
(1992) 08 P&H CK 0034

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 367 of 1992

M.L. Gupta, Superintending Engineer, P.W.D. Irrigation Branch	APPELLANT
Vs	
State of Haryana and Others	RESPONDENT

Date of Decision : 27-08-1992

Acts Referred:

Punjab Service of Engineers (Class I) Public Works Department (Irrigation Branch)
(Haryana Second Amendment) Rules, 1984 — Rule 12(6), 2(12)

Citation : (1993) 103 PLR 440

Hon'ble Judges : S.K. Jain, J;A.L. Bahri, J

Bench : Division Bench

Advocate : Sudarshan Goel, for the Appellant; K.K. Jagia, for the Respondent

Final Decision : Allowed

Judgement

A.L. Bahri, J.—Two Letters Patent Appeals No. 367 and 411 of 1992 are being disposed of vide this common judgment as the facts and the questions of law involved therein are common. The appellant in both the appeals is M. L. Gupta, a direct recruit whereas private respondents are different but all are promotees. The question of fixation of seniority in accordance with the Punjab Service of Engineers Class I PWD (Irrigation Branch) Rules, 1964 (The Rules is involved in both these appeals.)

2. Earlier the question of interpretation of identical provisions of Punjab Service of Engineers Class I PWD (Road & Building) Rules, 1960 was under consideration of the Supreme Court in A.N. Sehgal and others Vs. Raje Ram Sheoram and others, and of Punjab Service of Engineers Class I PWD (Public Health Branch) Rules, 1961 in S.L. Chopra and others Vs. State of Haryana and others, . The only difference which has been pointed out during arguments is with respect to Rule 2 (12)(c) of the Rules. The question debated at great length in the present case is that in view of sub-clause (c) of Sub-rule (12) of Rule 2, the interpretation placed by the Supreme Court in two cases, referred above, on other identical rules with respect to determination of seniority will not be

applicable to the present Rules. In order to appreciate the arguments addressed, a brief reference to the Rules which are relevant is being made. Rule 2 (1) (3) (10) (12) and Rule 5 (1) (2) (6) Rules 11 and 12 (1) (2) (3) (5) (6) (7) (8) and (9) are reproduced below :-

"2(1) "appointment to the Service" includes an appointment, made according to the terms and provisions of these rules, to an officiating vacancy or an ex cadre post :

Provided that an officer so appointed shall not be deemed to have become a "member of the Service" as defined in clause (12) of this rule ;

(3) "Cadre Post" means a permanent post in the Service;

(10) "ex-cadre" means a temporary post of the same rank as a cadre post;

(12) "member of the Service" means an Officer appointed substantively to a cadre post, and includes :

(a) in the case of a direct appointment and officer on probation, or such an officer who having successfully completed his probation, awaits appointment to a cadre post;

(b) in the case of an appointment by transfer, an officer who is on probation or who, having successfully completed his probation awaits appointment to a cadre post, provided such officer does not have a lien on a substantive post in any Government Department;

(c) In the case of an appointment by promotion an officer on probation or such an officer who having successfully completed his probation awaits appointment to a Cadre post.

Explanation :-- It is not necessary that member of the service shall at any given time be actually doing the work of a cadre post. He may be working in an ex-cadre post for reasons of administrative convenience. Conversely, an officer officiating against an ex-cadre post may in fact perform the duties of a Cadre post;"

"5. Recruitment to Service : -Recruitment to the service shall be made by Government by any one or more of the following methods :-

(a) by direct appointment ;

(b) by transfer of an officer already in Class I service of the Government of India or of State Government;

(c) by promotion from Class II Service.

(2) Recruitment to the Service shall be so regulated that the number of posts filled by promotion from Class II service shall not exceed seventy-five per cent of the number of posts in the service, excluding the posts of Assistant Executive

Engineers for the first ten years from the date of commencement of these rules and thereafter shall not exceed fifty per cent of the number of posts in the service excluding the posts of Assistant Executive Engineers :

Provided that in case an adequate number of Assistant Executive Engineers, who are eligible and considered fit for promotion, are not available, the actual percentage of officers promoted from Class II Service may be larger than seventy five per cent or of fifty per cent, as the case may be.

(6) Appointment by transfer of an Officer will normally be made to the rank of Executive Engineer."

"11. Probation.--(1) Officer appointed to the service shall remain on probation for a period of two years, if recruited by direct appointment and one year if recruited otherwise;

Provided that:

(a) any period, after the appointment to the Service spent on deputation on a corresponding or a higher post shall count towards the period of probation fixed under this rule.

(b) in the case of an appointment by transfer, any period of work in the rank of Executive Engineer or above, prior to appointment to the Service may, at the discretion of Government, be allowed to count towards the period of probation fixed under this rule ; and

(c) an officiating appointment in the Service shall be reckoned as a period spent on probation but no member who has thus officiated shall, on the completion of the prescribed period of probation, be entitled to be confirmed, unless he is appointed against a cadre post.

(2) If the work or conduct of an officer appointed to the Service during the period of probation is, in the opinion of Government, not satisfactory ; or

(a) dispense with his services, if recruited by direct appointment; or

(b) if recruited otherwise :-

(i) revert him to his former post ; or

(ii) deal with him in such other manner as the terms and conditions of his previous appointment permit.

(3) On the completion of the period of probation of an officer the Government may :-

(a) confirm such officer in his appointment ; or

(b) if no cadre post is vacant for him, declare that he has completed his probation satisfactorily ; or

(c) if his work or conduct has, in its opinion, not been satisfactory dispense with his services if recruited by direct appointment ; or

(d) if recruited otherwise :-

(i) revert him to his former post or

(ii) deal with him within the terms and conditions of his previous appointment ; or

(c) extend his period of probation and thereafter pass such orders as it could have passed on the expiry of the first period of probation ;

Provided that the total period of probation, including extension, if any, shall not exceed three years,

(4) On the satisfactory completion of the period of probation, Government shall confirm such officer in a cadre post, if one is available for him."

"12. Seniority:-(I) Except as provided in sub-rules (8) and (10) of this rule relating to officers appointed by transfer, and except to the extent provided in these rules, no member of the Service shall, for purposes of determining seniority in the Service, enjoy the benefit of any period of service rendered by him in any other employment prior to his appointment to the service.

(2) The seniority of a member of the Service shall be determined by the "year of allotment", officers with an earlier year of allotment being senior to those of a later year ;

Provided that if under the proviso to sub-rule (3) below a member of the Service has had added to his year of allotment the figure half, he shall be considered junior to all members who do not have such tin addition to their year of allotment.

(3) Assistant Executive Engineer : -The year of allotment of a member appointed to the Service as an Assistant Executive Engineer shall be the calendar year in which the order of appointment has been issued, by Government:

Provided that where the period of probation of an officer has been extended, the order of appointment shall be deemed to have issued on a date determined by adding to the original date the extended period or probation. If the resulting date is within the same calendar year, the officer shall be deemed to have been appointed in that year with the fraction half added to it. If the resulting date falls in a subsequent Calendar year, the year of allotment shall be such subsequent year."

"(5) Executive Engineers and above :-The year of allotment of a member of the Service promoted to the post of Executive Engineer in the Service shall continue to be the year allotted to him as Assistant Executive Engineer under the provisions of sub-rule (3) above.

Explanation :- Such an officer may be superseded for promotion to higher rank

but will continue to retain his seniority in the Service as initially fixed both in regard to the year of allotment and his position in it in regard to other officers similarly recruited."

(6) Subject to the provisions of sub-rules (7) and (8) below the year of allotment of an officer who is initially appointed to the service as Executive Engineer, shall be the same as that of the junior most officer in the Service whether officiating or confirmed as Executive Engineer before the former's appointment.

Explanation :-If an officer appointed to the Service as officiating Executive Engineer, later on reverts from that post and is again promoted to it, for purposes of this rule, the year of allotment shall be determined taking into consideration the date of his latest appointment on the post of the Executive Engineer

(7) If an officer initially appointed as Executive Engineer has had his period of probation extended, his date of appointment as Executive Engineer shall be deemed to be a date determined after adding to his original date the extended period of probation and his year of allotment shall be the same as that of the junior most officer in the Service whether officiating or confirmed as Executive Engineer immediately preceding the date of his appointment so determined.

(8) In the case of an officer appointed by transfer as an Executive, Engineer while normally his year of allotment shall be determined by the provisions of sub-rules (6) and (7) of this rule. Government may, in the interest of the public service and taking into consideration all the circumstances of the case, fix his year of allotment on an ad-hoc basis

Provided that the year of allotment thus fixed shall, in no case, be more favourable than a year of allotment allowing him credit for the period of service rendered by him in previous appointment as Executive Engineer or on a post the duties, of which, in the opinion of Government, are of equivalent or greater responsibility. The decision of Government on this point shall be final.

Provided further that the provisions of sub-rule (7) shall apply to such an officer if his period of probation is extended.

(9) The seniority of members of the Service having the same year of allotment shall be determined by the date of continuous officiating service on the post of Executive Engineer, the officer who starts officiating earlier being senior to an officer who starts officiating later:

Provided that :-

(a) xx xx xx xx (b) xx xx xx xx (c) xx xx xx xx (i) xx xx xx xx (ii) xx xx xx xx

3. In A. N. Sehgal and other's case (supra) the Supreme Court considered identical rules relating to Roads & Building Branch of the PWD and interpreting the same held as under with respect to the mode of fixation of seniority of the direct recruits as well as the promotees to the posts of Executive Engineers and

above in paras 9 and 21 respectively :-

Para 9 : Para 11 (b) of appendix "A" read with Rule 3(2), while determining the cadre strength of the service, acumbrates creation are appointments of Assistant Executive Engineers (direct recruit) an ex-cadre junior scale post in each year. Therefore, in a given situation, a direct recruit appointed to an ex-cadre post cannot be kept in lurch untill he is appointed to a cadre post so as to become a member of the service. Obviously to avoid such a hiatus, Rule 2(12) (a) was introduced . The main part of Rule 2(12) (a) declares that an appointee substantively so a cadre post i.e. permanent post is a member of the service. The inclusive definite brings an officer "by direct appointment on probation who having successfully completed probation and awaits appointment to a cadre post is also a member of the service. Take for instance if direct recruitment is made to fill in five posts of Asstt. Executive Engineers of which four are cadre post and one ex-cadre post and four persons are appointed to cadre posts in the order of merit and the last one to the ex-cadre post. The first four officers appointed on probation to the substantive vacancies and they are covered by the main part of Rule 2(12) (a) The fifth one intended to cover the field of operation of the inclusive definition which says that and also includes an officer directly appointed on probation" "and such an officer who having successfully completed his probation, awaits appointment to a cadre post". The words and such an officer" directly appointed would" a obviously referable to an Asstt. Executive Engineer directly appointed to an ex-cadre post, who may be placed on probation and awaits appointment to a cadre post. By operation of the definition clause he also becomes the member of the service from the date of initial appointment. This view is further fortified by the definition of the appointment to the service" in Rule 2(1) which says that appointment to the service includes an appointment made according to the terms and provisions of these rules to an officiating vacancy or to an ex-cadre post. Rule 2(7) says that direct appointment means appointment by open competition but excludes "promotee" or transferee. So a promotee promoted to an officiating vacancy or on ex-cadre post does not become member of the service unless he is appointed substantively to a cadre post. We, therefore, hold that a direct recruit appointed to an ex-cadre post alone is a member of the service even while on probation and Rule 2(12) (a) applies to them and it does not apply to promotee from Class II service."

Para 21 : "A promotee within quota under Rule 5(2) gets his seniority from the initial date of his promotion and the year of allotment, as contemplated in Rule 12(6) shall be the next below the junior most officer in the service whether officiating or confirmed as Executive Engineer before the former's appointment counting the entire officiating period towards seniority, unless there is break in the service or from the date of later promotion. Such promotee, by necessary implication, would normally become senior to the direct recruit promoted later. Combined operation of sub-rules (3) to (5) of Rule 12 makes the direct recruit a member of the service of Executive Engineer from the date of year of allotment as an Asstt. Executive Engineer. The result is that the promotee occupying the

posts within 50% quota of the direct recruits, acquired no right to the post and should yield to direct recruit, though promoted later to him, to the senior scale posts i.e. Executive Engineer, Superintending Engineer and Chief Engineer. The promotee, has right to confirmation in the cadre post as per Rule 1 (4) if a post is available to him within his quota or at a later date under rule 5(2) read with 11(4) and gets appointment u/s 8(11). His seniority would be reckoned only from the date of the availability of the post and the year of allotment, he shall be next, below to his immediate senior promotee of that year or the junior post of the previous year of allotment whether officiating or permanent occupying (he post within 50% quota. The officiating period of the promotee between the dates of initial promotion and the date of the availability of the cadre post would thus be rendered, fortuitous and stands excluded. A direct recruit on promotion within his quota, though later to the promotee is interposed in between the period and interjects the promotee "seniority snaps the links in the chain" of continuity and steals a march over the approved promotee probationer. Harmonious construction of rules 2(1), 2(3), 2(7), 2(10), 2(12) (a), 5(2) (a), 8, 9(2), 11, 12(3), 12(5) to 12(7) would yield to the above result, lest the legislative animation would be defeated and the rules would be rendered otiose and surpluses, It would also advertedly affect the morale and efficiency of the service. Mere officiating appointment by promotion to a cadre post outside the quota; continuous officiation therein and declaration of probation would not clothe the promotee with any right to claim seniority over the direct recruits. The necessary conclusion would, therefore, be that the direct recruit shall get his seniority with effect from the date of the year of the allotment as Asstt. Executive Engineer which is not alterable. Whereas the promotee would get his seniority w.e.f. the date of the availability of the posts within 50% quota of the promotees. The year of allotment is variable and the seniority shall be reckoned accordingly. Appointment to the cadre post substantively and confirmation thereof shall be made under rule 8(11) read with Rule 11(4) of the rules. A promotee Executive Engineer would only then become member of the service, "Appointed substantively within the meaning of Rule 2(12)(a) shall be construed accordingly. We, further hold that the seniority of the promotee from Class IT service as Executive Engineer shall} be determined with effect from the date on which the cadre post was available to him and the seniority shall be determined accordingly."

The aforesaid interpretation of the Rules was applied to the Public Health Branch Rules in S.L. Chopra's case (supra).

4. As to what is the effect of sub-clause (c) of Sub-rule (12) of Rule 2 of the Irrigation Branch Rules providing therein that in the case of the appointment by promotion an officer on probation or such an officer who having successfully completed his probation awaits appointment to a cadre post and such a person would be included in the definition of the member of the service. It may be stated that this clause would get the similar interpretation as is given to clauses (a) and (b) of sub-rule (12) of Rule 2. It is to be seen in respect of clause (a)

that it has been held by the Supreme Court in the cases referred to above that by appointment to the posts of Asstt. Executive Engineer a direct recruit becomes a member of the service, and in view of clause (c) a promotee appointed as Executive Engineer becomes member of the service if after completion of probation he awaits confirmation to a post of promotee's quota if available. The post in the cadre must be available to the direct recruit or the promotee as the case may be, and it is only against such a post that a person when appointed would become member of the service. The only difference in clauses (a) and (c) of sub-rule (12) of Rule (2) is that a direct recruit on posting as Assistant Executive Engineer becomes member of the service whereas a promotee on being appointed as Executive Engineer against a post within the quota of the promotees. Such persons have been included in the definition of member of the service. No doubt in the identical rules of other Branches sub-clause (c) was not there and it was held by the. Supreme Court that sub-clauses (a) and (b) of sub-rule (12), referred to above, do not apply to the promotes. By insertion of sub-clause (c) in the Rules concerning Irrigation Branch the position of the promotee is only improved to this extent that on officiating appointment on a cadre post within quota, the promotee is also to be considered as member of the service though awaiting confirmation. The relevant date thus would be date of appointment as Executive Engineer substantially or on probation or officiating as and when post within the quota is available for the promotee, then he will become member of the service. Merely on appointment as Executive Engineer against quota post of direct recruits or against ex-cadre post, he will not become member of the service for the purposes of determination of seniority under the rules. The contention of learned counsel for the promotees, that on appointment against, ex-cadre post, or against substantive post of quota of Direct recruits, such a promotee would become member of the service, in view of sub-clause "C" above cannot be accepted. Reliance has been placed on the decision of the Supreme Court in Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, . The ratio of this decision is not strictly applicable to the case in hand in view of peculiar Rules referred to above which are for consideration. At this stage it may further be pointed out, as also held by the Supreme Court in the two cases referred to above, that either appointment or officiation or confirmation on ex-cadre post or post within the cadre but beyond the requisite quota meant for the promotees, will be fortuitous and such a promotee cannot take any benefit of such service.

5. There are several steps which are required to be taken for the purpose of determination of seniority of the member of the service. As per the rules recruitment to the service is from three sources i.e. by direct appointment, by appointment by promotion and by appointment by transfer from other Government offices. The strength of service is also to be taken into consideration which is required to be determined under Rule 3. For first five years i.e. five years of constitution of service, when the Rules came into force, the State Government is required to determine the cadre strength of service-taking into

consideration the criteria provided in appendix "A" on the first day of January every year and after five years from time to time. It is on determination of this strength that the quota for the promotees is to be determined as provided under rule 5(2). Rule 8 also prescribes for preparing list of selected candidates to be promoted as class I Officers in the service. Such lists are also required to be prepared on first day of January every year and it is from this list that in order of merit the persons are so appointed. Rule 8(12) further provides that appointment by promotion can also be made to an ex-cadre post or to any post in the cadre in an officiating capacity. Rule 9 prescribes eligibility criteria for promotion to the post of Executive Engineers and above. Rule 11 provides period of probation of two years in the case of direct recruits and one year in the case of promotees. It is on completion of period of probation the officer is to wait till the post in the cadre is made available for him for confirmation. Then comes the stage of fixation of seniority of members of service which provided under Rule 12 of the Rules.

6. The manner in which the seniority is to be determined under Rule 12 of the Rules has already been elucidated by the Supreme Court in the two cases referred to above and in extenso portions of the judgment in Sehgal's case (supra) have been reproduced above. Herein only stages in the matter of fixation of seniority may be summarised again from para 21 of the judgment aforesaid :-

(1) The State Government is to determine the strength of the cadre posts after constitution of the service on the basis of the formula given in Appendix "A" attached to the Rules for the first five years every year as on first of January and thereafter from time to time. The State Government is also to declare the quota posts of promotees and other recruits as provided under the Rules out of such posts.

(2) The seniority of the members of the service to be determined on the basis of year of allotment allocated. Different mode of allotment of year is provided for direct recruits as well as for the promotees. The detailed discussion with respect to allotment of year to the direct recruit is mentioned in para 9 of the judgment in Sehgal's case (supra) and the manner in which year of allotment is to be allocated to the promotee officer and inter se seniority is mentioned in para 21 of the Judgment reproduced above. At this stage suffice it to say that the direct recruit gets year of allotment of the year in which he is initially appointed as Assistant Executive Engineer and as far as promotee is concerned the relevant date for consideration is appointment in the service as Executive Engineer against a post which is within the quota of the promotees. The year of allotment is to be determined with respect to the junior most officer in the service already officiating or confirmed. The significant fact to be noticed is that in the case of a promotee the period of appointment against ex-cadre post or officiation against a cadre post but beyond the quota of the promotees is to be ignored while allocating the year of allotment.

(3) Orders of confirmation to be made in accordance with seniority.

7. C. W. P. No. 5780 of 1987 : filed by Devki Nandan Shant and 13 others promotees seeking quashing of the seniority list Annexure P. 6 whereby M. L. Gupta's seniority was wrongly fixed above them. Devki Nandan Shant and others claim that they were appointed by the erstwhile State of Punjab between 1961 to 1963. At that time "the service was known as Temporary Engineers in the Irrigation Department (Class II posts). On the reorganization of the State of Punjab on November 1, 1986, they were allocated to the State of Haryana. Next avenue on promotion was Senior Scale Class I Post of Executive Engineer which was governed by statutory Rules known as Punjab Service of Engineers Class I.P.W.D. (Irrigation Branch) Rules 1964 as applicable to the State of Haryana (for short "the Rules"). Four of the petitioners Devki Nandan Shant, J.K. Dewan, B.S. Kukreja and H.C. Mehta were promoted as officiating Executive Engineers in October, 1971. M. R. Kwatra and others petitioners No. 5 to 9 were promoted between February 7, 1972 to April 17, 1972 and other petitioners, P. S. Passi and others were promoted as such on November 27, 1973. It was in 1982 that they were confirmed as Executive Engineers with effect from January 1, 1975 and some of them with effect from January 1, 1976. With respect to M. L. Gupta it was pleaded that he was appointed as Assistant Executive Engineer Class I Junior Scale on July 28, 1971 and he was promoted as Officiating Executive Engineer on September 17, 1976. In the gradation list corrected upto January 1, 1984 they were shown above M.L. Gupta who was shown at Sr. No. 92. The petitioners were shown at Sr. No. 45 to 82. M.L. Gupta filed C.W.P. No. 4335 of 1984 seeking a direction to the State of Haryana to finalise inter se seniority of Class I Service and the petition was disposed of on February 7, 1965 on the undertaking given on behalf of the State that seniority list would be finalised on or before July 31, and thus the writ petition was not pressed. Thereafter tentative seniority list was prepared which was circulated on April 28, 1986-Annexure P.3 M.L. Gupta in this seniority list was shown at Sr. No. 72 and the petitioners at Sr. No. 73 to 112. The year of allotment of all the petitioners was mentioned as 1971 which was also the year of allotment of M. L. Gupta. Objections were filed to the tentative seniority list which were disposed of by the State Government. On September 29, 1986 the tentative seniority list was confirmed. The said order of September 29, 1986 was challenged in C. W. P. No. 5802 of 1986. The aforesaid writ petition was disposed of on May 25, 1987 and the order of September 29, 1986 was quashed being a non-speaking order. The State was directed to pass a fresh speaking order within a period of 2 months. Subsequently the order was passed on July 23, 1987-Annexure P. 6 M. L. Gupta in the seniority list which was prepared in response to order dated July 23, 1987 passed by the Financial Commissioner. These petitioners claim that they became members of the service under Rule 2(12)(c) of the Rules the moment they were appointed on probation and in any case on successful completion of period of probation. Even from the dates of confirmation allotted to them which were in the years 1957 to 1976 and by that time M. L. Gupta had not started working even as officiating Executive Engineer and was still working as a Assistant Executive Engineer, they were to rank senior to M. L. Gupta. The writ petition was contested by M. L. Gupta.

Learned Single Judge on March 4, 1992 allowed this writ petition and order Annexure P. 6 dated July 23, 1987 and seniority list fixed thereon was quashed to the extent that it made petitioners junior to M. L. Gupta. Hence L. P. A. No. 367 of 1992 by M. L. Gupta.

8. C.W.P. No. 6182 of 1986 was filed by Shri M. L. Gupta (the present appellant) seeking directions to modify the seniority list Annexure P-I attached thereto wherein he was placed below J. R. Aggarwal who was at Sr. No. 22 and above S. K. Setia and others who were impleaded as respondents Nos. 2 to 42 and placed in the seniority list at Sr. Nos. 23 to 71 and thus he claimed all the service benefits including promotion to the post of Superintending Engineer w e.f. June 26, 1986. He was appointed as Assistant Executive Engineer in Irrigation Department of State of Haryana on August 27 1971 S.K. Setia and others, who were impleaded as respondents, joined the service in the Irrigation Department as temporary Engineers/Assistant Executive Engineers (the promotees) They were appointed as Executive Engineers on officiating basis on different dates between March 3, 1970 and July 28, 1971. Subsequently, they were confirmed in 1977-78. He was promoted as Executive Engineer on September 17, 1976 after he completed five years of service as Assistant Executive Engineer. The allegation of Mr. Gupta was that the respondents were officiating against the posts which were beyond the quota-meant for the promotees as prescribed under Rule 5(2) of the Rules. They could only be treated-as members of the service as and when posts in their own quota became available. Thus assigning them 1970 as the year of allotment was in contravention of the provisions of Rule 12(6) of the Rule and thus they could not be made senior to him. The case of the promotees was that even on appointment to ex-cadre post they would be deemed to be the members of the service and the period spent on such ex-cadre post was to be reckoned towards the period of probation. The moment they completed the period of probation and were awaiting appointment to the cadre post, they would become members of the service and entitled to be allocated the year of allotment. By 1975 the post had become vacant in their own-quota and thus they became senior to M. L. Gupta who was appointed in 1976 as Executive Engineer. Learned Single Judge dismissed the writ petition on January 24, 1992. Hence L.P.A. No. 411 of 1992 by M.L. Gupta.

9. Before I refer to the question as to whether the State Government had correctly fixed the seniority in accordance with the rules as interpreted by the supreme court in the two cases referred to above, it may be noticed that the approach of the learned single Judge on the question of the interpretation of the rules and the dictums laid down by the supreme court does not appear to be correct. In Devki Nandan Shant's case learned Single Judge observed as under :-

"After hearing the learned counsel for the parties, I am of the view that there is considerable force in the arguments of the petitioner. In view of the decisions of the supreme court in A.N. Swghal's case(supra), the petitioners would be deemed to be the members of the service under Rule 2(12)

(c) of the rules even if it is held that their initial appointment was beyond their quota."

10. In support of the above view reliance was placed on Rule 2(12) (a) and (c) observing that in view of Rule 2 (12) a direct recruit even though appointed on ex-cadre post could be a member of the service and on the same party a promotee would be member of the service even though appointed on an ex-cadre post. Rule 2(12) has been discussed in detail by the supreme court in *Sehgal's case* (supra) neither this Rule nor the interpretation thereof by the supreme court suggests that a direct recruit on appointment against ex-cadre post could be a member of the service. As a matter of fact a direct recruit is initially appointed as Assistant Executive Engineers and thus, such a direct recruit so appointed would be member of the service in the junior scale of pay as defined under Rule 2(2). For a direct recruit the post of Assistant Executive Engineer is not out of the service, as defined and in his case even though he is promoted as Executive Engineer, subsequently, on completion of probationary period his year of allotment has to be the year in which he was appointed as Assistant Executive Engineer. In para 9 of the judgment in *A. N. Sehgal's case*, (supra) it has been clearly laid down as above As far as direct recruit is concerned, there is no question of his appointment against an ex-cadre post which has been defined as a temporary post of the same rank as a cadre post. The approach of the learned Single Judge on relying upon Rule 2(12) (c) in this context is again not correct Rule 2(12) (c) is to be given similar interpretation as has been given to Rule 2(12)(a). There is not much difference in the phraseology used in these sub-rules However, as already discussed above, Rule 2(12) (c) is not to be read to mean that a : promotee officer appointed against an ex cadre post could also become member of, the service. The only benefit that such a promotee can get is that he would be deemed to be member of the service from the date post within the quota of the promotees is made available for him . though confirmation is made later. There could be no presumption as has been drawn by the learned Single Judge that when the promotees were confirmed in the year 1975-76 they would be within their own quota on the respective dates. The entire" judgment of the learned , Single Judge is based on the assumption, as discussed above.

11. In the other appeal (L.P.A. No. 411 of 1992) similar view was taken by the learned Single Judge. It was assumed that on orders of confirmation of the promotees having been passed, such posts in their own quota were available and, thus, they had become members of the service entitled to the allotment of year under Rule 12(6) of the Rules. It is on that basis that the promotees were given year of allotment as 1970, which was of the last officer working in the service, namely Vithal Ram (a direct recruit). As already discussed by the Supreme Court in the cases referred to above, it is not the date of confirmation that should be treated as an entry into service. After declaration of cadre strength years of allotment are to be allocated to the members of the service and their due places fixed in the seniority and that the orders for confirmation were

required to be made accordingly. If such orders of confirmation were passed without fixation of the seniority with respect to the promotees, no presumption could be raised that such officers were confirmed against posts which were within their quota. The judgments in two cases rendered by the learned Single Judge, therefore, cannot be sustained in law.

12. The question still to be examined is as to whether the seniority of the parties, as fixed by the state; is in accordance with the rules or not. Learned counsel appearing on behalf of both the parties relying upon the order of the State Government determining cadre strength argued their respective cases. However, it is significant that the State of Haryana, "while determining the cadre strength did not further declare the number of posts, which were available to be filled, belonging to the quota of direct recruit or the promotees. The interpretation of the relevant rules as laid down by the Supreme Court in the cases of A. N. Sehgal and S. L. Chopra (supra) leaves no manner of doubt that it was the duty of the State Government to determine the cadre strength for the first five years of enforcement of the former as laid down in appendix-A attached to rules and thereafter from time to time. In the year 1976 the State Government determined the strength of the cadre as 182, the promotees quota would be 50% thereof i.e. 91. Year of allotment of Mr. Gupta being 1971, when he joined as A.E.E., the number of promotees confirmed or awaiting confirmation against promotees' quota would only be considered as members of the service. The promotees could only be accommodated against permanent posts of Executive Engineers falling within quota of 91 posts so declared. As far as direct recruits are concerned, it was only M. L. Gupta, who was recruited from this source after Vithal Ram, thus, leaving the number of posts meant for direct recruits, the remaining posts could be only treated to be within the quota of promotees and no such promotees could be accommodated against such number of posts within their quota and only such promotees' case for determination of seniority vis-a-vis the direct recruit, M. L. Gupta, could be considered.

13. So far as M. L. Gupta is concerned, there is difficulty in allocating year of allotment to him. He was initially recruited as Assistant Executive Engineer on August 27, 1971. He was appointed as Executive Engineer on September 7, 1976. In this case year of allotment has to be 1971 under Rule 12(3) of the Rules. This position is not being disputed. Furthermore in view of the law laid down by the Supreme Court in the two cases, referred to above, for all intents and purposes M.L. Gupta entered the service on his initial appointment as Assistant Executive Engineer and his seniority on the post of Executive Engineer is to be determined as on the date of his initial appointment as Assistant Executive Engineer.

14. The question which is debated in these appeals primarily relates to allocation of years of allotment to the promotees. In view of the discussion on the implication of Rule 2(12)(c) and the rule of law as laid down by the Supreme Court in the cases of A. N. Sehgal and S. L. Chopra (supra) the relevant date for

consideration as to when year of allotment is to be allocated such promotees is when they became members of the service having joined cadre post within their quota. The period of service spent by them either on ex-cadre post or on cadre post which was beyond their quota, is to be ignored from consideration. The words probation or having completed probationary period awaiting confirmation against cadre post do not refer to their posting against temporary posts. How a proviso to Rule 52 is to be inserted, is explained in para 15 of the judgment in A. N. Sehgal's case as under :--

"The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It was to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect."

15. Before reference be made to the individual cases another question requires to be discussed. It has been argued on behalf of the promotees that such number of promotees for whom cadre post became available within their quota during the period the direct recruit was appointed initially as Assistant Executive Engineer and his posting as Executive Engineer would come senior to such a direct recruit. This contention cannot be accepted. So far as direct recruit is concerned, to him year of allotment is to be allocated with respect to his initial appointment as Assistant Executive Engineer. For all intents and purposes for fixation of seniority, it would be deemed that he was appointed as Executive Engineer in the year in which he was initially appointed as Assistant Engineer. This contention is, therefore repelled in view of the reasons recorded in para 21 of A. N. Sehgal's case.

16. In Civil Writ Petition No. 5780 of 1987 Devki Nandan Shant and others, (Promotees), order Annexure R-2/1 was filed vice which State of Haryana fixed the strength of service on January 1, 1976, as 182, cadre-posts. in the senior scale. The names of 91 persons, the promotees manning the posts to the extent of their quota are given in Annexure R-2/2. The last person promoted in this list is shown as Jagdish Rai Aggarwal. Names of Devki Nandan Shant and others in this writ petition do not find mention among the 91 persons, list of which is Annexure R. 2/2. Vithal Ram, who was the last direct recruit in the service, was given date of confirmation as May 27, 1970, which is shown in Annexure P/1, He was shown at serial number 13 in the Gradation list as corrected up to January 1, 1984, Annexure P-2. In this list Madan Lal Gupta was shown at number 92 whereas Devki Nandan Shant and others, petitioners, were shown above him. Subsequently, another list was circulated which is Annexure P-2. In this list, M. L. Gupta, was shown at serial No. 72 whereas Devki Nandan Shant and others were shown junior to him i.e. at serial No. 73 onwards. In between Vithal Ram and M. L. Gupta, promotees namely, Ajit Singh and others were shown. In the order

Annexure P/6 dated July 28, 1987, it was observed by the Financial Commissioner that since the promotee officers had started officiating as Executive Engineers from May 27, 1970, upto December 1, 1973, they were to be allotted 1971 as the year of allotment. This was observed after holding that since Assistant Executive Engineers (direct recruits) eligible and fit for promotion were not available, the officers from Class II service were promoted in excess of 50% quota ; meaning thereby that benefit was being given to such of the promotees who had worked from May 27, 1970 to December 4, 1973, on the posts meant for direct recruits in the matter of fixation of seniority of the promotees. This was clearly prohibited by the Supreme Court in the case of A. N. Sehgal and others (supra) All the promotee officers, he had started working against either ex-cadre posts or against the posts meant for direct recruits but they had joined before August 17, 1971 on which date M. L. Gupta joined as Assistant Executive Engineer, were held to be senior to M. L. Gupta. This approach of the Financial Commissioner is palpably against rule of law as laid down by the Supreme Court in the cases referred to above. 182 permanent posts formed the cadre It included 91 posts of the quota of promotees and 91 of the direct recruits. Seniority has to be fixed among 182 persons only and while fixing the seniority 91 promotee officers and directly recruited officers upto a number of 91 have to be taken into consideration. Mr. M.L. Gupta has to be placed below Mr. J. R. Aggarwal in order of seniority. A promotee officer could only be placed between J.R. Aggarwal and M.L. Gupta, if a post within promotees, quota of 91 posts had fallen vacant before the initial appointment of M.L. Gupta. The writ petition of Devki Nandan Shant and others, the deserve to be dismissed as M. L. Gupta was rightly fixed above the in the seniority.

17. Civil Writ Petition No. 8812 of 1986 was filed by M. L. Gupta claiming seniority above S. K Setia and others, who were impleaded as respondents. Annexure P/1 of this writ petition is the order of the Financial Commissioner, dated July 23, 1987, which has been discussed while considering the other writ petition. Alongwith this order seniority list was filed, which contains names of 121 officers and the name of M. L. Gupta appears at serial No. 72. The petitioner had challenged the fixation of his seniority at serial No. 72, as mentioned in, this seniority list. In the meantime certain persons were promoted and he challenged their promotion as well. When M. L. Gupta was appointed, there were in all 4 direct recruits in service. According to him persons shown above him were holding posts in excess of their quota of the promotees and they had to make way for the petitioner. His name was to be fixed in the seniority just below Shri J.R. Aggarwal at Serial No. 22. It is significant to mention that Vithal Ram was shown in this seniority list at Serial No. 39, which would show that M. L. Gupta was also claiming seniority above him. He explained that since Vithal Ram had gone on deputation, he was thus not claiming any relief against him Annexure P/6 is the order, which was passed after hearing the parties on July 23, 1987, which is also under challenge. M. L. Gupta cannot claim seniority above Vithal Ram, who was a direct recruit earlier inducted into the service in 1970. In any

case, he has to be below Vithal Ram in order of seniority S. K. Setia was placed at serial No. 23 and M.L. Kansalat serial No. 38. All these promotees from serial No. 23 to 38 were given the year of allotment as 1970 and thus, fixed above Vithal Ram, taking 1970 as the year of allotment of J. R. Aggarwal, last promotee in service. In the order Annexure P/1, as already discussed, it was observed that since only four persons (at that time) were among the direct recruits the promotees who were eligible and fit for promotion were promoted in excess of 50% quota under Rule 5(2), Since they had started officiating as Executive Engineers after Vithal Ram, they were allocated 1970 as the year of allotment and, thus, they were placed after Vithal Ram. This argument, though attractive, cannot be accepted qua M. L. Gupta, direct recruit. In this order, it was further observed that all those promotee officers, who had started officiating as Executive Engineers on or before August 27, 1971 then M.L. Gupta, joined as Assistant Executive Engineer, were ranked senior to M. L. Gupta. This position again cannot be accepted unless it is shown that posts within their quota had fallen vacant before August 27, 1971, when M. L. Gupta joined as Assistant Executive Engineer in Class I Service. Thus, the promotee, in such circumstances would get year of allotment, as on the relevant date of entering in service as Executive Engineer when post is first made, available within the quota of promotees, for officiation, probation or confirmation as the case may be in view of Rule 2(12) (c) of the Rules.

18. Since year of allotment of M. L. Gupta is 1971, the sanctioned strength of the cadre then prevalent is to be taken into consideration as on August 20, 1971. Promotees working against ex-cadre posts or against quota of direct recruits are to make room for M. L. Gupta. As already stated above only four direct recruits were in service and out of sanctioned strength of the cadre which was 182 posts, 91 posts i.e. 50% were to be filled by the promotees. Annexure R-2/1 gives the strength of the cadre as on January 1, 1976. The names of 91 promotees who were already in service as on 1-11-1966, on Constitution the State of Haryana, are given in Annexure R. 2/2 and the last one is Jagdish Rai Aggarwal. M. L. Gupta was to be fixed just after Jagdish Rai Aggarwal, who was last in the service of permanent Executive Engineers including promotees and direct recruits. To place S. K. Setia and others above M. L. Gupta on the ground that they had started officiating before M.L. Gupta is not in accordance with the rules if they so started functioning against the posts of quota of direct recruits.

19. It has been argued by learned counsel appearing on behalf of the promotees that when the State Government passed orders of confirmation of the different promotees, they should be deemed to have entered the service w.e.f the respective dates of confirmation and these should be considered the relevant dates for allocating years of allotment to them. This contention cannot be accepted in view of the reasons recorded in A. N. Sehgal's case reproduced above, such promotees were not confirmed against the posts falling within their quota of the declared strength of the cadre. The mere fact that such orders were passed under Rule 8 or Rule 11 (4) of the Rules will be of no benefit to such

promotees. As already discussed above, it is only after fixation of the seniority in accordance with the year of allotment allocated that the orders of confirmation accordingly are required to be made. In the present case, without finalising the seniority of the promotees vis-a-vis direct recruits, orders of confirmation of some of the promotees were made. This will not effect the question of determination of seniority of members of the service.

On behalf of the appellant, M. L. Gupta, an argument, was addressed that on November 1, 1966, on creation of the State of Haryana, 92 posts were allotted to the State of Haryana out of 230 posts which were sanctioned in 1966 on the basis of 60% : 40% ratio. Photo-copy of the order dated September 2, 1966 fixing cadre strength of Punjab Service Engineers with effect from January 1, 1965 under 1964 Rules has been produced indicating the total strength of senior posts at 230. Names of 92 persons who were allocated to Haryana at that time were shown in the list attached with the writ petition. The contention is that such 92 posts should be considered as the sanctioned strength of the service as on November 1, 1966 and the promotees quota should not increase 75% i.e. 69 posts and all others among 92 persons should be treated to have been officiating against ex cadre posts and further on appointment of M. L. Gupta, the only direct recruit after creation of Haryana State should rank in seniority in the 92 posts allocated in Haryana and fix him among them. This contention cannot be accepted. Taking the facts as stated above to be correct that sanctioned strength of joint Punjab was 230 and 92 persons were allocated to Haryana i.e. 40% of the sanctioned strength, in the absence of any fresh order passed under Rule 3 of the Rules determining the cadre strength, the quota of promotees or the direct recruits could not be determined. The fact remains that seniority of those 92 persons allocated to Haryana on November 1, 1966 who at one time were members of the service, cannot be disturbed. On the other hand learned counsel for the promotees have argued that 92 persons allocated to Haryana on bifurcation of Haryana from Punjab and such number of posts would form a group in itself constituting the service under the Rules and the provisions under the Rules fixing cadre strength or respective quota of the promotees would not be applicable to such posts or persons so allocated. To elaborate the same it was argued that vacancies occurring henceforth either by conversion of temporary posts into permanent or by raising of the a cadre strength would be divided under the Rules among the promotees and others quota wise and rotawise. This contention is devoid of merit. As already observed above, seniority of 92 persons allocated to Haryana, of course, would not be disturbed by induction into service of members of the service recruited thereafter but it cannot be said that such persons, 92 in number, constituted a separate group in the service. If new posts are added to the service, they are to be calculated along with the existing 92 posts to determine the quota of the promotees as further recruitment of the promotees into service has to be within their quota as fixed under the Rules. If by so appointing the number exceeds the maximum limit prescribed, such appointment would be considered against an ex-cadre post and their period of

service on such ex-cadre post is to be ignored for the purposes of determining seniority of such a person till the post within the promotees quota is made available for such a person. This contention is, therefore, repelled.

20. With effect from January 1, 1975, cadre strength was fixed 173 vide order dated June 7, 1977. Since the Rules were framed in 1964 after a period of 10 years, the promotees quota was not to exceed 50% which would be 86, and four direct recruits already there the petitioner would be fixed at 90th place. This contention of learned counsel for M. L. Gupta cannot be accepted as seniority of 91 persons allocated to Haryana, as discussed above, cannot be disturbed, Shri M. L. Gupta has to be fixed in seniority below J. R. Aggarwal.

21. For the reasons recorded above, both the Letters Patent Appeals are allowed. The judgment of learned Single Judge in both the cases are set aside. Civil Writ Petition filed by Devki Nandan Shant and others stands dismissed whereas Civil Writ Petition filed by M. L. Gupta is allowed. The order fixing seniority of M. L. Gupta vis-a-vis respondents Nos. 2 to 42 is quashed. The promotion of respondent Nos. 2 to 42 to the post of Superintending Engineer and above considering them senior to M. L. Gupta also stands quashed. Direction is given to the respondents to re-fix the seniority of members of the service treating M. L. Gupta as senior to respondents Nos. 2 to 42 allocating necessary years of allotment thereafter pass orders of confirmation and promotion respectively, with retrospective effect from the date the posts become available for confirmation and promotion. There will be no order as to costs.