
(1992) 07 SHI CK 0003
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 584 of 1984

Mr. A.L. Vaidya

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 02-07-1992

Acts Referred:

All India Services (Conditions of Service Residuary Matters) Rules, 1960 — Rule 3
Constitution of India, 1950 — Article 235, 31A
Himachal Pradesh Higher Judicial Service Rules, 1973 — Rule 10(1), 12, 2(2), 2(6), 21, 21
Punjab Superior Judicial Service Rules, 1963 — Rule 12

Citation : (1993) 2 ShimLC 354

Hon'ble Judges : L.S. Panta, J; Kamlesh Sharma, J

Bench : Division Bench

Advocate : Kedar Ishwar, for the Appellant; R.M. Bisht, Law Officer for Respondent No. 1, K.D. Sood, for Respondent No. 2., A.K. Goel, for L.Rs. No. 1 to 3 of Respondent No. 3, G.S. Ahuja, for L.R. No. 4 of Respondent No. 3 and D.D. Sood, for the Respondent

Final Decision : Allowed

Judgement

Kamlesh Sharma, J.—The Petitioner and the fourth Respondent are promoted officers of the H.P. Higher Judicial Service. The first Respondent, State of Himachal Pradesh, is only proforma and it has not filed any reply to the writ petition. The second Respondent is the High Court of Himachal Pradesh and it has put in its defence to the writ petition by way of its affidavit dated 25th September, 1985. Originally, Anr. member of H.P. Higher Judicial Service, Sh S.S. Ahuja, a direct recruit, was impleaded as the third Respondent and he had also filed his reply affidavit dated 26th August, 1985, Unfortunately, during the pendency of the writ petition, Sh S.S. Ahuja has died on 18th September, 1985(sic) and the Petitioner moved a Civil Misc. Petition No. 375 of 1990 to delete his name from the array of the Respondents. The application was allowed on 25th April, 1990. Later at the request of the fourth Respondent, he was allowed to file his reply affidavit dated 19th September, 1990. Rejoinders to the

replies filed by Respondents No. 2, 3 and 4 are also on record.

2. When the writ petition was taken up for final hearing on 24th April, 1992, it was urged on behalf of the fourth Respondent that as a consequence of the death of Sh S.S. Ahuja and the order of deletion of his name, the writ petition has become infructuous as the controversy of fixation of seniority of promotee officers vis-a-vis the direct recruit has ended. According to him, the only controversy that remains is the determination of seniority between the Petitioner and the fourth Respondent for which Clause (ii) of the proviso to Rule 12 of the Himachal Pradesh Higher Judicial Service Rules, 1973 (hereinafter called "the Rules of 1973") is very clear that their seniority in the Himachal Pradesh Judicial Service as it stood immediately before their confirmation is to be maintained. As admittedly, the fourth Respondent is senior to the Petitioner in the Himachal Pradesh Higher Judicial Service, he will continue to be senior to him in the Himachal Pradesh Higher Judicial Service. At this, time was sought on behalf of the Petitioner to consider the effect of deleting the name of Sh. S.S. Ahuja from the array of Respondents and to take necessary steps, if any. Thereafter, on 24th April, 1992, the Petitioner filed Civil Misc. Petition No. 623 of 1992 for recalling the order dated 25th April, 1990 passed in Civil Misc. Petition No 375 of 1990 and bringing on record the Legal representatives of late Sh. S.S. Ahuja as proper parties. On this application, notices were issued to the legal representatives of late Sh S.S. Ahuja whose names and addresses were given in the application. This application was opposed by the fourth Respondent as well as by the legal representatives of late Sh. S.S. Ahuja by filing separate replies thereto. After hearing the parties, it was ordered to decide this application alongwith the writ petition. Before we record our decision on this application, we would like to state the respective case of the parties.

3. By separate notification dated 30th October, 1980, (Annexures "A" and "B" to the petition), the Governor Himachal Pradesh was pleased to appoint the Petitioner and the fourth Respondent to the H.P. Higher Judicial Service by promotion from the H.P. Higher Judicial Service with effect from the date they would assume charge of the post to which they might be posted by the High Court. On the other hand, vide notification dated 20th February, 1981 (Annexure "C" to the petition) late Sh. S.S. Ahuja, an Advocate of the High Court of Himachal Pradesh, was also appointed to the H.P. Higher Judicial Service as a direct recruit with effect from the date of his assuming charge in the Sessions division to which he might be posted by the High Court. The High Court of Himachal Pradesh issued posting order of the Petitioner and the fourth Respondent vide notification dated 31st October, 1980 (Annexure "D" to the petition). Under Clause 3 of this Notification, it was provided:

3. The appointment and posting of S/Sh. R.L. Khurana and A.L. Vaidya to the cadre posts will not give them any right to claim seniority over a direct recruit to be appointed very shortly, in accordance with the rules.

The posting order of late Sh. S.S. Ahuja was issued vide notification dated 26th

February, 1981 (Annexure "E" to the petition).

4. All the three officers, the Petitioner, the fourth Respondent and late Sh. S.S. Ahuja were confirmed from the same date, that is, 15th October, 1982 by separate notifications dated 20th October, 1982 (Annexures "F", "G" and "H" to the petition). For confirming them, their period of probation was reduced as stated by the Full Court in its meeting held on 15th October, 1982 in view of their work being exceptionally well and the fact that though the High Court had recommended the name of late Sh. S.S. Ahuja against the post reserved for direct recruits vide its resolution dated 29th August, 1980 and the names of the fourth Respondent and the Petitioner for promotion on 6th October, 1980 to the H.P. Higher Judicial Service, yet, the Government took time to order their appointments. An extract of the minutes of the Full Court meeting dated 15th October, 1982 is placed on the record as Annexure "I" to the petition.

5. The gradation list of officers of H.P. Higher Judicial Service as on 1st January, 1983 was circulated by the High Court by its circular dated 17/18th February, 1983 (Annexure "J" to the petition). In this gradation list, late Sh. S.S. Ahuja was placed senior to both the Petitioner and the fourth Respondent. The fourth Respondent was placed senior to the Petitioner. Both the Petitioner and the fourth Respondent felt aggrieved by the seniority list and they made their representations to which the comments of late Sh. S.S. Ahuja were called by the High Court. The representations of the Petitioner and the fourth Respondent and the reply thereto by late Sh. S.S. Ahuja are on record as Annexure "K", "L", "M" and "N" to the petition. Ultimately, by a confidential letter dated 9th April, 1984, (Annexure "O" to the petition), the then Registrar of the High Court of Himachal Pradesh informed the Petitioner that his representation was considered by the Full Court in its meeting held on 27th March, 1984 and it was decided to maintain the inter-se seniority as assigned in the Gradation list already circulated and that his representation stood disposed of accordingly. A copy of the order passed by the Full Court on the representations of the Petitioner and the fourth Respondent is also on record as Annexure "Q" to the petition. As is apparent from the order of the Full Court, the background relating to the respective appointment of the concerned officers, the seniority of the Petitioner and the fourth Respondent in the lower cadre, the consistent stand of the High Court that late Sh. S.S. Ahuja should take precedence over the Petitioner and the fourth Respondent which stand was within their knowledge and injustice, inequity and undue hardship would be caused to late Sh. S.S. Ahuja if the order of inter-se seniority already circulated was changed, were the considerations which weighed with the Full Court while refusing to accept the representations of the Petitioner and the fourth Respondent. Under the circumstances, the Full Court by way of abundant caution resolved to exercise the powers conferred by Rule 21 of the Rules of 1973 to maintain the inter-se seniority of the officers of the H.P. Higher Judicial Service already determined. The Full Court further resolved that it was the High Court alone who had the authority to exercise the powers under Rule 21 of the Rules of 1973 in the matter of actual determination of seniority of Judicial

officers as provided under Article 235 of the Constitution of India and in R.M. Gajjar Vs. State of Gujarat and Others, and it was not necessary to approach the Governor in that behalf. It was in this background that the writ petition was filed.

6. Both, the High Court of Himachal Pradesh the second Respondent, and late Sh. S.S. Ahuja, in their separate replies have given the detailed background of the appointment of the Petitioner and the fourth Respondent by way of promotion and of late Sh. S.S. Ahuja by direct recruitment to justify his seniority vis-a-vis the Petitioner and the fourth Respondent. It is stated that on the death of Sh. P.L. Sharma on 12th May, 1980 a permanent post had fallen vacant in the H.P. Higher Judicial Service which was to be filled by direct recruitment as per Rule 8 of the Rules of 1973 which provides quota of 2/3rd by promotion and 1/3rd by direct recruitment. After holding selection, the name of Sh. S.S. Ahuja was recommended for appointment to the H.P. Higher Judicial Service on 13th September, 1980. But before his appointment, two more posts fell vacant on 30th October, 1980 on the retirement of Sh. S.S. Kanwar and premature retirement of Sh. Onkar Nath, members of the H.P. Higher Judicial Service. Against these two vacancies, the High Court recommended the name of the fourth Respondent on 4th/7th October, 1980 and that of the Petitioner on 17th October, 1980 for appointment to the H.P. Higher Judicial Service by promotion. Whereas the notifications of appointment of the Petitioner and the fourth Respondent were issued on 30th October, 1980, the notification of appointment of late Sh. S.S. Ahuja was delayed upto 20th February, 1981 despite communications sent by the then Registrar as well as by the Chief Justice of the High Court to the first Respondent, the State of Himachal Pradesh. These communications have been brought on record as Annexures "R-A" to "R-D" by late Sh. S.S. Ahuja, alongwith his reply.

7. According to the second Respondent, the High Court of Himachal Pradesh, there was delay in issuing the notification of appointment of late Sh. S.S. Ahuja whereas the notifications appointing the Petitioner and the fourth Respondent stood already issued on 30th October, 1980 and anomalous position was created, adversely affecting the right of late Sh. S.S. Ahuja as direct recruit to be senior to these promoted officers, therefore, a specific stipulation was made in the posting order of the Petitioner and the fourth Respondent that their appointment to "the cadre posts will not give them any right to claim seniority over a direct recruit to be appointed very shortly in accordance with the rules." The High Court of Himachal Pradesh and late Sh. S.S. Ahuja have further alleged that without raising any protest to the condition in the posting order, the Petitioner and the fourth Respondent joined their places of posting respectively on 6th November, 1980 and 1st November, 1980. So far late Sh. S.S. Ahuja is concerned, he could join only on 27th February, 1981. In these circumstances, late Sh. S.S. Ahuja in his reply had taken a preliminary objection that the Petitioner having accepted the condition imposed in the posting order is estopped from claiming seniority above him. Another preliminary objection raised by him was that the petition was mala fide, having been filed in furtherance of the interest of the fourth

Respondent because being junior to the fourth Respondent in the lower cadre, the Petitioner cannot claim seniority over the fourth Respondent who had not assailed his seniority in view of his act and conduct as Registrar, detailed in reply to the representation, Annexure "L" to the petition.

8. Whereas the High Court in its reply has defended the confirmation of the Petitioner, the fourth Respondent and late Sh. S.S. Ahuja from the same date, that is. 15th October. 1982 by reducing their period of probation, Sh. S.S. Ahuja had stated that only his case fell within the category of exceptional circumstances under proviso to Rule 10(1) of the Rules of 1973 to reduce his period of probation by (sic)1/2 months and in the case of the Petitioner and the fourth Respondent, the period of probation could not be reduced by 21 and 15 days respectively as there were no exceptional circumstances. Therefore, their confirmation from the same date as his was bad. According to late Sh. S.S. Ahuja, the Full Court was led to pass the bad order confirming him, the Petitioner and the fourth Respondent from the same date because the then Registrar and the Deputy Registrar, Sh. R.C. Malhotra joined hands with the Petitioner and the fourth Respondent in not placing the correct facts before the Full Court Neither there was any delay in the appointment of the Petitioner and the fourth Respondent nor their work could be equated with him, stated late Sh. S.S. Ahuja. Therefore, he had prayed that the confirmation order may be set aside to the extent that the period of probation of the Petitioner and the fourth Respondent has been reduced and they may be deemed to be confirmed on the completion of two years probation period from the dates of their joining that is, 6th November, 1982 and 1st November, 1982 respectively.

9. So far the determination of seniority of direct recruits and promotees is concerned, there was/is no dispute between the Petitioner, the High Court, the fourth Respondent and late Sh. S.S. Ahuja that it is to be determined under Rule 12 of the Rules of 1973 but they have given their different interpretation as well as method of application of this Rule. According to the Petitioner, in view of the same date of confirmation, Clause (iii) of proviso to Rule 12 of the Rules of 1973 will apply and he being admittedly eldest in age, was required to be placed senior to the fourth Respondent as well as late Sh. S.S. Ahuja. The High Court has taken the stand that under Rule 12 of the Rules of 1973, first the inter-se seniority of confirmed direct recruits is to be determined by applying Clause (i) to the proviso and that of the confirmed promotee officers in accordance with Clause (ii) of proviso to Rule 12, in case their date of confirmation is the same. Thereafter, inter-se seniority of direct and promoted officers is to be determined by applying Clause (iii) of the proviso to Rule 12 of the Rules of 1973 but without disturbing the seniority inter-se already determined between the officers from the same source. Thus, Clauses (i), (ii) and (iii) of the proviso to Rule 12 of the Rules of 1973 have to be read together and applied harmoniously- Application of Clause (iii) of proviso to Rule 12 of the Rules of 1973 without having regard to Clauses (i) and (ii) thereof, will create an anomalous position inasmuch as a promoted officer who is junior in the lower cadre will become senior, in the

higher cadre, to his promoted senior colleague merely by being older in age. Besides anomaly, this interpretation will also create hardship, inconvenience and injustice. Their further case was is that while applying Clause (iii) of proviso to Rule 12, Rule 8 of the Rules of 1973 which has fixed the quota for filling the posts cannot be ignored. As late Sh. S.S. Ahuja was recommended against the vacancy to be filled in by direct recruitment much before the recommendations of appointment of the Petitioner and the fourth Respondent by way of promotion, the delay in the issuance of notification of appointment of late Sh. S.S. Ahuja had resulted in undue hardship to him, therefore, the High Court had rightly exercised its power of relaxation under Rule 21 of the Rules of 1975 in placing him senior to the Petitioner and the fourth Respondent.

10. Further, according to the High Court and late Sh. S.S. Ahuja, on the correct interpretation of Article 235 of the Constitution of India, it is the High Court which is the competent authority to exercise the power of relaxation under Rule 21 of the Rules of 1973 in the context of fixation of seniority of Judicial Officers Both the High Court and late Sh. S.S. Ahuja have supported the Full Court decision dated 27th March, 1984 dismissing the representations of the Petitioner and the fourth Respondent for the reasons given therein. The High Court in its reply has disclosed that before taking this decision, the Full Court had sought the opinion dated 21st March, 1984 of the then Attorney General of India. A copy of the opinion has been placed on the record of this petition during the course of the hearing. From the opinion of the Attorney General of India, it is clear that he has answered the queries raised by the High Court on the basis of the material placed before him.

11. The defence of the fourth Respondent in the beginning as stated in his representations dated 4th October, 1983 and 15th March, 1983, was that seniority was to be determined in accordance with Rule 12 of the Rules of 1973 by application of which he was to be placed senior to late Sh. S.S. Ahuja as he was older to him in age. According to him, in any event the Petitioner was rightly placed below him and late Sh. S.S. Ahuja. Lateron, in his reply affidavit dated 19th September, 1990, he has pleaded that after the death of Sh. S.S. Ahuja, the writ petition has become infructuous and the grievance of the Petitioner regarding fixation of inter-se seniority between the direct recruits and promotees does not survive. According to him, there cannot be any dispute of seniority between him and the Petitioner as it is to be determined under Clause (ii) of the proviso to Rule 12 of the Rules of 1973, according to which, the seniority in the lower cadre of H.P. Higher Judicial Service is to be maintained in which he is admittedly senior to the Petitioner. The fourth Respondent has denied that Rules 8 and 12 of the Rules of 1973 have been mis-interpreted by the High Court and that the Petitioner was entitled to be ranked senior to him and late Sh. S.S. Ahuja merely because he was older to them. The fourth Respondent has also put up an alternative case that on the principle of date of officiation also, he was senior to the Petitioner because he started working against the ex-cadre post of H.P. Higher Judicial Service since 7th June, 1979 whereas the Petitioner was, for

the first time, appointed to a cadre post on 30th October, 1980.

12. After considering the pleadings of the parties and the arguments addressed on their behalf, we are of the opinion that we need not go into the allegations and counter allegations made in respect of issuance of appointment orders of the Petitioner and the fourth Respondent on the one hand and of late Sh. S.S Ahuja on the other and also the condition laid down in the posting order of the Petitioner and the fourth Respondent because all three of them were confirmed from the same date by the Full Court decision dated 15th October, 1982.(sic) The Petitioner and the fourth Respondent are not aggrieved by this decision as for confirming them from 15th October, 1982, their period of probation was reduced. So far late Sh. S.S. Ahuja is concerned, he had also accepted it as he was placed senior to the Petitioner and the fourth Respondent despite the same date of confirmation. We do not find any thing wrong with the decision dated 15th October, 1982 of the Full Court as it assessed the merit of all the three officers as exceptionally good and treated them equal for reducing the period of probation. After confirmation of all the three officers from the same date the controversy pertaining to the right of late Sh. S.S. Ahuja to be senior to the Petitioner and the fourth Respondent on the basis of his recommendations made earlier in point of time to their recommendations and also being a direct recruit, loses its importance. In view of this, the controversy has narrowed down to the interpretation and application of Rule 12 of the Rules of 1973 which is:

12. Seniority- The seniority, inter-se, of the substantive members of the service whether direct recruits or promoted officers, shall be determined with reference to the respective dates of their confirmation:

Provided that the seniority, inter-se, of substantive members of the service having the same date of confirmation shall be determined as follows:

- (i) in the case of direct recruits, the older in age shall be senior to the younger ;
- (ii) in the case of promoted officers, in accordance with the seniority in the Himachal Pradesh Judicial Service as it stood immediately before their confirmation;
- (iii) in the case of promoted officers and direct recruits the older in age shall be senior to the younger."

13. Before we interpret Rule 12, firstly, it is to be seen whether both the Rules 8 and 12 are to be read together or Rule 12 is independent of Rule 8 which lays down quota for recruitment. Almost similar Rule 8 prescribing quota of 2/3rd by promotion and 1/3rd by direct recruitment to the superior Judicial Service and exactly similar seniority. Rule 12 existed in the Punjab Superior Judicial Service Rules, 1963 which came for interpretation by a Full Bench of the High Court of Punjab and Haryana in Narender Singh Rao Vs. State of Haryana and Others, Following the principles for determination of seniority of promotees vis-a-vis the direct recruits laid down in A.K. Subraman and Others Vs. Union of India (UOI)

and Others, and AIR 1977 251 (SC) five learned Judges constituting the Full Bench held that:

...Rules 8 and 12 are independent of each other, the rotational system cannot impliedly be read in the quota rule provided under Rule 8 of the Rules and that a member of the superior Judicial Service is entitled to claim seniority strictly in accordance with the provisions of Rule 12.

14. The findings of the Full Bench in Narender Singh Rao v. State of Haryana and Ors. (supra) were considered by the Supreme Court in B.S. Yadav and Others Vs. State of Haryana and Others, and were confirmed. In the case of B.S. Yadav and Ors. v. State of Haryana and Ors. (supra) the Supreme Court considered the up-to-date law on the determination of seniority of direct recruits vis-a-vis the promotees and held that:

...Therefore, whether the quota system has to be observed not only at the stage of initial recruitment but also at the stage of confirmation is not a matter of abstract law but will depend on the wording of the rules and the scheme of the rules under consideration Any dogmatic assertion one way or the other, is wrong to make. On a review of these authorities, all that we would like to say is that on a proper interpretation of the rules governing the Punjab and Haryana Superior Judicial Service, the rule of rota cannot be read into the rule of quota. In other words, the ratio of 2:1 shall have to be applied at the stage of recruitment but cannot on the language of the relevant rules, be applied at the stage of confirmation....

Referring to the Full Bench judgment of the High Court of Punjab and Haryana in Narender Singh Rao v. State of Haryana and Ors case (supra) the learned Judges of the Supreme Court opined that "the aforesaid judgment has taken a correct view of the matter on a combined reading of Rules 8 and 12.

15. If Rule 12(sic) is independent of Rule 8. the next question arises how to apply Clauses (i) to (iii) of the proviso to this rule when the seniority is to be determined between the direct recruits and the promotees As per the interpretation adopted by the High Court and suggested by the fourth Respondent as well as by late Sh. S.S. Ahuja in his reply affidavit, the seniority of direct recruits and promotees is to be determined separately under Clause (i) and Clause (ii) and thereafter Clause (iii) is to be applied for determining their inter-se seniority keeping the inter-se seniority of officers of each category intact. According to them, if the interpretation sought for by the Petitioner is accepted, that for determining inter-se seniority of direct recruits and promotees only Clause (iii) of the proviso to Rule 12 is to be resorted to, it will lead to injustice, hardship and anomalous condition inasmuch as a senior promotee officer will be ranked junior merely on the basis of age. In our opinion, this submission though attractive, deserves to be rejected on the ground that it will amount to adding words to Clause (iii) of Rule 12 of the Rules of 1973.

...If the language of the enactment is clear and unambiguous it would not be

legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the legislature said five Judges of the constitution Bench of the Supreme Court in Sri Ram Ram Narain Medhi Vs. The State of Bombay, In this case, the Supreme Court rejected the argument that the extinguishment or modification of any right in any estate should only be in the process of acquisition by the State of any estate or any rights therein as it amounted to adding words "in the process of such acquisition" in Sub-clause (a) of Clause (1) of Article 31-A of the Constitution of India after the words "the extinguishment or modification of any such rights". This basic principle of interpretation of statute has been reiterated in many later judgments which need not be referred to.

16. If the language of a statute or a rule is plain and admits of one meaning, it is to be given effect to even if it leads to hardship or inconvenience to any of the parties. In the present case, the language is very simple and meaningful It is susceptible to no other meaning save and except that the inter-se seniority of promoted officers and direct recruits is to be determined only on the basis of age. that is, the older in age is to be ranked senior to the younger not withstanding their inter-se seniority in their respective group Clause (iii) of proviso to Rule 12(sic) of the Rules of 1973 is in uniformity with Clause (i) which also provides that the seniority of direct recruits is determined on the basis of age. It definitely comes in clash with Clause (ii) according to which the seniority of promoted officers is determined in accordance with their seniority in the lower cadre of H.P. Judicial Service and might create hardship, inconvenience as suggested on behalf of the High Court, the fourth Respondent and late Sh. S.S. Ahuja. But in the face of plain language of Clause (iii), it cannot be avoided. The intention of the rule making authority that amongst the members of the H.P Higher Judicial Service, age should be the only criterion for fixing their seniority, irrespective of their source of recruitment, is apparent. Neither any rule nor the scheme of the Rules of 1973 suggests an intention otherwise Had the intention of the rule making authority been that while deterermining iter-se seniority of promotees and direct recruits, their inter-se seniority in their respective categories is to be protected, it would have provided father in Clause (iii) of the proviso to Rule 12 of the Rules of 1973 that "but their inter-se seniority in their respective categories will not be disturbed" this Court cannot add these words to Clause (iii) in order to give it the meaning suggested on behalf of the High Court, the fourth Respondent and late Sh. S.S. Ahuja.

17. Or the interpretation of Clause (iii) of proviso to Rule 12 of the Rules of 1973 as given by us, it will be of no effect if the seniority of direct renuits and promotees is determined first in their respective categories in accordance with Clauses (i) and iii) respectively and thereafter Clause (iii) is applied because by its application, the direct recruits and the promoted officers will be placed according to their age notwithstanding their seniority in their respective categories. We do not find any force in the argument addressed on behalf of the High Court, the fourth Respondent and late Sh. S.S. Ahuja that if Clause (iii) is

applied independent of Clause (ii), it will negate the provisions of Clause (ii). According to us, Clause (ii) meets a situation when seniority of those promoted officers is to be determined who were confirmed on the same date.

18. For taking this view, we are guided by the observations of the Supreme Court in *B.S. Yadav and Ors. ; Pritpal Singh and Ors. v. State of Haryana; State of Punjab and Ors. (supra)* that:

Rule 12 now in force in Haryana and which was in force in Punjab prior to the amendment dated December 31, 1976 provides that the seniority of direct recruits and promoted officers shall be determined with reference to the respective dates of their confirmation. The proviso to Rule 12 deals with three kinds of cases in which substantive members of the Service have the same date of confirmation. In regard to the third category of cases, the proviso says that in the case of promoted officers and direct recruits having the same date of confirmation, the older in age shall be senior to the younger.

19. In view of the interpretation of Rule 12 of the Rules of 1973 and its mode of application as given by us, we hold that the determination of seniority of the Petitioner vis-a-vis the fourth Respondent and late Sh. S.S. Ahuja as on 1-1-1983 is not in accordance with Rule 12 of the Rules of 1973. The Petitioner being older in age was to be placed senior to the fourth Respondent as well as late Sh. S.S. Ahuja. As the fourth Respondent is older to late Sh. S.S. Ahuja, he was required to be placed above him and below the Petitioner. As a consequence, the order of the Full Court (Annexure "Q" to the petition) rejecting the representation of the Petitioner and resolving that inter-se seniority of all the three officers determined vide Gradation list (Annexure "J" to the petition) was correct, is also held bad.

20. Relying upon constitution Bench judgment of the Supreme Court in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, it has been urged on behalf of the fourth Respondent that he is senior to the Petitioner as he had started officiating on ex-cadre post of Additional District and Sessions Judge on 7th June, 1979 whereas the Petitioner was appointed to a cadre post on 30th October, 1980. This argument has been raised to be rejected in view of the specific seniority Rule 12 of the Rules of 1973. Moreover, the question before us is determination of seniority of substantive members of the H.P. Higher Judicial Service and appointment to an ex-cadre post does not make a person "member of the Service" as defined by Sub-rule (6) read with Sub-rule (2) of Rule 2 of the Rules of 1973.

21. From the order of the Full Court (Annexure "Q" to the petition), we find that besides on the interpretation of Rule 12 of the Rules of 1973, the Full Court exercised its power of relaxation under Rule 2 of the Rules of 1973 to maintain the seniority of late Sh. S.S. Ahuja above the Petitioner and the fourth Respondent keeping in view the background of their respective appointments. As stated in its order, the Full Court had invoked the relaxation clause, "Under the

circumstances, in the alternative and by way of abundant caution." The Petitioner has assailed this part of the order of the Full Court on the ground, firstly, that after the confirmation from the same date of late Sh. S.S. Ahuja by reducing his probation period by 4-1/2 months, as well as of the Petitioner and the fourth Respondent by reducing their probation period by 21 and 15 days respectively, the hardship, if any, caused to late Sh. S.S. Ahuja stood obliterated. The other ground urged is that the power of relaxation could not be exercised by the Full Court retrospectively to justify its action on the administrative side.

We find substance in both these submissions. If the operation of Rule 12 of the Rules of 1973 was causing hardship to late Sh. S.S. Ahuja, he could be confirmed earlier to the Petitioner and the fourth Respondent by reducing his probation period and the Petitioner and the fourth Respondent could be confirmed later on completion of their probation period. Once all the three officers were confirmed from the same date,, keeping in view the background of their appoint runs, it could not be said that application of Rule 12 was creating any hardship for late Sh. S.S. Ahuja. Therefore, we hold that in the circumstances, no relaxation could be granted in favour of late Sh. S.S. Ahuja in placing him senior to the Petitioner and the fourth Respondent in violation of Rule 12 of the Rules of 1973.

22. Interpreting almost similar Rule 3 of All India Services (Conditions of Service Residuary Matters) Rules, 1960, pertaining to relaxation, the Supreme Court in *Shri. Amrik Singh and Ors. v. Union of India and Ors.* 1980 (2) SLR 110, observed that:

...Government must be satisfied, not subjectively but objectively that any rule or regulation affecting the conditions of service of a member of the All India Services causes undue hardship, then the iniquitous consequence thereof may be relieved against by relaxation of the concerned Rule or Regulation There must be undue hardship and, further the relaxation must promote the dealing with the case "in a just and equitable manner". These are perfectly sensible guidelines. What is more, there is implicit in the Rule, the compliance with natural justice so that nobody may be adversely affected even by administrative action without hearing....

23. On the basis of the guidelines laid down in the case of *Amrik Singh and Ors. v. Union of India and Ors.* (supra), we hold that in the present case, there was no inequity in favour of late Sh S.S. Ahuja from which he was required to be relieved after his confirmation and the confirmation of the Petitioner and the fourth Respondent from the same date, by relaxation of Rule 12 of the Rules of 1973. The Full Court had not considered the case objectively while exercising its powers of relaxation under Rule 21 of the Rules of 1973. The order of the Full Court is also bad as the powers of relaxation were exercised retrospectively for justifying the determination of the seniority of late Sh. S.S. Ahuja above the Petitioner and the fourth Respondent If it was a case for relaxation, it could be given at the time the seniority of late Sh S.S. Ahuja was initially determined in the Gradation List (Annexure "J" to the petition) and not afterwards when it was

challenged by way of representations by the Petitioner and the fourth Respondent. It cannot be said that at the time of determination of seniority, the Full Court impliedly relaxed Rule 12 of the Rules of 1973 as the learned Counsel appearing on behalf of the High Court, the fourth Respondent and late Sh. S.S. Ahuja have tried to urge. By now it is well settled that order exercising relaxation in favour of an employee adversely affects the rights of other employees, therefore, it is to be exercised by recording an express order in that behalf, (please see: *State of Punjab and Ors. v. Tikka Singh and Ors.* 1981 (2) SLJ 173).

24. Lastly, we advert to C.M.P. No. 623 of 1992. Though it has been opposed on behalf of the fourth Respondent and the legal representatives of late Sh. S.S. Ahuja, yet, they have not denied that change in the seniority of late Sh. S.S. Ahuja vis-a-vis the Petitioner and the fourth Respondent will adversely affect the pensionary benefits as well as selection grade already received and claimed for by the legal representatives of late Sh. S.S. Ahuja. It is correct that the order dated 25th April, 1990 in C.M.P. No. 375 of 1990 was passed by this Court on invitation and without notice to the legal representatives of late Sh. S.S. Ahuja and the fourth Respondent who was not represented by any Counsel at that time but the explanation given for getting the order of deletion of the name of Sh. S.S. Ahuja from the array of Respondents seems to be plausible to us and we accept the same. It has been correctly urged on behalf of the Petitioner that seniority in the cadre of H.P. Higher Judicial Service was a personal right of late Sh. S.S. Ahuja which did not survive against his legal representative and the Petitioner had no knowledge of the grant of selection grade to late Sh. S.S. Ahuja with effect from 25th August, 1987 provisionally and the payment of arrears thereof to his legal representatives by the order of this Court vide notification dated 18th April, 1990 subject to the result of the present writ petition, on the day the order dated 25th April, 1990 was passed. The Registrar alongwith his affidavit dated 24th June, 1992 has placed on record the Notification dated 14th November, 1991 and Addendum thereto whereby late Sh. S.S. Ahuja has further been granted Selection grade for the period 1st January, 1985 to 27th December, 1985 subject to the present writ petition. It has also been brought to our notice that the legal representatives of late Sh. S.S. Ahuja have also filed a writ petition (C.W.P. No. 440 of 1991) for grant of Selection grade to late Sh. S.S. Ahuja from 1st January, 1985 and also monetary benefits accruing to them as a consequence thereof. In the said writ petition neither the Petitioner nor the fourth Respondent, in the present writ petition, are parties. C.W.P. No. 440 of 1991 was filed much later in August, 1991. Owing to these subsequent events, the order dated 25th April, 1990 deserves to be recalled and the legal representatives of late Sh. S.S. Ahuja are to be brought on record. It cannot be said that by getting the order of deletion of the name of Sh. S.S. Ahuja, the Petitioner had abandoned his claim of seniority against Sh. S.S. Ahuja as urged on behalf of his legal representatives and the fourth Respondent. The seniority list under challenge is of 1st January, 1983 when it commenced between the parties. This Court is to decide the rights of the parties as on that

date.

25. Therefore, according to us, the legal representatives of late Sh S.S. Ahuja are proper parties and they ought to be joined as Respondents to enable us to effectually and completely adjudicate upon the questions involved in the writ petition. Let them be arrayed as Respondents No 3(a) to 3(d) and the cause title of the writ petition be corrected accordingly. For arriving at our conclusions in this writ petition, we have already considered the reply filed by late Sh. S.S. Ahuja and have also heard the learned Counsel appearing on behalf of his legal representatives.

26. The result of the above discussion is that the writ petition is allowed. The Gradation List (Annexure "J" to the petition) to the extent it relates to the seniority of the Petitioner, the fourth Respondent and late Sh. S.S. Ahuja and the decision of the Full Court (Annexure "Q" to the petition) are quashed. The High Court of Himachal Pradesh, the second Respondent, is directed to determine the seniority of the Petitioner vis-a-vis the fourth Respondent and late Sh. S.S. Ahuja as on 1st January, 1983 in accordance with this judgment.

27. In view of the facts and circumstances of this case, there is no order as to costs.

28. Before parting with this case, we would like to observe that to avoid any inequity, in the matter of grant of selection grade and/or pensionary benefits to the legal representatives of late Sh. S.S. Ahuja, as a result of fixation of his seniority below the Petitioner and the fourth Respondent, the competent authority may consider creation of a supernumerary post against which Sh. S.S. Ahuja could be given selection grade already granted to him.