
(1978) 05 PAT CK 0001

In the Patna High Court

Case No : C.W.J.C. No"s. 1059 of 1973 and 1029, 1238 and 1470 of 1974

Mithileshwari Saran Sinha and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 02-05-1978

Acts Referred:

Citation : (1978) 26 BLJR 705

Hon'ble Judges : Shambhu Prasad Singh, J;H.L. Agrawal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Shambhu Prasad Singh, J.—Questions arising for decision in these four writ jurisdiction cases being almost similar, they have been heard together and are being disposed of by this common judgment. The petitioner in each of these four cases is a member of the senior branch of the Bihar Finance Service (hereinafter referred to as the service). They all challenge the legality of the Government notification dated 25th of June, 1974.

2. Facts necessary for decision of these cases may briefly be stated. The service condition of the petitioners and other members of the service, some of whom have been made respondents in these cases, are governed by the Bihar Finance Service Rules, 1963 (hereinafter referred to as "the Rules"). According to Rule 3, the Service consists of two classes of Officers: (a) the senior branch and (b) the junior branch, and the Government is required from time to time to determine the number of posts to be sanctioned in the respective cadres under the senior and junior branches of the Service. He may sanction additional permanent or temporary post in the cadre of each service or may keep in abeyance or leave unfilled any post or - posts in such cadre. Rule 5 of the Rules provides that save as otherwise provided, recruitment to the Service shall be made (a) by direct recruitment in accordance with the rules in part III or (b) by promotion in accordance with the rules in part IV, (i) to the senior branch from junior branch, and (ii) to the junior branch of persons serving in any office under the

Government in a permanent post. There are two provisos to Rule 5 which may be referred to, if necessary, at a latter stage. Rule 6 says that the Governor shall declare in each year the number of vacancies in the Service in each of the two branches separately to be filled in that year by direct recruitment and by promotion provided that the number of vacancies to be filled by promotion in the senior branch of the Service in any one year shall not, unless the Governor is satisfied that there is no sufficient number of officers fit for promotion, be less than 50 per cent of the total number of vacancies to be filled in any such year. In accordance with Rule 6, it was declared that for the year 1958, 4 permanent posts and for the year 1959, 10 permanent posts and 5 temporary posts in the senior branch of the Service were to be filled in by promotion. Rule 19 of the Rules lays down the procedure for promotion of officers from the junior branch to the senior branch, selection for the purposes of promotion, according to this rule, is to be made strictly on merit with due regard to seniority in service from amongst the officers eligible for such promotion. A selection committee (hereinafter referred to as the "Committees") has to be constituted in accordance with Sub-rule (2) of the said rule and that Committee shall select such number of candidates as may be fixed by the Governor arranging their names in order of their position inter se in the junior branch of the service. If the selection of candidates by the Committee involves supersession of an officer senior to one selected, the Committee shall record a memorandum containing reasons in support of such supersession. The names of candidates selected by the Committee are to be forwarded to the Bihar Public Service Commission (hereinafter referred to as "the commission") with all relevant papers including the memorandum recorded by the Committee in support of the proposed supersession and the confidential records of officer whose supersession is involved. The Commission shall advise the Governor in respect of each candidate nominated whether his records prove him to have the requisite character and ability for the service to which it is proposed to promote him and whether in the opinion of the Commission, the supersession of the officer recommended to be superseded is justified and final selection of an officer to be promoted shall be made by the Governor after considering the recommendations made by the Commission.

3. For filling up the aforesaid 19 posts the committee recommended the names of 20 officers of the junior branch of the Service who were considered fit for promotion. These names included those of Jai Krishna Prasad Sinha, Jagannath Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha their serial numbers in the list being Nos. 14 to 17 respectively. Jai Krishna Prasad Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha are respondents Nos. 3, 4 and 5 respectively in C.W.J.C. No. 1059 of 1973. Jai Krishna Prasad Sinha and Janki Jiwan Prasad Sinha are respondents Nos. 4 and 6 respectively in C.W.J.C. No. 1129 of 1974. Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha are respondents Nos. 2 and 3 respectively in C.W.J.C. Nos. 1238 and 1470 of 1974. Jagannath Sinha is the petitioner in C.W.J.C. No. 1238 of 1974. According to the

Committee, Nithileshwari Saran Sinha (petitioner in C. W. J. O. No. 1059 of 1973), Rishikesh Kumar Sinha (petitioners in C W. J. C. No. 1129 of 1974) and Paras Nath Singh (petitioner in C.W.J.C. No. 1470 of 1974) were not fit for promotion and, therefore, their names were not recommended. The name of one Murari Saran Verma (respondent No. 2 in C.W.J.C. No. 1059 of 1973) was also not recommended by the Committee.

4. The Commission recommended 19 names for promotion which included the names of said Murari Saran Verma and one Haribans Sahay who were not recommended by the Committee. Jai Krishna Prasad Sinha, Jagannath Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha were also recommended by the Commission for promotion, but as a result of the inclusion of the names of Haribans Sahay and Murari Saran Verma, the serial numbers of the aforesaid four persons in the list sent by the Commission was 16, 11, 18 and 19 respectively ; the serial number of Murari Saran Verma in the said list was 15. The memorandum submitted by the Additional Secretary, Finance Department, dated 29th of July, 1961 (annexure "A" to the counter-affidavit filed by the State of Bihar in C.W.J.C. No. 1059 of 1973 on August 7, 1975) shows that the Finance Department proposed for accepting the recommendation of the Commission and proposed that Murari Saran Verma, Jai Krishna Prasad Sinha, Jagannath Sinha and Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha be promoted as against the five temporary posts declared for the year 1959. It appears that the Department noticed that really only three temporary posts could be declared for the year 1959 and accordingly Murari Saran Verma, Jai Krishna Prasad Sinha and Jagannath Sinha were appointed on temporary basis in the senior branch of the service by a notification (Annexure 7 to C.W.J.C. No. 1059 of 1973) dated 12th of August, 1961, with effect from the date of notification itself. Two posts, it appears, were subsequently created and by a notification (annexure 8 to C.W.J.C. No. 1059 of 1973) dated 26th of June, 1962. Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha were also appointed on temporary basis in the senior branch with effect from 12th of August, 1961. On 26th of November, 1964, the Secretary, Finance Department, wrote a letter (annexure 9 to C.W.J.C. No. 1059 of 1973) to the Secretary of the Commission for permanent absorption in the senior branch of the Service of Murari Sharan Verma, Jai Krishna Prasad Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha. It was stated in the letter that five permanent vacancies were available in the senior branch of the Service, but as Jagannath Sinha had earned adverse remarks during the years 1962-63 and 1963-64 and an enquiry was also pending against him regarding his integrity, his name was not being recommended for permanent absorption but a vacancy might be kept reserved for him till the completion of the enquiry against him. On 1st of February, 1965, the Secretary, Finance Department wrote another letter (annexure 10 to C.W.J.C. No. 1059 of 1973) to the Secretary of the Commission that three permanent vacancies declared for the year 1962 and five temporary vacancies declared for the year 1964, i.e., altogether 11 vacancies were available in the senior branch of the Service for

being filled by promotion of officers belonging to the Junior Branch of the Service and the committee, after holding meetings on 11th and 25th of October, 1964 and 25th of January, 1965, found the officers of Junior Branch named in the letter fit for promotion to the Senior branch. The officers named included Mithileshwari Saran Sinha, Rishikesh Kumar Sinha and Paras Nath Singh their serial numbers being 3, 6 and 8 respectively. The first two, namely, Mithileshwari Saran Sinha and Rishikesh Kumar Sinha were recommended for absorption as against permanent vacancies and the third one Paras Nath Singh as against a temporary vacancy. This letter further stated, however, that the cases of Murari Sharan Verma, Jai Krishna Prasad Sinha, Jagannath Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha were not considered along with the cases of those recommended for promotion by this letter and others who were not being recommended for the aforesaid five officers had already been promoted temporarily to the senior branch of the Service with effect from 12th of August, 1961 and concurrence of the Commission for their permanent absorption had been separately sought for.

5. It appears that the Commission made certain queries by its letter dated 10th of February, 1965, and in reply to it the Secretary, Finance Department, sent a letter annexure 11 to C.W.J.C. No. 1059 of 1973 dated 21st of May, 1965, enclosing statement therewith showing the date of passing of the departmental examination completely by higher standard by the first 21 officers of the gradation list of the junior branch of the Service. This letter further gave details of number of vacancies year wise from 1959 to 1964 and stated that all the vacancies of the year 1959 and two vacancies of the year 1961 were proposed to be filled in by permanent absorption of the five officers already promoted temporarily to the senior branch. Three more permanent vacancies declared for the year 1961 and other permanent vacancies of the subsequent year were proposed to be filled in by promotion of officers of the Junior Branch of the Service on permanent basis and the vacancies of the year 1964 which were of temporary nature were also proposed to be filled in by promotion of officers of junior branch on temporary basis. (The number of vacancies as stated in this letter, however, do not appear to be accurate). On 6th of September, 1966, the Secretary to the Commission wrote a letter (Annexure 12 to C.W.J.C. No. 1059 of 1973) to the Secretary, Finance (Commercial Taxes) Department, giving the opinion of the Commission in the matter of promotion of the officers of the junior branch to the senior branch. According to the Commission, Mithileshwari Saran Sinha was to be allotted a vacancy of the year 1959, Murari Saran Verma, Rishikesh Kumar Sinha and Jai Krishan Prasad Sinha vacancies of the year 1961 and Paras Nath Singh and Krishnadeo Narain Sinha those of the year 1962. They were allotted serial number 3, 5, 6, 7, 8 and 9 respectively in the said letter and recommended for being absorbed against permanent vacancies. It was further suggested that one vacancy of the year 1961 should be kept reserved for one Bhupendra Mohan Sinha and Anr. of 1962 for Jagannath Sinha. Janki Jiwan Prasad Sinha was recommended for absorption on temporary basis as against

one of the vacancies allotted to the year 1964. Kishori Sharan and Adya Shankar Verma (who are respondents in C.W.J.C. No. 1238 and 1470 of 1974) were also recommended for appointment against temporary vacancies allotted to the year 1964 but were placed above Janki Jiwan Prasad Sinha. Kali Shankar Samanta, Purnendu Shekhar Mishra and Kamla Prasad Singh, who have not been referred to so far, were also recommended for absorption against permanent vacancies allotted to various years by this letter and they are respondents in C.W.J.C. No. 1238 of 1974.

6. On 31st of May, 1968, the Secretary, Finance Department wrote a letter (annexure 13 to C.W.J.C.No. 1059 of 1973) to the Secretary of the Commission describing in detail permanent and temporary vacancies allotted to various years from 1959 to 1967, totalling 26, recommending names of 18 officers of the junior branch of the service for promotion to 18 permanent vacancies in the senior branch and of 8 such officers for promotion to the 8 temporary vacancies in the senior branch. The names of five other officers of the junior branch were also recommended for absorption against temporary vacancies likely to occur in the course of that year, namely, 1968. The name of Mithileshwari Saran Sinha was not in any of the lists. Jai Krishna Prasad Sinha's name was recommended for appointment as against one of the permanent vacancies but he was placed below Rishikesh Kumar Sinha ; the former being given serial No. 9 and the latter serial No. 7. Janki Jiwan Prasad Sinha was also recommended for appointment as against one of the permanent vacancies but he was given serial No. 11 ; Paras Nath Singh was given serial No. 10. Murari Sharan Verma, Jagannath Sinha and Krishnadeo Narain Sinha were given serial Nos. 1, 2 and 3 respectively in the list of officers recommended for appointment against the 8 temporary vacancies. On 12th of September, 1968 the Secretary to the Commission sent a letter (Annexure 14 to C. W.J. C. 1009 of 1973) to the Secretary, Finance (Commercial Taxes) Department, stating therein the opinion of the Commission. According to the Commission, there were altogether 20 permanent vacancies to be filled in allotted to various years as follows:

Year No. of vacancies 1959 3 1961 5 1962 3 1966 3 1967 4 1968 2 20

The Commission also recommended names of 20 officers for filling these vacancies indicating the year of allotment against each officer arranged in order of seniority in the junior branch of the Service except in case of Kishori Sharan and Adya Shankar Verma who were given lower places on account of the fact that their records did not prove them to have requisite character and ability for promotion to the senior branch of service on permanent basis before the year 1966. It will be better to produce the list itself as recommended by the Commission in the said letter:

Name of officers Year of allotment 1. Shri Kali Sankar Samunta 1959 2. Shri Purnendu Shekhar Mishra 1959 3. Shri Mithileshwari Sharan Sinha 1964 4. Shri Kamla Prasad Singh 1961 5. Shri Bhupendra Mohan Sinha 1961 6. Shri Radhika Raman Prasad 1961 7. Shri Murari Sharan Verma 1961 8. Shri Rishikesh Kumar

Sinha 1961 9. Shri Jaikrishna Prasad Sinha 1962 10. Shri Jagannath Sinha 1962 11. Shri Paras Nath Singh 1962 13 Shri Kishori Sharan 1966 13. Shri Adya Shanker Verma 1966 14. Shri Haridhan Chatterjee 1966 15. Shri Janki Jiwan Prasad Sinha 1967 16. Shri Harihar Nath Singh 1967 17. Shri Ramyash Singh 1967 18. Shri Rajendra Prasad Singh No. 1 1967 19. Shri Ramdhari Singh 1968 20. Shri Nihar Ranjan Sahay 1968

The Commission also made recommendations for temporary vacancies but it is not necessary to refer to those recommendations.

7. On 24th of September, 1968, the State Government, as it appears from the notification of that date (Annexure 1 to C. W. J. O. No. 1059 of 1973) accepted the recommendation of the Commission as contained in annexure 14 to C.W.J.C. No. 1059 of 1973 except in the case of Bhupendra c Mohan Sinha and appointed the 19 officers recommended by the Commission giving them the years of allotment as recommended by the Commission. Out of the five vacancies allotted to the year 1961, only four appear to have been filled in by this notification which indicates that one of it was kept reserved for Bhupendra Mohan Sinha. The notification also indicated the dates from which these officers were put on probation. In the copy of the notification filed name of Haridhan Chatterjee appears to have been omitted by mistakes of the typist between serial Nos. 12 and 14 ; his serial number being 13. On 10th of September, 1969, however, the Additional Secretary, Finance Department, wrote a letter (annexure 15 to C.W.J.C. No. 1059 of 1973) to the Secretary of the Commission pointing out certain anomalies and recommending for reconsideration of the opinion of the Commission and for placing the five officers, namely, Murari Sharan Verma, Jai Krishna Prasad Sinha, Jagannath Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha, who were considered fit for promotion in August 1961, above those officers who were not found fit for promotion at that time. Reference in this connection was made in the letter to a circular of the Appointment Department dated 27th of April, 1966 as well as earlier instructions of the Government of the year 1944, popularly known as Sergeant-Major rule. However, the letter further pointed out that so far Jagannath Sinha was concerned, earlier the Commission had opined that he was unfit for a permanent vacancy of 1962 quota and latter on recommended for a permanent vacancy of 1962 quota.

8. The Secretary of the Commission by his letter dated 28th of August, 1970 (Annexure 16 to C. W.J.C. No. 1059 of 1973) informed the Finance Commissioner that in the circumstances explained in the letter dated 10th of September, 1969, the Commission considered the aforesaid five officers suitable for substantive appointment in the senior branch of the Service against three permanent vacancies of 1959 and two permanent vacancies of 1961 and that the Commission's recommendations conveyed in earlier letters dated 14th of March, 1961, 5th of September, 1966 and 12th of September, 1968 be considered modified to that extent. On 16th of June, 1972, the Secretary of the Commission wrote another letter (Annexure 17 to C.W.J.C. No. 1059 of 1973) to the Finance

Commissioner even modifying the letter dated 28th of August, 1970, and stating that only four of the aforesaid officers, namely, Murari Sharan Verma, Jai Krishna Prasad Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha be promoted in the senior branch of the Service against vacancies of 1959 and 1961 and Jagannath Sinha be given promotion against a permanent vacancy of another year and that other officers who had been found fit for promotion subsequently would be junior to the aforesaid four officers in the seniority list.

9. Ultimately came the notification dated 25th of June, 1974 (annexure 6 to C.W.J.C. No. 1059 of 1973;). In this notification, Murari Sharan Verma, Jai Krishna Prasad (a mistake for Jai Krishna Prasad Sinha), Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha have been placed as numbers 1,2,3 and 4 respectively according to seniority. Mithileshwari Sharan Sinha has been placed as serial No. 7, Rishikesh Kumar Sinha as No. 11, Paras Nath Singh as No. 14 and Jagannath Sinha as No. 15. The year of allotment, date of putting on probation and date of confirmation shown as against these officers are as follows:

name of officers	Yeats of	Date of	Date of allotment	putting on	confirmation
				probation	

1. Mithileshwari	1961	19.7.62	19.7.64	Saran Sinha	2. Rishikesh Kumar	1962
4.7.64	4.7.66	Sinha	3. Paras Nath Singh	1966	24.9.68	24.9.70
4. Jagannath	Sinha	1967	24.9.68	24.9.70		

10. The main argument advanced on behalf of Mithileshwari Saran Sinha, Rishikesh Kumar Sinha and Paras Nath Singh is that cases of Murari Sharan Verma, Jai Krishna Prasad Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha were not considered in the year 1961 for their absorption as against permanent vacancies in the senior branch of the Service, but only for absorption against temporary vacancies declared for the year 1959 and when their cases were considered for absorption against permanent vacancies in the senior branch of the Service after the Government circular of 27th of April, 1966 along with these petitioners who were also found fit for promotion the three petitioners were entitled to retain their seniority in the junior branch of the Service as shown in the notification dated 24th of September, 1968 Annexure 1 to C.W.J.C. No. 1059 of 1973) and the changes made in that by the subsequent notification dated 25th of June, 1974 are illegal and fit to be quashed. The stand of the State Government and Jai Krishna Prasad Sinha who was represented by Mr. Tarakant Jha has been that the same test having been applied in finding Murari Sharan Verma, Jai Krishna Prasad Sinha, Krishnadeo Narain Sinha and Janki Jiwan Prasad Sinha fit for promotion which was applied for those who were found fit for absorption against the permanent vacancies of the years 1958 and 1959 while the petitioners were not found fit, these four persons should be absorbed as against earlier permanent vacancies in preference to the petitioners and the modification made by the Government by its notification dated 25th of June, 1974 in its earlier notification dated 24th of September, 1968 is justified. Learned Counsel appearing for Jagannath Sinha in C.W.J.C. No. 1238 of 1974

advanced alternative arguments. In the first place, he adopted the arguments advanced by Mr. Tarakant Jha for Jai Krishna Prasad Sinha and submitted that Jagannath Sinha should have also been given the place given to him by the Commission in the year 1961 and absorbed as against a permanent vacancy on that basis. In the alternative, Learned Counsel submitted that if his first argument was not accepted, then Jagannath Sinha should be allowed to retain the place which was given to him by the notification dated 24th of September, 1968, and his position should not have been altered as done by the notification dated 25th of June, 1974. In other words, in his alternative argument Learned Counsel for Jagannath Sinha has adopted the arguments advanced on behalf of the petitioners Mithileshwari Sharan Sinha, Rishikesh Kumar Sinha and Paras Nath Singh.

11. In *Gaya Prasad Pandey and Anr. v. State of Bihar and Ors.* 1973 B.L.J.R. 265, Bench of this Court, of which myself was also a Member, dealing with the Bihar Finance Service Rules itself held:

The seniority of a person in Government service...does not depend how it is fixed by the authority concerned. It stands authentically determined according to the existing rules. The preparation of the seniority list by the authority concerned is a mere formal matter. If the authority commits any mistake in preparing the seniority list and it is not found in accordance with the rules the mistake must be corrected.

The only question, therefore, which arises for decision in these four cases is whether the seniority of the petitioners and of the respondents who belong to the Service as shown in the notification dated 24th of September, 1968 is in accordance with rules or that shown in the notification dated 25th of June, 1974 is in accordance with the rules. If the seniority as shown in the notification dated 24th of September, 1968 was in accordance with the rules, then that could not be changed by the authority by the notification dated 25th of June, 1974, but if it was not in accordance with rules, then it could be changed by the notification dated 25th of June, 1974 in accordance with the rules. It has been conceded by Learned Counsel for the parties that firm executive instruction issued by the Government have also the force of rules. In the letter dated 10th September, 1969 it was stated by the Additional Secretary, Finance Department, that the seniority fixed in the notification dated 24th of September, 1968 was not in accordance with the circular of the Appointment Department of the State Government dated 27th of April, 1966 and 15th July, 1944. The answer to the contention raised in these writ applications will, therefore, mostly depend on the interpretation of the aforesaid two circulars and various provisions of the Rules. An argument was made by Mr. Tarakant Jha that if really some permanent vacancies were existing in the year 1959 but they were not taken into consideration by mistake, then those persons, who were found fit for promotion in the year 1961 in preference to the petitioners Mithileshwari Sharan Sinha, Rishikesh Kumar Sinha and Paras Nath Singh, should be deemed to have been

appointed on permanent basis as against those permanent vacancies and rank senior to the aforesaid petitioners on that account.

12. Reference has already been made to Rules 3 and 6 of the Rules and it has been noticed that under Rule 3(2), the Governor has been empowered to determine from time to time the number of posts to be sanctioned in the respective cadres of the senior and junior branches of the service and he may sanction additional permanent or temporary posts in the cadre of each service or may keep in abeyance or leave unfilled any post or posts in such cadre. Rule 6, as noticed earlier, laying down that the Governor shall declare in each year the number of vacancies in the Service in each of the two branches separately to be filled in that year by direct recruitment and by promotion. The two rules read together lead to an irresistible conclusion that mere existence of a permanent post in the cadre would not confer a right on any person to claim to be considered for it for under Rule 3, the Governor may keep in abeyance or leave unfilled any post or posts in the cadre and according to Rule 6, only such Vacancies are to be filled in which are declared in the year for being filled in that year by direct recruitment and by promotion. It is true, as stated in paragraph 2 of the letter dated 10th of September, 1969 (Annexure 15 to C.W.J.C. No. 1059/73), that one permanent post was rendered vacant in the year 1959 by confirmation of a senior branch officer in the Indian Railway Service with effect from 9.9.1959. Two permanent posts were vacant in the senior branch of the Service from the year 1959 was, perhaps, not known even to the authorities concerned. Information about said two posts was given to the Accountant General, Bihar, by the Additional Secretary, Finance Department, for the first time by his letter No. BFS/A-1017/61/4779 dated 1st of May, 1962. We came to know of this letter in course of argument when it was shown to us by learned Standing Counsel No. 4 and he was also kind enough to supply a copy of it to us. Even this letter does not show that two permanent posts were sanctioned in the senior branch of the Service in the year 1959; rather it says "two of the posts shall be deemed to have been sanctioned retrospectively with effect from 1st January, 1959". From the language of this letter it is clear that the sanctioning was on 1st of May, 1962, with retrospective effect from 1st of January, 1959. It is manifest, therefore, that these two permanent posts in the senior branch of the service with retrospective effect from 1st of January, 1959 did not stand sanctioned prior to 1st of May, 1962. In other words, they were not sanctioned posts when the cases of the five officers who are found fit for promotion on temporary basis were considered in the year 1961. Even if these two posts be considered as existing permanent posts in the senior branch of the Service in the year 1959, these two and the third one which had been rendered vacant by the confirmation of a senior branch Officer of the Service in the Indian Railway Service with effect from 9.9.1959 were not declared as vacancies which were to be filled in that year by promotion, as according to Rule 3(2), the posts might have been kept in abeyance or left unfilled. The selection of the five officers for promotion to some of the temporary vacancies cannot be considered as their

selection for permanent vacancies in the senior branch of the service.

13. Mr. Sarojendu Mukherji appearing for Mithileshwari Sharan Sinha also drew our attention to Rules 22 and 23 of the Rules. Rule 22 merely lays down that an officer on appointment in substantive vacancy in the cadre or service has to be placed on probation which is in ordinary course to be for two years and the period during which a person who has held officiating or temporary appointment in a post may also be allowed by the Governor to count towards period of probation. Rule 23 provides that subject to provisions of Rule 22, an officer appointed on probation shall be confirmed at the end of the period of his probation if he passed the departmental examination by prescribed standard and if the State Government considered him fit for promotion. Mr. Mukherji emphasised on these rules to show that so long an officer was not appointed in substantive vacancy he should not be placed on probation and so long he had not completed the period of probation he could not be confirmed. He has submitted that there is nothing on the record to show that the period during which the aforesaid five officers held officiating or temporary appointments, was allowed by the Government to count towards the period of probation except what is stated in the notification dated 25th June, 1974 itself. It is, therefore, not possible to accept the contention of Mr. Tarakant Jha that three permanent posts in the senior branch of the Service were existing in the year 1959 and they were not taken into consideration by mistake and, there fore, Murari Sharan Verma, Jai Krishna Prasad Sinha (for whom Mr. Jha has appeared) and Jagannath Sinha should be deemed to have been appointed as against substantive posts on the recommendation of the Commission and should get preference over the petitioners and others on that account. From Annexure A to the counter-affidavit filed on behalf of the State of Bihar on 7.8.1975 it is manifest that 4 permanent posts for the year 1958 and 10 permanent and 5 temporary posts for the year 1959 were declared under the Rules and the consideration by the Committee and the Commission was on that basis. The recommendation which was accepted by the Cabinet was that the aforesaid five officers be promoted against the five declared temporary posts. Any of these officers, therefore, cannot claim that they shall be deemed to have been promoted in the year 1961 as against three undeclared permanent vacancies of the year 1959.

14. The Government circular dated 27th of April, 1966 is to be found at pages 51-52 of the Compilation of Government orders relating to Service Rules and Conditions, Volumes I and II, Second Edition of the year 1976. The circular reads as follows:

Subject-Principles to be followed for promotion to higher grade and determination of seniority Inter se.

The undersigned is directed to say that instructions of Government regarding fixation of inter se seniority on promotion or appointment to posts under Government were issued in the following memos of Appointment Department (copies enclosed):

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

(ii) Memo No. 2763-A, dated the 15th July, 1944.

(iii) Memo No. 322-A.R., dated the 9th September, 1944.

The 1934 order prescribed the mode of fixation of inter se seniority of persons appointed directly or promoted at the same time to permanent posts on substantive basis. These instructions still continue to hold good. The orders of 1944, however, referred to officiating promotion and laid down that length of officiating service on a post of promotion would not be taken into account for fixing inter se seniority on the posts of promotion at the time of substantive promotion and that rigorous test of merit should be applied to the cases of all those holding the said posts of promotions on officiating basis as also to those others who may be holding lower posts but may be eligible for promotion and that all those found suitable for such promotion should be substantively promoted in accordance with their inter se position in the lower substantive rank irrespective of earlier officiation by any one on the post of promotion. It was further prescribed that the test of merit should be applied for from time to time as and when substantive vacancies might occur.

2. When the aforesaid circulars of 1944 were issued, temporary posts were very few and therefore officiating promotion was a rare feature except in fortuitous circumstances, e. g. in the leave chain of an officer, etc For such temporary vacancies, officers immediately available at the spot used to be promoted on an officiating basis without detriment to the interest of their senior colleague. The aforesaid orders were issued in the situation then prevailing in order to ensure that because of officiating promotion secured through fortuitous circumstances a junior should not be allowed to steal a march over his seniors in the matter of substantive promotion. The present position is, however, very much different. The number of temporary posts in most of the services is considerably large and naturally, even for officiating promotion most rigorous tests are generally applied, namely, a Selection Board makes the selection, the Public Service Commission is consulted, approval of the Council of Ministers is obtained, etc. After going through all these necessary pre-conditions unsuitable officers are superseded and only the suitable officers are promoted on officiating basis. For want of permanent posts however the officers so promoted temporarily on consideration of merit are usually not substantively promoted for a number of years. In the meantime the senior officers earlier superseded on merit also get promoted in the subsequent transactions. Thus, when, after a number of years, permanent posts fall vacant in view of the aforesaid Appointment Department memo of 1944, the more brilliant officers who had earlier been promoted on merit have to make room for their less meritorious colleagues whom they had superseded on merit but who too later on secured promotion. Thus the circular of 1974 in the changed context operates of a premium on inefficiency.

3. In view of the changed situation in which the number of temporary posts is

very large and because appointment and promotion to these temporary posts are made after going through the same procedure as ordinarily prescribed in making selection for substantive promotion, it has been decided to modify the 1944 orders in the following manner:

(i) If officiating promotion is made after applying the same procedure which is required to be applied for substantive promotion, i.e.-

(a) in the case of gazetted officer, if selection is made on rigorous examination of the character rolls, an assessment of eligibility and the relative merit of the candidates in consultation with the Selection Board and/or Public Service Commission in accordance with the prescribed procedure and with the approval of the Council of Ministers ;

(b) in case of non-gazetted officers, if selection is made on merit by the appointing authority either on his own or in consultation with the Selection Board in accordance with the prescribed procedure after a rigorous examination of character rolls and an assessment of eligibility and the relative merit of the candidates; then the officers so promoted to officiating vacancies would rank senior in the officiating rank and get preference over those superseded by them, in the matter of substantive promotion.

(ii) Those officers who are superseded in the matter of officiating promotion because of certain pending enquiries, allegations and adverse remarks in the character roll or on similar fortuitous- considerations, would not suffer at the time when substantive vacancies occur, if at the conclusion of the pending enquiry the allegations are found baseless or not so serious as to withhold promotion or if the adverse remarks are subsequently expunged and they are deemed fit for promotion. In such cases however, it would be necessary to keep posts of suitable seniority vacant for them.

4. These instructions would apply to those cases in which decisions could be taken hereafter. The cases of officers who have been superseded in the matter of officiating promotion before the issue of these instructions would continue to be governed by the 1944 circular.

5. These instructions may be brought to the notice of all concerned for information and guidance.

6. Receipt may kindly be acknowledged.

It is manifest from paragraph 2 of the circular that according to earlier circulars if some officer after due consideration on merit was promoted temporarily but some officer senior to him superseded on merit, when the former was so promoted, meantime gets promoted and they are substantively promoted together, the senior officer even though superseded on merit earlier retains his seniority. This, according to the Government, amounted to premium on inefficiency and, therefore, it was decided that from the date of the issue of the circular while determining seniority even those who were promoted on temporary

basis would get preference over those who were their seniors but superseded. This was made clear in paragraph 3 of the circular already quoted above. The circular was not to have retrospective effect is manifest from the language of paragraph 4 which says that the cases of officers who had been superseded in the matter of officiating promotion before the issue of these instructions would continue to be governed by the 1944 circular.

15. It is important to note that a new rule, Rule 39-A, has been added to the Rules containing the substance of the circular dated 27th of April, 1966. Rule 39-A was inserted vide G S. R. 135 dated 30th of December, 1971 which also provided that it shall be deemed to have been added with effect from 27th of April, 1966. That also made it clear that the aforesaid circular was not to have retrospective effect. There is nothing in the circular of 1944 which is at pages 53-54 of the said Compilation of Government Orders relating to service Rules and conditions to show that under that circular the five officers who were selected for promotion as against five temporary vacancies would get seniority over their senior officers though they were appointed on substantive basis together. Even the circular dated 27th of April, 1966 makes that clear. The statement in the letter dated 10th of September, 1969 (Annexure 15 to C. W J.C. No. 1059 of 1973) that those five officers could derive advantage in the matter of fixing their seniority even from the circular of the year 1944 does not appear to be correct. As ill-luck of those five officers could have it, they were not considered together with the petitioners Mithileshwari Sharan Sinha, Rishikesh Kumar Sinha and Paras Nath Singh and others for promotion to substantive post before the circular dated 27th of April, 1966 and thereafter when they were considered together the Commission recommended even those who were superseded earlier including the petitioners for promotion and that was accepted by the State Government as evidenced by the notification dated 24th of September, 1968 (annexure 1 to C.W.J.C. No. 1059 of 1973). The ranking in the said notification, therefore, appears to be in accordance with the rules and circulars. By the said notification the petitioners acquired vested right of seniority and that could not be redetermined against them by the authorities concerned against the rules. The authorities could not have taken away that seniority even by framing new rules and giving retrospective effect to it. The changes in seniority introduced by the notification dated 25th of June 1974 appear to be illegal and are fit to be quashed.

16. Mr. Bhsudeva Prasad appearing for Rishikesh Kumar Sinha in C.W.J.C. No. 1129 of 1974 raised a new point which was not argued by Mr. Sarojendu Mukherji that Rishikesh Kumar Sinha stood automatically confirmed from 19th July, 1964, after expiry of the period of probation of two years (which was not extended) from 19th of July, 1962 the date of his appointment on probation (vide annexure 8 to C.W.J.C. No. 1129 of 1974 and thus he had acquired a lien to the substantive post and no representation could be entertained against that confirmation thereafter nor that could be altered. In support of this contention he relied on a decision of the Supreme Court in the case of Parshotam Lal Dhingra

Vs. Union of India (UOI), and also some other cases. Since he succeeds on the other ground I do not consider it necessary to go into this arguments.

17. There was another controversy about Rishikesh Kumar Sinha. A counter-affidavit has been filed on behalf of the State in this case stating that his representation earlier had been rejected but he managed to create evidence by fraudulent means to show that it was allowed. On the other hand, a photostat copy of a page of the relevant file was produced before us on his representation was allowed but the department itself had played fraud. In this writ case we do not find it possible to come to any conclusion about these allegations. If the Government are convinced that Rishikesh Kumar Sinha had adopted fraudulent means for creating evidence in his favour, they may, if so advised, take necessary steps against him in accordance with law.

18. In view of the findings recorded above, the contention of Learned Counsel for Jagannath Sinha that he is also entitled to the benefit of being absorbed against permanent vacancies of the year 1959 cannot be accepted, However, his petition shall have to be allowed so far it claims that his seniority as shown in the notification dated 24th of September, 1968 cannot be changed by the notification dated 25th of June, 1974.

19. Before closing the judgment, I would like to deal with an argument of Mr. Thrakant Jha, namely, that the notification dated 24th of September 1968, merely put the petitioners and others on probation and it is really the notification dated 25th of June, 1974 which confirms them and, therefore, it is this notification which should prevail over the notification dated 24th of September, 1968. Had it been merely a case of changing the seniority of the petitioners and others with reference to dates of their confirmation, there may have been some substance in this contention of Mr. Jha, but here serial Nos. 1 to 4 of the notification dated 25th of June, 1974 have been placed above all others on the round, as is the case of the State, that they could be absorbed as against permanent vacancies of the years 1959 and 1961 as they were found fit for promotion in the year 1961 in preference to others. As already held, those four persons cannot get any advantage in the matter of seniority on that ground in view of the rules and circulars on the subject discussed earlier. Further confirment one of any of the petitioners or any other persons named in the notification dated 25th of June, 1974 has not been delayed on the ground that his period of probation had to be extended. They appear to have beer confirmation just after two years from the date they are shown to have been per on probation in the said notification. That shows that their works during the period of probation was not found bad. Therefore, this contention of Mr. Jha has also no bearing on the result of the writ application.

20. In fact, Mr. Sarojendu Mukherji urged four points in C.W.J.C.No. 1059 of 1973, but I have amalgamated all the four points together and stated their substance while considering his arguments.

21. In the result, all the four writ applications are allowed to the extent indicated in the judgment. Let writs issue accordingly quashing the notification dated 25th of June, 1974 so far it brings about changes in the seniority as shown in the notification dated 24th of September, 1968. In the circumstances of the case, there will be no order as to costs.

Harilal Agarawal, J.

22. I agree.