee covered by regulation 30(1) shall as soon as possible be replaced by a member of the service eligible to hold the post under the regulations. Regulation 30(4) stipulates that the temporary promotee shall not be regarded as the probationer in the higher category, neither shall he have any preferential claim to future promotion in the higher category. Regulation 30(6) states that if a temporary promotee is subsequently promoted to the higher category in accordance with the regulations, his probation shall commence in the higher category only from the date of subsequent promotion in the higher category and he shall not be entitled to any benefits for the period when he was a temporary promotee. Regulation 34 applies to posts reserved only to be filled by direct recruits. Reading item 3 of Appendix-A (Section-B) with regulation 34, it is clear that filling up of the posts reserved for direct recruits by departmental promotees has to be on temporary basis under regulation 30 and as soon as eligible candidates from direct recruits quota become available, they are to replace the temporarily promotees.

5. Regulation 3 of the Service Regulations inter alia states that seniority shall be determined by the date of first appointment to such service, class, category or grade. In the present case, regulation 3 of the service regulations has been pressed into service by the appellants, who have urged that their seniority shall be determined on the basis of the date of appointment. However, one has to read regulation 3 of the service regulations with regulations 30 and 34 of the recruitment regulations. In the present case, the appellants - promotees were promoted to the posts of ATMs/AMEs temporarily under regulation 30 as there were no direct recruits available. They were promoted subject to being reverted to substantive posts on approved candidates becoming available. Regulation 34(6) states that the reverted shall subsequently be considered for re-promotion against the quota of vacancies reserved for promotees. Therefore, in the present case, one has to read regulation 3 of the service regulations with regulations 30 and 34 of the recruitment regulations. It is only when such reverted are re-

promoted as per regulation 34, they can be deemed to have been appointed to the post of ATM or AME. Therefore, when the appellants were tentatively appointed to the post of ATMs/AMEs originally for want of direct recruits and to the posts reserved for direct recruits, it cannot be said that they were first appointed to that category within the meaning of regulation 3 of the service regulations. Therefore, in so far as posts reserved for direct recruits are concerned, the temporary promotions cannot be said to be first appointments to that category. It follows that seniority had to be fixed between the direct recruits and the promotees strictly in accordance with the quota provided for in Item - 3 of Appendix-A (Section-B).

6. Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the appellants submitted that the appellants had a right to be promoted within their quota during the years 1981 to 1987, when vacancies for promotees quota became available. During this period, no direct recruits were available. Direct recruits became available in July 1988, November, 1990 and June, 1992. Appellant M. Subba Reddy was regularized from 27.12.1986 vide order dated 9.9.1998, when no direct recruits were available and, therefore, it was improper for corporation to place direct recruits above the promotees. It is the case of the appellants that the direct recruits cannot claim appointments from the date of the vacancy in their quota before their selection. It has been contended that Item-3 of Appendix-A (Section-B) prescribes the method of recruitment in the manner in which vacancy is allocated. According to the learned counsel it does not involve rota for the purposes of seniority. It prescribes only quota, therefore, rota cannot be implied. It was urged that seniority is dealt with only by regulation 3 of the service regulations, 1964 and not by regulation 34 of the recruitment regulations, 1966. Reliance was placed in this connection on regulation 34 as amended on 15.9.1995. It was submitted that in view of the said amendments, Appendix-A refers to only allocation of vacancy and not for determination of seniority. It was to be determined only by regulation 3 of the service regulations. The non-availability of candidates in a particular category, it was urged, may be on account of ban on recruitment or on any other ground. Therefore, in the present case, where promotees were regularized in the promotion quota when direct recruits were not available, the quota in item-3(1) of Appendix-A will not apply. It was submitted that in any event, allocation of vacancy under the said clause was not rigid and it cannot be a basis for denying seniority to the promotees from the date of regularization. Reliance was place on the judgment of this Court in the case of *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, .

7. We do not find any merit in the above arguments. Appellants have not challenged the validity of the above regulations. As stated above, it has been contended before us on behalf of the appellants that item-3(1) of Appendix-A (Section-B) prescribes method of recruitment and the manner in which vacancy is to be allocated, which does not involve rotation for the purposes of seniority; that item-3(1) of Appendix-A (Section-B) prescribes only quota and rota cannot

be implied. However, the appellants before the High Court unequivocally submitted that under the above regulations, promotions and direct recruitments were required to be made in the ratio of 1:1 and that the said regulations provided for a cycle in which vacancies were to be rotated. [See: Affidavit of M. Subba Reddy dated 28.12.1994]. In the said affidavit, it is further submitted that in the absence of direct recruits, the slots reserved for direct recruits were liable to be adjusted with the promotees immediately and subsequently arrived direct recruits should be given their positions in the seniority list subsequently in a bunch. In our view, the averments of the appellants before the High Court, if accepted, would result in complete violation of the quota and rota rule embodied in the above regulations, which cannot be permitted. As stated above, appellants were promoted originally subject to the conditions envisaged in regulation 34 and, therefore, they cannot claim seniority by ignoring the said regulations and on the basis of their officiating services. They were promoted temporarily under regulation 30 which provides for ad hoc promotions. Regulation 34 ensures induction of qualified direct recruits. But for regulation 34, candidates from feeder posts would be temporarily promoted to the slots reserved for direct recruits and on their regularization, the quota prescribed for direct recruits will be defeated. Regulation 34 has been enacted to protect quota prescribed for direct recruits. As stated above, regulation 3 of the service regulations has to be read with regulations 30 and 34 of the said recruitment regulations. The appellants were promoted on temporary basis under regulation 30 with the clear understanding that the period of officiation will not give them any right over direct recruits in future. It is for this reason that regulation 30 (6) states that if a temporarily promotee is subsequently promoted in accordance with the regulations, his probation will commence in the higher category only from the date of subsequent promotions. For the same reason, regulation 34 states that reverted shall be subsequently considered for re-promotion against the quota of vacancies reserved for being filled by promotion. Therefore, regulation 34 protects the quota prescribed for direct recruits. On reading regulation 3 of the service regulations with regulations 30 and 34 of the recruitment regulations, it becomes clear that neither the date of promotion nor the date of selection is the criteria for fixation of seniority. The fixation of seniority under the above regulations depends upon the number of vacancies falling in a particular category. Therefore, the rule of rota is inbuilt in the quota prescribed for direct recruits and for promotees in terms of item-3 of Appendix-A (Section-B) to the recruitment regulations. In the present case, the above regulations prescribe a quota of 1:1, which leads to rota for confirmation. The fixation of seniority under the above regulations depends upon the number of vacancies against which promotees became due for promotion. In the case of Devendra Prasad Sharma Vs. State of Mizoram and others, , rule 25(iii) stated that the relative seniority of direct recruits and of promotees shall be determined according to rotation of vacancies between direct recruits and promotees based on the quotas of vacancies reserved for direct recruitment and promotion. Rule 25(iii) is similar to Item-3 (1) of Appendix-A (Section-B). It was held by this Court that in cases

where there is rotation of vacancies between direct recruits and promotees based on quota of vacancies, the rotation has to be considered in accordance with the vacancies as and when they accrue under the rules. Therefore, the quota rule needs to be strictly adhered to, if not, it would lead to absurdity. If the contention of the appellants is accepted, it would mean that the entire group of direct recruits will have to be placed below the entire group of promotees. We are of the opinion that having fixed the quota between the two sources of recruitment, there is no discretion with the corporation to alter the quota or to deviate from the quota. In the circumstances, there is no merit in the argument of the appellants that item-3(1) of Appendix-A (Section-B) prescribes only quota and not rota and that the said item was not for determination of seniority. In the case of *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, , this Court held that having fixed the quota between two sources of recruitment, it is not open to the government to alter the quota or to deviate from the quota. In the case of *Union of India and others etc. Vs. S.D. Gupta and others*, . reported in *Union of India and others etc. Vs. S.D. Gupta and others*, , the respondents were promotees - Extra Assistant Directors (Class-III) in Central Water Commission Engineering Class-I Service. The recruitment rules were made w.e.f. 15.10.1965. In the earlier litigation, the tribunal found that one Shri V.P. Misra, Extra Assistant Director was promoted on ad hoc basis on 31.3.1978 and he was required to be confirmed with effect from the date on which vacancy was available to him in the quota of promotees. The vacancy had admittedly arisen in the quota of promotees on 3.5.1979. Shri V.P. Misra was fitted in that vacancy. While doing so, the department applied principle of rota and quota and determined the inter-se seniority of promotees and direct recruits. Consequently, the promotees were pushed down in the order of seniority which led to second round of litigation. The question which arose for determination before this Court was whether fitment of seniority determined by the department was in accordance with the rules. The Court found that 60% of the vacancies were to be filled by direct recruits and 40% by promotees. Among the 40% quota, there was a further demarcation in the ratio of 25% and 15% between promotees and transferees. Admittedly, the promotees were entitled to their fitment within 25% quota. Vacancies for the promotees had arisen on 3.5.1979 and, therefore, V.P. Misra was entitled to that vacancy which arose on that date. However, as stated above, in the integrated list, the promotees were pushed down. It was contended on behalf of the promotees that the direct recruits were not born in the service when the promotees were promoted and equity requires that the promotees cannot be pushed down. This Court rejected the said argument by observing that the object of direct recruitment is to blend talent and experience. So long as the system continues, consequences were inevitable. Although, the direct recruits were recruited later, their fitment in the order of seniority had to be determined with reference to rota and quota prescribed under the rules. In such a case, there was no illegality even when promotees were pushed downwards in the order of seniority. In our view, the judgment of this Court in the case of *S.D. Gupta's case (supra)* squarely applies to the facts of the present case.

8. Appellants have relied upon the judgment of this Court in the case of The Direct Recruit Class-II Engineering Officers' Association's case (supra). In that matter, an unusual situation had developed under which the rota and quota system had broken down. The promotees had worked for twenty years without being reverted and in view of that fact, the Constitution Bench of this Court confirmed the principles of counting towards seniority, the period of continuous officiation. The said judgment has no application to the facts of this case. In the present case, the argument of the appellants is that on the date when the appellants were regularized, there were no direct recruits available and consequently they cannot be pushed down in the integrated seniority list. Hence, the judgment of this Court in the case of The Direct Recruit Class-II Engineering Officers' Association (supra) has no application to the present case. In fact, in the later judgment of this Court in the case of State of W.B. and Others Vs. Aghore Nath Dey and Others, , it has been held, relying on the judgment in the case of The Direct Recruit Class-II Engineering Officers' Association (supra), that seniority has to be counted from the date of initial appointment and not from the date of confirmation provided the initial appointment is according to the rules. But the corollary to the above proposition is that where initial appointment is only ad hoc and not according to rules, the officiation cannot be taken into account for considering the seniority. The ratio of the judgment of this Court in the case of Aghore Nath Dey (supra) is that the benefit of ad hoc or temporary service is not admissible, if appointment was outside the rules. Applying the ratio of the said judgment to the facts of this case, the benefit of temporary promotion to the appellants under regulation 30 was not admissible to them for computation of seniority.

9. It was, however, urged on behalf of the appellants that the position changed when vacancies became available in the promotion quota and the appellants came to be regularized vide order dated 9.9.1988. By the said order, according to the appellants, regularization took place with retrospective effect from the dates indicated against their names and against the post earmarked for promotion and consequently in the integrated seniority list, they were not liable to be pushed down below direct recruits. We do not find any merit in this argument. Under regulation 30 read with regulation 34, temporary promotees were liable to be reverted as and when approved direct recruits became available. The promotees were liable to be replaced by direct recruits. Under regulation 34, the said reverted were to be considered for re-promotion only against the quota of vacancies reserved for promotees. This is clear from the terms of the order dated 9.9.1988. In the case of U. P. Secretariat U.D.A. Association v. State of U. P., 1999 (1) SCC 278 , it has been held that a direct recruit is to be treated as in service from the date he joins it, whereas the promotee has to be fitted into service from the date when he becomes entitled to fitment in accordance with the quota and rota rule prescribed under the rules. In the case of A.N. Sehgal and others Vs. Raje Ram Sheoram and others, , one of the arguments advanced on behalf of the promotees was that they were

promoted as Executive Engineers against regular vacancies and they continued in service without break from the respective dates of their promotion, therefore, they were members of the service in substantive capacity from respective dates of promotion. It was argued that the direct recruit Shri Raje Ram was recruited long after the promotion of the appellants (promotees) and, therefore, the promotees cannot be pushed down and placed below the direct recruit. On examination of the rules, this Court found that recruitment to the service was from three sources, namely, direct recruitment, promotion and by transfer. A ratio was prescribed under rule 5(2) between the promotees and direct recruits. The ratio was 1:1. It was held that rule 5(2) had restricted the number of posts to promotees at 50%. Under the proviso to rule 5(2), it was laid down that the rigour of 50% quota may be relaxed in cases where direct recruits were not available. On reading rule 5, it was held by this Court that a promotee within his quota under rule 5 got his seniority from the date when the vacancy arose in his quota. It was held that the promotee occupying the post within 50% quota of the direct recruit acquired no right to the post and should yield to direct recruit though promoted later to him. It was held that the seniority of the promotee has to be reckoned only from the date of availability of the post and, therefore, he has to be placed below his immediate senior promotee within the said quota. The officiating period of the promotee between the date of initial promotion and the date of availability of vacancy would stand excluded. A direct recruit on promotion within his quota, though later to the promotee is interposed in between the periods and interjects the promotee's seniority; he snaps the links in the chain of continuity and steals a march over the promotee. It has been further held that the rule of quota is a statutory rule and must be strictly implemented. The result of pushing down the promotees may work hardship but it is unavoidable as it would nullify otherwise the statutory rules. In the case of U.P. Secretariat U.D.A. Association (*supra*), it has been held by this Court that mere inaction on the part of the government cannot be made ground to contend that the quota rule has broken down. In the present case, in the absence of direct recruitment, the appellants could not have got seniority over direct recruits. Where there is inaction on the part of the Government or employer or imposed ban on direct recruitment in filling up the posts meant for direct recruits, it cannot be held that the quota has broken down.

10. Before concluding, it may be pointed out that in the present case, the impugned seniority list is dated 10.11.1994 whereas regulation 34 has been amended w.e.f. 15.9.1995. Therefore, reliance placed on the amended regulation 34 by the appellants is incorrect.

11. For the aforesaid reasons, we do not find any merit in the above civil appeals and the same are dismissed accordingly, with no order as to costs.

S.B.Sinha, J.

INTRODUCTION:

12. The usual vexed question as regard determination of inter se seniority between the direct recruit and the promotees once again falls for consideration in this appeal which arises out of a judgment and order dated 3.2.1999 passed by a Division Bench of the Andhra Pradesh High Court in Writ Appeal No.70/1990.

FACTUAL MATRIX:

13. The appellants herein were granted temporary promotion in terms of Regulation 30 & 34 on or about 18.1.1993 on purely temporary basis and against the vacancies reserved for direct recruitment subject to appointment. The petitioner was promoted as Assistant Traffic Manager. On 31.1.1983 when vacancy arose in the promotee quota, his services were regularised after placing him on probation with effect from 27.12.1986. Thereafter he was confirmed on 1.4.1987. The respondents-direct recruits were borne into the services of the Corporation on 9.11.1990 on being recruited as officer under Training (General). The next batch of direct recruits came into the service of the Corporation on 4.3.1991.

14. The Office Order dated 9.9.1988 reads as follows:-

"The VC & MD has now accorded sanction for regularisation of the officers in the cadres of ATM/AME as the case may be with probation rights with retrospective effect from the dates indicated against them, against the posts earmarked for promotion. The VC & MD has also accorded sanction for declaration of the period of probation of these officers from the dates shown against their names."

15. A perusal of this order clearly shows that the promotion of the appellant was regularised with probation rights with retrospective effect from the dates specified therein. It categorically states that such regularisation was against the post earmarked for promotion. It does not say that the seniority of the promotees would be fixed after the direct recruitment is made. The direct recruits were appointed on or about 9.11.1990. It is also not in dispute and as would appear from the counter affidavit filed by the first respondent herein before the High Court that there had been a ban on direct recruitment from 1977 upto 1988. In the meanwhile on 13.5.1994, the appellants were promoted to the Class I Senior Scales as Divisional Managers. A provisional seniority which was prepared on 22.8.1994 was finalised on 10.11.1994 where against some representations were made. A writ petition filed there against was dismissed. A writ appeal preferred by the appellant was also dismissed.

Statutory Provision:

16. The first respondent is a statutory corporation constituted under the Road Transport Corporation Act, 1950. It framed rules in exercise of its power conferred u/s 45 thereof. Rule 3 of the Recruitment Rules provides for appointment to the post of Assistant Traffic Manager by three modes; (i) by direct recruitment (ii) by promotion and (iii) by transfer or deputation. The method of recruitment to each post specified in column 2 of Annexure 'A' is to be

as shown in the corresponding entry in column 3. Sub-rule 4 of Rule 3 of Recruitment Regulation reads thus:-

"3. Appointment and qualification:

(4) Where suitable departmental candidates are not available for promotion to any of the posts specified in Annexure-A where the posts are to be filled by promotion only, such posts may be filled by direct recruitment by selection provided that recruitment to all the higher posts from the lower posts shall be made by way of promotion and resort had to direct recruitment only when suitable and qualified persons are not available for promotion."

17. Regulation 17 provides for temporary appointment. A temporary appointment de'hors the rules is permissible only in administrative interest owing to emergency, provided, however, the post is not one which is reserved for promotion. Such an appointee may be replaced by an approved candidate who is qualified to hold the post under the regulations. Regulation 18 reads as under:-

"18. Date of Commencement of probation of persons appointed temporarily:

If a person, having been appointed temporarily under clauses (1), (3), or (6) of regulation 17 to a post borne on the cadre of any service, or having been appointed to any services otherwise than in accordance with the regulations governing appointment thereto is subsequently appointed to the service in accordance with these regulations, he shall commence his probation from the date of such subsequent appointment or from such earlier date (not being earlier than the date of his first appointment on a temporary basis) as the appointing authority may determine. He shall also be eligible to draw increments in the time scale of pay applicable to him from the date of commencement of his probation but shall not be entitled to arrears of pay unless otherwise ordered by the corporation."

18. Regulation 30 provides for temporary promotion, clause 6 whereof reads thus:-

"(6) If any person referred to in clause (4) is subsequently promoted to the higher category in accordance with these regulations, he shall commence his probation in such category from the date of such subsequent promotion or from such earlier date as the appointing authority may in its discretion determine. He shall also be eligible to draw increments in the time scale of pay applicable to him from the date of commencement of his probation but shall not be entitled to arrears of pay unless otherwise ordered."

Regulation 34 reads as under:

"If in any of the following categories a sufficient number of approved candidates who have successfully completed their training is not available for filling posts reserved to be filled by direct recruitment such posts may be filled temporarily by departmental promotion until approved candidates who have successfully

completed their training become available to replace the promotees and the reverted person shall subsequently be considered for re-promotion against the quota of vacancies reserved for being filled by promotion.

(a) Asstt. Mechanical Engineer and Asstt. Works Manager.

(b) Asstt. Traffic manager

(c) Chargeman

(d) Traffic Inspector Grade II and Head Depot Clerk.

(e) Artisans."

19. In terms of item No.3 of Annexure 'A' (Section-B) Class-I, Junior Scale Service, as appended to the said regulation, so far as the post of Assistant Traffic Manager is concerned; in a unit of 4 the first and third vacancy are to be filled in by appointment of an officer under training who has successfully completed his training and the second and the fourth by promotion of a Chief Inspector. If, however, a suitable candidate is not available, the vacancy can be filled up by a suitable candidate from other categories.

20. Regulation 3 providing for seniority reads as under:-

"Seniority

(a) The "Seniority" of a person in service class, category or grade shall unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such service, class category or grade. If any portion of the service of such person does not count towards probation his seniority shall be determined by the date of commencement of his service which counts towards probation.

21. Interpretation of the Regulations is required to be considered having regard to the factual backdrop as noticed hereinbefore.

High Court Judgment:

22. The learned Single Judge sought to make a distinction between those who had been promoted prior to 1981 and those who were promoted subsequent thereto. The learned Single Judge of the High Court, however, applying the quota-rota rule held that direct recruits were rightly treated as senior to the promotees. The Division Bench of the high Court also proceeded on the basis that vires of the regulations being not in question, the question of placement of the promotee candidates in the event of non-availability of direct recruit candidate did not arise and in that view of the matter the contention that the promotee candidate would rank senior to the direct recruits must be repelled.

Findings:

23. The High Court unfortunately did not enter into the question as regard

application and interpretation of the Regulations. It is neither in doubt nor in dispute that any ad hoc or any temporary appointment or temporary promotion de hors the rules or against the quota meant to be filled up by direct recruitment shall be of no avail for any purpose whatsoever as consequent upon the appointment of the direct recruits such promotees are liable to be reverted. However Regulation 18 which provides for date of commencement of probation either by way of direct recruitment or by way of promotion, clearly states that the date of probation may in the event of his subsequent appointment (which would include promotion) may commence from the date of subsequent appointment or from such earlier date, as the case may be. Appellants herein were temporarily promoted to the post of Traffic Managers initially in the year 1983. By an office order dated 9.9.1988, their promotion was regularized with retrospective effect from 27.12.1986. Their services were so regularized having regard to the vacancies which occurred in the posts earmarked for promotion.

24. It is furthermore not in dispute that total ban for direct recruitment was imposed from the year 1977 to 1988 and, thus, the purported quota and the rota rule contained in clause 3 of Annexure 'A' could not have been given effect to. In a situation of this nature I am of the opinion that the said quota rule become inoperative.

25. A similar question come up for consideration before a Constitution Bench of this Court in The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, wherein this court observed:

"Mr. Tarkunde is right when he says that in such a situation the rule should be appropriately amended, so that the scope for unnecessary controversy is eliminated. But, merely for the reason that this step is not taken promptly, the quota rule, the performance of which has been rendered impossible, cannot be treated to continue as operative and binding. The unavoidable situation brings about its natural demise, and there is no meaning in pretending that it is still vibrant with life. In such a situation if appointments from one source are made in excess of the quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are inducted in the Service subsequently. The later appointees may have been young students still prosecuting their studies when the appointments from the other source take place - and it is claimed on behalf of the respondents that this is the position with respect to many of the direct recruits in the present case - and, it will be highly inequitable and arbitrary to treat them as senior. Further, in cases where the rules themselves permit the government to relax the provisions fixing the ratio, the position for the appointees is still better; and a mere deviation therefrom would raise a presumption in favour of the exercise of the power of relaxation. There would be still a third consideration relevant in this context : namely, what is the conclusion to be drawn from deliberate continuous refusal to follow an executive instruction fixing the quota. The inference would be that the executive instruction has

ceased to remain operative. In all these cases, the matter would however be subject to the scrutiny of the court on the ground of mala fide exercise of power. All the three circumstances mentioned above which are capable of neutralising the rigours of the quota rule are present in the cases before us, and the principle of seniority being dependent on continuous officiation cannot be held to have been defeated by reason of the ratio fixed by the 1960 Rules."

26. The Constitution Bench summing up its decisions, inter alia, held:-

"If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the ends of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative. "

27. The said decision of the Constitution Bench in Direct Recruitment Class II Engineering Officers' Association (supra) was followed by this Court in Excise Commissioner, Karnataka and another Vs. V. Sreekanta, .

28. Another aspect of the matter may not also be lost sight of. The appellants herein were promoted in a regular manner having been regularized in services with retrospective effect. Their services were not regularized from the date of their initial ad hoc promotion but with effect from the date when the vacancies became available. Their services after regularization would not be by way of a stopgap arrangement. In Santosh Kumar Vs. State of Andhra Pradesh and Others, this court has laid down the law in the following terms:-

"...The respondent was admittedly promoted on temporary basis as OSSI prior to the recruitment of the appellant. Once his services were regularised that too in the promotee quota, the appellant being direct recruit cannot make any grievance. In this view it cannot be said that the appellant was an affected person for want of notice before passing the order of relaxation to question the seniority of the respondent."

29. The direct recruits who were appointed in the years 1990 and 1991, in terms of clause 3 of Annexure 'A' would be considered to have been appointed only after their successful completion of training. They were borne in the cadre in the years 1990-1991 and, thus, prior thereto they cannot claim seniority.

30. The consequence of imposing the quota-rota rule would become evident if the seniority list of 10.12.1994 is closely scrutinised. Item No.20 thereof refers

to a promotee Shri U. Brahma Chari. He was temporarily promoted on 21.5.1981 and his services were regularized with effect from 9.7.1981. The direct recruits whose services have been regularized in March, 1991 and October, 1991 would have been senior to him. As noticed hereinbefore those who have been appointed in 1991 would also be senior to the appellant No.1 whose promotion admittedly was regularized with effect from 27.12.1986.

31. It is trite that a direct recruit is considered to be borne in the cadre from the date of his recruitment. This aspect of the matter has been considered by a Division Bench of this Court in Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, wherein almost all the decisions operating in the field including State of W.B. and Others Vs. Aghore Nath Dey and Others, and AIR 1977 251 (SC) were noticed.

32. This court formulated the following points for consideration:-

"(1) Whether the quota rule had broken down ? Whether excess promotees are to be pushed down ? Whether there is a quota-rota rule ?

(2) Whether the ad hoc/stopgap promotion of Assistant Engineers (and Assistant Executive Engineers) could be made beyond six months and till regularisation, by the Government without consulting the Public Service Commission ? Whether the Government could have regularised the ad hoc service by executive order dated 2-1-1998 ? Whether the point raised in para IX of the written submissions by the direct recruits that retrospective regularisation cannot be made in respect of the ad hoc/stopgap service and could be made only if the initial appointment as Assistant Engineers or Assistant Executive Engineers was "in accordance with rules", is correct ?

(3) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter ?"

33. As regards the quota rule, the Court referring to the dicta of the Constitution Bench in Direct Recruitment Class II Engineering Officers' Association (supra) held that quota rule as far as possible should be followed.

34. Ban on direct recruitment was an outcome of a policy decision of the corporation. The legality of the said policy decision on the part of the corporation was not questioned by the direct recruits on the ground of mala fide or otherwise. A suitable candidate was, thus, not available in terms of the extant regulations, which should receive a broad interpretation. When in terms of a policy decision, no appointment can be made, the question of finding out a suitable candidate would not arise. Having regard to the policy decision of the corporation the question of considering the candidature of any person for direct recruitment at the relevant time, thus, did not arise. The said policy decision evidently had presumably been taken keeping in view the financial health of the

corporation. It is well settled that only because certain vacancies existed, the employer cannot be forced to employ persons against their will. If the ban order was not questioned and the same had been followed over a period of more than 10 years, an inference has to be raised that the quota rule had broken down.

35. The following observations of this Court in Suraj Prakash Gupta (supra) are furthermore worth noticing: "We shall next refer to the contention for the direct recruits that "rota-quota" rule is to be applied. Before us, it is not disputed by the learned counsel for the direct recruits that in the Recruitment Rules, 1978, there is only a quota rule and that no rota rule has been expressly prescribed."

36. It categorically held that the principles of "rota" cannot be employed to the quota rule and the same can break down because of past practice. Even this aspect of the matter has not been considered by the High Court.

37. As regard point No.3 the Division Bench in Suraj Prakash (supra) took into consideration a large number of earlier decisions of this Court and held that services of ad hoc/stop gap service of promotees can be regularized. The court noticing the decisions relating to the employees governed by the service regulations framed by the State of Andhra Pradesh (which are in pari materia with the rules in question) in no uncertain terms held that services of an employee can be regularized with retrospective effect. This court while arriving at the said conclusion also relied upon a large number of decisions arising from other states which also support the legal principle that the regularization of the promotees with retrospective effect is permissible in law. It was categorically held:-

"Service of the promotees which is regularized with retrospective effect from the date of vacancies within the quota counts for seniority."

38. This court in no uncertain terms repelled the contention that if promotees occupied the quota belonging to the direct recruits they had to be pushed down whenever direct recruitment was made, stating:-

"This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service."

39. The direct recruits of 1990 and 1991 by reason of the impugned seniority list could not, thus, have been placed over and above the appellants.

40. Furthermore, in a case of this nature this court shall not consider the matter relating to allocation of vacancy in term clause (1) of Appendix 'A' as a rigid formula; in terms whereof even the promotees would be denied seniority from the date of regularisation. The regulation governing the field clearly suggest that in a case of this nature the promotees should be held to be senior to the direct recruits. Regulation 3 clearly states that respective dates of first appointment in service shall be the determinative factor. If the rules governing appointment

contained in Appendix 'A' could not be given effect to for good and valid reasons, the quota rule, if any, must be held to have broken down. In any event as Regulation 18 permits regularisation of promotion with retrospective effect; in absence of any challenge to the office order dated 31.1.1988, the court must give effect thereto in terms whereof the appellants were placed on probation with effect from 21.07.1986 which must be considered to be the crucial date for determining the seniority. The regulations in my opinion should be read in a manner so that a meaningful effect thereto can be given.

41. In Rudra Kumar Sain and Others Vs. Union of India and Others, a Constitution Bench Of this Court while considering the relevant provisions of Delhi Higher Judicial Services Rules held that the concept of 'cadre' is larger than the 'service' under the recruitment rules. While following the earlier decision of this Court in O.P. Singla and Another Vs. Union of India (UOI) and Others, it was observed:

"We are also unable to accept the contention of Mr. Subramaniam that until the principle of "quota" provided in Rule 8 is made applicable to appointments under Rules 16 and 17, such appointees, under Rules 16 and 17 cannot claim continuous length of service for their seniority. Such a contention appears to have been considered and negatived in O.P. Singla and Another Vs. Union of India (UOI) and Others, . The judgment of this Court in O.P. Singla and Another Vs. Union of India (UOI) and Others, is obviously intended to evolve some equitable principle for determination of inter se seniority of a group of officers, when the Rule of seniority contained in Rule 8(2) has been held to be not operative because of breaking down of "quota and rota" Rule. To meet the peculiar situation, the Court evolved the principle that continuous length of service should be the criteria for inter se seniority between the direct recruits and the promotees, provided, the promotees did possess the required qualification as per Rule 7 and the appointments had been made under Rules 16 and 17, after due consultation and/or approval of the High Court, which in our view also is the most appropriate basis, evolved in the fact-situation. This being the position, we see no justification for reconsidering the decision of this Court in O.P. Singla and Another Vs. Union of India (UOI) and Others, . That apart, the Recruitment Rules have been amended in the year 1987 and the aforesaid principle, which had been evolved in O.P. Singla and Another Vs. Union of India (UOI) and Others, would apply for determining the inter se seniority between the promotees and direct recruits, all of whom had been appointed to the Higher Judicial Service, prior to the amendment of the Rules in question, which was made in the year 1987."

42. The court further held that if a strict construction to the different provisions of the rules is given then all the temporary appointees under Rule 16 who might have rendered 5 to 10 years of service would be denied of their right for the purpose of seniority observing:

"It is this impasse created on account of inaction of the authorities and on

account of non-adherence to the provisions of the Rules strictly, which persuaded the Court in *O.P. Singla and Another Vs. Union of India (UOI) and Others*, to evolve the principles for working out equities and that principle has to be followed by the High Court in drawing up the seniority list."

43. Furthermore when two interpretations are possible; the one which promotes justice and equity should be preferred. Although hardship cannot not be a ground for striking down a law but when two views are possible, it is permissible in law that the court shall interpret the statutory provision in such a manner so that possible hardship is avoided.

44. In *Mahadeo Oil Mills and Others Vs. Sub-Divisional Magistrate and Others*, , it was held:

"...I am aware of the well settled rule of construction that the argument from inconvenience and hardship is a dangerous one and is only admissible in construction of statutory provisions where there are alternative methods of construction. But another principle which has to be borne in mind is that if too literal an adherence to the words of an enactment appears to produce an absurdity and injustice, it will be the duty of the Court of construction to avoid such a result in case the enactment is capable of any other fair interpretation. As Maxwell on the Interpretation of Statutes, Twelfth Edition, points out at p.43,

"It was stated in this way by Parke B.: 'It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.' 'If', said Brett L.J. 'the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning.'"

45. Yet again in *Commissioner of Income Tax, Bangalore v. J.H. Gotla, Yadagiri* , this Court held:

"47...Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice then such construction should be preferred to the literal construction..."

46. For the aforementioned reasons I respectfully dissent with the opinion of Brother Kapadia, J., I would allow this appeal.

ORDER

47. In view of the majority opinion delivered by Hon'ble Mr. Justice S.H. Kapadia

on behalf of Himself and Hon'ble the Chief Justice, the civil appeals are dismissed with no order as to costs.