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JOGINDER NATH AND ORS.

v.

UNION OF INDIA AND ORS.

October 31, 1974

[K. K. MATHEW AND N. L. UNTWALIA, JJ.]

B *Constitution of India—Art. 14—Treating unequals as equals—Length of service—Art. 309—Laches—Whether rule of law or rule of practice—Civil Service —Delhi Higher Judicial Service Rules, 1970—Delhi Judicial Service Rules 1970 —Seniority and confirmation—Substantive—Officiating—Probation appointments. Interpretation of Statutes—Whether Constitutionality of a rule can be saved by interpreting it in a reasonable sensible and just manner.*

C The petitioners originally belonged to the Punjab Civil Service (Judicial) in the time scale of Rs. 400-1250. They had been put in the scale of Rs. 1300-1500. On the other hand, respondents 3 to 5 were judicial officers in the U.P. in the lower scale of Rs. 300-900. The next higher scale on being appointed to the post of Additional District Magistrate was Rs. 400-1000. Prior to 1966, the Union Territory of Delhi for the purposes of administration of justice was included within the territorial jurisdiction of the erstwhile Punjab High Court and the Presiding Officers of the courts at Delhi were posted by transfer from the State of Punjab. There was no separation of executive and judiciary.

D In 1970, Delhi Higher Judicial Service Rules, 1970 and Delhi Judicial Service Rules 1970 were framed under Art. 309 of the Constitution. A selection Committee was constituted in accordance with rule 7 of the Delhi Judicial Service Rules. On the basis of the recommendation of the Selection Committee, appointments of officers by way of initial recruitment to the Delhi Judicial Service were made. Petitioners 1 and 2 were working as Assistant Sessions Judges at the time of initial constitution of the Delhi Judicial Service while none of the respondents 3 to 5 was appointed as Assistant Sessions Judge in spite of their longer service E in the cadre of U.P. Judicial Officers Service. The petitioners were promoted to the post of Additional District Judges in January and March, 1972. Respondents 3 to 5 were not considered to have qualified for being promoted as Additional District Judges. Respondents 3 to 5 were promoted as Additional District Judges in June, 1972 and respondent No. 6 was promoted in June, 1973. Thus respondents 3 to 6 were promoted to the higher judicial service later on, yet they were made to rank senior to petitioners under rule 8 of the Delhi Higher Judicial Service Rules. Rule 9 of Delhi Judicial Service Rules provides that initial recruitment to the service would be made from amongst the subordinate Judges and Law F Graduate Judicial Magistrates working in the Union Territory of Delhi on deputation from other States as well as members of Civil Judicial Cadres of States whose names might be recommended by their respective State Governments for appointment and members of Delhi, Himachal Pradesh and Andaman & Nicobar Islands who were law graduates. Rule 11 of Delhi Judicial Service Rules provides that the Selection Committee should arrange the seniority of the candidates recommended by it in accordance with the length of service rendered by them in the cadre to which they belonged at the time of their initial recruitment the service G provided that the interse seniority as already fixed in such cadre shall not be altered. Rule 7 of Delhi Higher Judicial Service Rules provides that recruitment after the initial recruitment shall be made by promotion from the Delhi Judicial Service and by direct recruitment from the Bar. It further provides that not more than one third of the substantive posts in the service should be held by direct recruits. Rules 8 further provides that the interse seniority of members of Delhi Higher Judicial Service promoted to the service shall be the same as in Delhi Judicial Service and that the seniority of Direct Recruits vis-a-vis Promotees shall be determined on the basis of roaster following the quota system.

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The petitioner's contention was that they should be treated as senior to respondents 3 to 6. The petitioners contended that rule 9 of the Delhi Judicial Service Rules was bad as it was not framed in accordance with Article 234 of the

Constitution and also because it permitted the initial appointment to the Delhi Judicial Service of persons who were not in any judicial service from before. The petitioners further contended that rule 11 of the Delhi Judicial Service Rules is bad as it infringes Article 14 of the Constitution inasmuch as it equates length of judicial service with the length of non-judicial service for the purpose of fixing seniority and thus treats unequals as equals. Rule 8 of the Delhi Higher Judicial Service Rules is bad because it fixes the seniority in higher service according to the seniority in the lower one. A

The respondents controverted the contention of the petitioners. In addition the respondent contended that the Writ Petition was not maintainable on the ground of delay. It was also contended that after the impugned seniority list a further seniority list was published which has not been challenged and that, therefore, the petition ought to be dismissed. B

HELD : (i) The relative position of the petitioners and respondents 3 to 6 remains the same in the new seniority list as it was in the impugned seniority list. The contention of the respondent therefore cannot succeed.

(ii) The question of laches is one of discretion. There is no lower limit and there is no upper limit. The rule which says that the court may not enquire into the belated and stale claims is not a rule of law but a rule of practice based on sound and proper exercise of discretion and there is no inviolable rule that whenever there is delay the court must necessarily refuse to entertain the petition. Each case must depend upon its own facts. In the present case, nothing special has happened creating any right in favour of the respondent or no such position has been created the disturbance of which would unsettle the long standing settled matters. The writ application, therefore, cannot be thrown out on the ground of delay in regard to any of the reliefs asked for by the petitioners. [559C; G & A-B] C D

(iii) It is difficult to find any trace of invalidity in rule 9 of the Delhi Judicial Service Rules. For the purpose of initial recruitment to the Service officers of the Judicial cadre all the officers although not belonging to the judicial cadre but by and large performing the judicial functions could be put together. There was no infraction of Arts. 14 and 16. Rule 11 of Delhi Judicial Service which provides that the seniority should be determined in accordance with the length of service does not put unequals as equals. The rule is neither arbitrary nor discriminatory. Once the Selection Committee found persons belonging to Clause (a) rule 9 suitable for appointment to the service it was under a duty and obligation to arrange the list of suitable persons by placing them in proper place in the matter of seniority. Arranging the seniority in accordance with the length of service rendered in judicial cadre to which they belonged at the time of their initial recruitment to the service was perfectly good. Petitioners cannot have any grievance in that regard. It was not possible to have a different yardstick. Taking the length of service for the purpose of fixation of seniority was justified, legal and valid. For the purpose of fixation of seniority it would have been highly against, and unreasonable to take the date of their initial recruitment to the service as their first appointment. Nor was it possible to take any other date in between the period of their service in their parent cadre. It would have been wholly arbitrary. There was no escape from the position that the entire length of service of the two classes of officers had got to be counted for the purpose of determination of their seniority on their initial recruitment to the Delhi Judicial Service. It was not possible or practical to measure the respective merits for the purpose of seniority with mathematical precision by Barometer but some formula doing largest good to the largest number had to be evolved. The only reasonable and workable formula which could be evolved was the one engrafted in rule 11. [561F; 562C-H] E F G

Kunnathat Thatthuni Moopil Nair v. *The State of Kerala and another*, [1961] 3 S.C.R. 77, distinguished.

Jalan Trading Co. (Private Ltd.) v. *Mill Mazdoor Union*, [1961] 1 S.C.R. 15, distinguished. H

(iv) In the instant case, treating the two classes as one for the purpose of initial recruitment and fixation of seniority was reasonable as the classification was one which included all persons who were similarly situated with respect to the purpose of the law. [563G-H]

A (v) The interse seniority of the members of the Delhi Judicial Service promoted to the higher service would be the same provided the promotion from the lower to the higher service is at the same time. If a member of Delhi Judicial Service is superseded at the time of recruitment under rule 7 by his junior but gets a chance of promotion later it is obvious that he cannot retain his seniority in the lower rank. All candidates on appointment to higher service have got to be on probation for a period of 2 years ordinarily and generally they would be confirmed at the end of the said period of 2 years. Strictly speaking, the question of B determination of interse seniority under rule 8 will crop up at the time of confirmation of the appointee. The question of seniority therefore has to be determined when the persons appointed either temporarily or on officiating basis are given substantive appointments. So far as the petitioners and three respondents are concerned that time is yet to come. Two members of the Delhi Judicial Service confirmed in the higher service at the same time will retain their interse seniority as in the lower service but if they are not confirmed at the same time then one who is confirmed earlier will be senior to the one who is confirmed later though they might have been appointed on probation at the same time. There C are no rules prescribing the mode of determination of interse seniority of temporary appointees or permitting them to count their officiation in the temporary appointments for the purpose of their seniority on their being appointed substantively. The attack on the constitutionality of rule 8 is obliterated in view of the construction placed by this Court. In the absence of such an interpretation rule 8 would be discriminatory and violative of Art. 14 of the Constitution. With the aid of well established connons of interpretation we see no difficulty in saving the constitutionality of the rule by interpreting it in a reasonable sensible and just D manner. [566BC; FH]

(vi) The appointment of a Government servant to a permanent post may be substantive or on probation or on officiating basis. An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes E to an end on the return of the incumbent substantively holding post from leave in the former case or on the substantive appointment. In the instant case due to justifiable reasons the appointment of respondents 3 and 4 substantively to 14th and 15th vacancies was deferred and the petitioner No. 1 was made to officiate in a temporary capacity against the substantive vacancy. Such an officiation came to an end on the substantive appointment of either of respondent No. 3 or 4. [569A-C]

F ORIGINAL JURISDICTION : Writ Petition No. 1854 of 1973.

Petition under Article 32 of the Constitution of India.

V. M. Tarkunde, Shyamla Pappu, D. D. Sharma and *Ashok Kumar Srivastava*, for the petitioners.

L.N. Sinha, Solicitor General of India and *R. N. Sachthey* for respondents nos. 1-2. G

B. P. Maheshwari for respondent no. 3.

R.K. Garg, S. C. Agarwal, S. C. Bhatnagar, V. J. Francis and *S. K. Mehta*, for respondents nos. 4-6.

H The Judgment of the Court was delivered by

UNTWALIA, J.—The four petitioners in this petition under Article 32 of the Constitution of India are working as Additional District &

Sessions Judges in the Delhi Higher Judicial Service at Delhi. Their prayers in this writ petition are to strike down Rules 9(a) and 11 of the Delhi Judicial Service Rules, 1970 as being ultra vires and violative of Articles 14 and 16 of the Constitution and to declare Rule 8 of Delhi Higher Judicial Service Rules, 1970 as void and unconstitutional. Their further prayer is to quash the fixation of the seniority of the petitioners and respondents 3 to 6 and to place petitioners 1 to 4 above respondents 3 to 5 and petitioners 2 to 4 above respondent 6 in the gradation of seniority in Delhi Judicial Service and Delhi Higher Judicial Service.

All the four petitioners originally belonged to the Punjab Civil Service (Judicial). Shri Joginder Nath, petitioner no. 1 joined the said service on 2.7.1956, Shri D. C. Aggarwal, petitioner no. 2 on 2.7.1957, Shri S. R. Goel, petitioner no. 3 on 8.7.1957 and Shri P. L. Singla, petitioner no. 4 on 10.10.1958. Prior to 1966, the Union Territory of Delhi for the purposes of administration of Justice was included within the territorial Jurisdiction of the erstwhile Punjab High Court and Presiding Officers of the Courts at Delhi were posted by transfer from the State of Punjab. There was no separation of Executive and Judiciary. The Magistrates were selected on ad hoc basis from the States of U.P. and Punjab and were posted to work as such at Delhi. Later on creation of the States of Punjab and Haryana the officers of Punjab and Haryana Civil Service (Judicial) cadre used to be posted in Delhi against all judicial posts. A separate High Court for Delhi was constituted on the 31st October, 1966. The arrangement in regard to Judicial officers in the lower Courts however continued as before. In 1969 under the Union Territories (separation of Judicial and Executive functions) Act, the magistracy in Delhi was split up into two parts with effect from 2.10.1969. Some magistrates of the State Civil Service, Executive Branch, were transferred to work under the superintendence and control of the High Court of Delhi while others were assigned Executive duties and remained under the control of the Delhi Administration as before. In pursuance of the Scheme of separation aforesaid, respondents 3 to 5 who were working as Judicial Magistrates from before were appointed as Chief or Additional Chief Judicial Magistrates under the aforesaid Union Territories Act of 1969. They were formerly Officers of the U.P. Judicial Officers Service. Respondent no. 6 was a member of the Haryana Civil Service (Judicial). Respondents 3 to 5 were performing the functions of Revenue Officers and Judicial Magistrates in U.P. and thereafter in Delhi.

The petitioners case is that on 27-8-1970 the Lt. Governor of Delhi, respondent no. 2 as Administrator of the Union Territory framed Delhi Higher Judicial Service Rules, 1970 and Delhi Judicial Service Rules, 1970 under Article 309 of the Constitution read with certain notifications of the Government of India, Ministry of Home Affairs. A Selection Committee was constituted in accordance with Rule 7 of the Delhi Judical Service Rules. On the basis of the recommendations of the Selection Committee, respondent no. 2 made appointment of officers by way of initial recruitment to the Delhi

A Judicial Service under Rule 8. 61 officers were selected. It may, however, be stated here that as per the statement in the counter-affidavit filed on behalf of respondent no. 2 only 49 officers joined. The petitioners 1 to 4 were placed in the seniority list of the Delhi Judicial Service at serial nos. 6, 9, 12 and 13 respectively while the respective serial nos. assigned to respondents 3 to 6 were 1, 2, 4 and 7. It would thus be seen that respondent no. 6 was junior to petitioner no. 1 but
B senior to petitioners 2 to 4 and respondents 3 to 5 were shown as senior to all the petitioners.

The petitioners claim that they were formerly permanent members of the Punjab Civil Service Judicial Branch in the time scale of Rs. 400-1250. They had been put in the selection grade also in the scale of Rs. 1300-1500. On the other hand, respondents 3 to 5 were euphemistically
C called Judicial Officers in U.P.—the State of their parent service. They were in a lower scale of Rs. 300-900. The next higher scale on being appointed to the post of Additional District Magistrates was Rs. 400-1000/-.

The petitioners' grievance is that Rule 11 of the Delhi Judicial Service Rules permitting the fixation of the seniority of the selected
D officers under Rule 9(a) on the basis of length of service was bad. It was fixed by a notification dated 2.8.1971 and was subject to revision on good cause shown. Respondents 3 to 5 had joined service in the year 1947 as Judicial Officers which was not a cadre service. It was only on 1.4.1955 that a regular cadre of Judicial officers was created in U.P. but it was different and distinct from the U.P. Civil Service Judicial Branch. Petitioners 1 and 2 were working as Assis-
E tant Sessions Judges at the time of initial constitution of the Delhi Judicial Service while none of the respondents 3 to 5 was appointed as Assistant Sessions Judge in spite of their longer service in the cadre of U.P. Judicial Officers Service.

The petitioners case further runs thus : Petitioner no. 1 was promoted to the post of Additional District Judge with effect from
F 24.1.1972 and the petitioners 2 to 4 were so promoted with effect from 25.3.1972. Respondents 3 to 5 were not considered to have qualified themselves for being promoted as Addl. District Judges. One of the reasons for not promoting them to the higher judicial service was that they had not received requisite training in the Civil Law. Accordingly they were by-passed and in the meantime they were given powers of the Subordinate Judges to enable them to get requisite
G training in Civil Law. Respondent no. 6 was posted as Sub-Judge, First Class and demoted from the post of a Senior Sub-Judge on account of inefficiency. He was not enjoying the selection grade of Haryana Civil Service (Judicial Branch) at the time of his appointment to Delhi Judicial Service while the petitioners were in such grade in their parent service. Respondents 3 to 5 were later promoted as Additional District Judges on 2.6.1972 and respondent no. 6 was
H promoted in June, 1973. Thus all of them were promoted to the higher Judicial Service after the petitioners. Yet they were made to ranks senior to petitioners 1 to 4 under Rule 8 of the Delhi Higher Judicial Service Rules. Respondent no. 6 in spite of his appointment

as an Additional District Judge later than petitioners 2 to 4 was allowed to rank senior to them on the basis of Rule 8 aforesaid.

Mr. Tarkunde, learned counsel for the petitioners submitted in support of the Writ Petition the following points :

1. Rule 9(a) of the Delhi Judicial Service Rules was bad as it was not framed in accordance with Article 234 of the Constitution and because it permitted the initial appointment to the Delhi Judicial Service of persons who were not in any Judicial service from before. In any event respondents 3 to 5 could not be appointed to the Delhi Judicial Service under Rule 9(a).

2. Rule 11 of the Delhi Judicial Service Rules is bad as it infringes Article 14 of the Constitution in as much as it equates length of Judicial service with the length of non-judicial service for the purpose of fixation of seniority and thus it makes unequals as equals.

3. Rule 8 of the Delhi Higher Judicial Service Rules is bad because it fixes the seniority in higher service according to the seniority in the lower one.

A counter-affidavit has been filed on behalf of respondent no. 2 and learned Solicitor General appeared to oppose the rule on his behalf. Various counter-affidavits were filed on behalf of respondents 3 to 6 and Mr. Garg who appeared on their behalf informed us that respondent no. 3 has since retired and the petitioners could not be granted any relief against him. He, however, raised a preliminary objection to the maintainability of the Writ petition on the ground of delay. He submitted that the seniority fixed on 2.8.1971 by list Annexure E/1 to one of the rejoinders could not be challenged by filing a writ application in September, 1973. He further pointed out that the said seniority list has been revised and substituted by a new list dated 2.6.1973, a copy of which is Annexure R-4/1. The petitioners have not challenged the correctness of that list in which had merged the first list dated 2.8.1971.

In our opinion on the facts and in the circumstance of this case the preliminary objection raised on behalf of the respondents cannot succeed. The first list fixing the seniority of the Judicial officers initially recruited to the Delhi Judicial Service was issued on 2.8.1971. This was subject to revision on good cause being shown. Petitioners also, as we shall show hereinafter in this Judgment on one ground or the other, wanted their position to be revised in the seniority list. They, however, did not succeed. A revised seniority list was issued on 2.6.1973. The filing of the writ petition was not designedly delayed thereafter. Since the petitioners' position in the seniority list vis-a-vis respondents 3 to 6 had not been disturbed in the new list dated 2.6.1973 it was sufficient for the petitioners to challenge the list dated 2.8.1971. We shall point out in this judgment that except the promotion to the posts of Additional District Judges, the seniority in relation to which

A also is under challenge in this writ application, nothing special had happened creating any right in favour of the respondents or no such position had been created the disturbance of which would unsettle the long standing settled matters. The writ application, therefore, cannot be thrown out on the ground of delay in regard to any of the reliefs asked for by the petitioners.

B It has been pointed out by Hidayatullah, C.J. in the case of *Tilokchand Motichand & Ors.* v. *H. B. Munshi & Anr.*(1) at page 831 "The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court." The learned Chief Justice had said at page 832. "Therefore, the question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be C brought within Limitation Act by reason of some Article but this Court need not necessarily give the total time to the litigant to move this Court under Art. 32. Similarly in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose. In the case of *Rabindra Nath Bose & Ors.* v. *Union of India & Ors.*(2) Sikri J, as he then was, delivering D the judgment on behalf of the Court has said at page 712: "The highest Court in this land has been given Original Jurisdiction to entertain petitions under Art. 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of years." But under what circumstances a petition under Art. 32 of the Constitution should be thrown out on the ground of delay, has been pointed out in the last paragraph on that page by observing. E "It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years." On the facts of this case the petition was held to have been filed after inordinate delay.

F In a recent decision of this Court, Bhagwati, J. delivering the judgment on behalf of the bench of five Judges in *Ramchandra Shankar Deodhar and others.* v. *The State of Maharashtra and others*(3) at page 265 has said "In the first place, it must be remembered that the rule which says that the Court may not inquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever G there is delay, the court must necessarily refuse to entertain the petition. Each case must depend on its own facts." On the facts and in the circumstances of this case we do not feel persuaded to throw out the petition on the ground of delay as there is none to disentitle the petitioners to claim relief.

The two impugned rules in this case were made by the Lt. Governor of Delhi in consultation with the High Court of Delhi in exercise H of his powers conferred by the proviso to Art. 309 of the Constitution

(1) [1969] 2 S.C.R. 824. (2) [1972] 2 S.C.R. 697.

(3) A.I.R. 1974 S.C. 259.

r/w certain notifications of the Government of India, Ministry of Home Affairs. The Delhi Higher Judicial Service Rules regulating the recruitment and condition of higher service could indisputably be made under the proviso to Art. 309 Art. 234 says: "Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with State Public Service Commission and with the High Court exercising Jurisdiction in relation to such State." It was not disputed on either side that the word "State" in the said Article would include a Union Territory also. But the learned Solicitor General pointed out that there was no judicial service in the Union Territory of Delhi before its creation by initial recruitment to the service under the Delhi Judicial Service Rules. The initial recruitment to the service could be made only under a valid rule framed under Art. 309 Framing of a rule under Art. 234 was not necessary. We may, however, point out that part IV of Delhi Judicial Service Rules refers to recruitment to the service after the initial recruitment. In our opinion, however, the rules framed by the Lt. Governor for appointment to the Delhi Judicial Service either at the initial stage or thereafter cannot be held to be invalid merely because they were not framed in accordance with Art. 234. Rules framed under Art. 309 in consultation with the Delhi High Court were good and valid and cannot be assailed. When it was pointed out to the learned counsel of the petitioners that on the argument advanced with reference to Art. 234 even the initial recruitment of the petitioners to the Delhi Judicial Service was in jeopardy, the point was ultimately given up and not pressed.

The constitution and strength of the Delhi Judicial Service as provided in rule 3 of the Delhi Judicial Service Rules will be of the service consisting of two grades-namely Grade I (Selection Grade) and Grade 2. The posts in Grade I shall be civil posts, class I Gazetted, and those-in Grade II shall be civil posts, class II Gazetted. Clause (d) of Rule 3 provides A "person appointed to the service shall be designated as Subordinate Judge or Judicial Magistrate or as Subordinate Judge or Judicial Magistrate or as Subordinate Judge-cum-Judical Magistrate in accordance with the duties being discharged by him for the time being." The posts borne on the permanent strength of the service and the posts included therein have been specified in the Schedule appended to the rules. 10% of the permanent strength of the service will be the posts in the selection grade. A Selection Committee was constituted consisting of 3 Hon'ble Judges of the Delhi High Court, the Chief Secretary and a Secretary of the Delhi Administration. The initial recruitment was made by the Lt. Governor in accordance with Rule 9 which reads as follows:

"9. For initial recruitment to the service, the Selection Committee shall recommend to the Administrator suitable persons for appointment to the service from amongst the following:

(a) Subordinate Judges and Law Graduate Judicial Magistrates working in the Union territory of Delhi on deputation from other States;

A (b) members of Civil Judicial cadres of States whose names may be recommended by their respective State Governments for appointment, and

(c) members of the Delhi Himachal Pradesh and Andaman and Nicobar Islands Civil Service, who are Law Graduates.

B The consent of the officer to be recommended and the consent of his parent Government shall be necessary before his appointment to the service."

It would thus be noticed that the Selection Committee was to recommend only "suitable persons" for appointment to the service. It is stated in paragraph 12 of the writ application that clause (c) of Rule C 9 was struck down by the High Court of Delhi in Writ Petition No. 1322/70-*D. K. Poddar* v. *Lt. Governor at Delhi.* We are not concerned in this case with clause (c). The source of the initial recruitment to the service under clause (a) was Subordinate Judges who necessarily belong to the Judicial cadre of a State and Law Graduate Judicial Magistrates (not merely Judicial Magistrates) working in the Union territory of Delhi. The creation of the service being only in two D grades, grade 2 and grade I (selection grade) and there being no provision for appointment in the selection grade at the stage of the initial recruitment of the service it is plain that all those who fulfilled the qualifications laid down in clause (a) of Rule 9 and who were found "suitable" by the Selection Committee could be initially recruited to the Delhi Judicial Service. Even Judicial Magistrates have been put on a par with the Subordinate Judges. None of the respondents 3 to E 5 either in their parent service in U.P. or in the Union Territory of Delhi was a Magistrate on the Executive side. All of them were doing the work of Judicial Magistrates and of Revenue officers which also included performance of judicial duties. It is difficult to find any trace of invalidity in rule 9(a) of the Delhi Judicial Service Rules. For the purpose of initial recruitment to the service, officers of the judicial cadre of a State and officers although not belonging to the F judicial cadre but by and large performing the judicial functions could be put together. There was no infraction of Arts. 14 and 16. In the counter-affidavit filed on behalf of respondent 2 it is mentioned that respondents 3 to 5 were in the regular cadre of U.P. Judicial Officers w.e.f. 1.4.1955. It has been pointed out by this Court in the case of *Chandra Mohan* v. *State of Uttar Pradesh & Ors.*(1) at page 80 "that the expression "judicial officers" is a euphemism for the G members of the Executive department who discharge some revenue and magisterial duties." Strictly speaking the expression "Judicial duties" was held to be a misleading one for the purpose of recruitment to the higher judicial service in accordance with Art. 233 of the Constitution. In the context and set up of the Article it was pointed out that the source of service for appointment as a District Judge must be the Judicial service and not any service. It is plain that the same H principle cannot apply to the recruitment of persons to the lower judicial service obviously not covered by Art. 233.

(1) [1977] 1 S.C.R. 77.

Rule 11 of the Delhi Judicial Service Rules reads as follows : A

"11. The Selection Committee shall arrange the seniority of the candidates recommended by it in accordance with the length of service rendered by them in the cadre to which they belong at the time of their initial recruitment to the service.

Provided that the inter-se seniority as already fixed in such cadre B shall not be altered."

The question for determination is was there any infirmity in rule 11 ? Did it put unequals with equals and violated Art. 14 of the Constitution ? Was the rule arbitrary and discriminatory ? Once the Selection Committee found persons belonging to clause (a) of Rule 9 suitable for appointment to the service it was under a duty and obligation C to arrange the list of suitable persons by placing them in proper places in the matter of seniority. They were all being initially appointed to the Delhi Judicial Service wherein there was no separate gradation of posts. The assignment of duties was to follow on the basis of seniority list. Arranging the seniority of the candidates recommended by the Selection Committee in accordance with the length of service rendered by them in the judicial cadre to which they belonged at the D time of their initial recruitment to the service was perfectly good. The petitioners could not have any grievance in that regard. On their initial recruitment to the Delhi Judicial Service they retained their original seniority inter-se as was assigned to them in their parent cadre. Was it possible to have a different yardstick, some other date or shorter period for fixation of the seniority of the law graduates judicial magistrates on their initial recruitment to the service ? From which E date their seniority ought to have been reckoned ? Was it possible to treat them as the first and the new recruits to the Delhi Judicial Service. Even so what would have been the basis of determining their seniority inter-se ? The questions posed are suggestive of the answers. Taking the length of service rendered by the candidates in their respective cadres for the purpose of fixation of seniority under rule 11 of the Delhi Judicial Service Rules was justified, legal and valid. Had F it been otherwise it would have been discriminatory. It was not equating unequals with equals. It was merely placing two classes at par for the purpose of seniority when it became a single class in the integrated judicial service of Delhi. For the purpose of fixation of seniority it would have been highly unjust and unreasonable to take the date of their initial recruitment to the service as their first appointment. Nor was it possible to take any other date in between the period of their G service in their parent cadre. It would have been wholly arbitrary. In our judgment, therefore, there was no escape from the position that the entire length of service of the two classes of officers had got to be counted for the purpose of determination of their seniority on their initial recruitment to the Delhi Judicial service. It was not possible or practical to measure their respective merits for the purpose of seniority with mathematical precision by a barometer. Some formula doing H largest good to the largest number had to be evolved. The only reasonable and workable formula which could be evolved was the one engrafted in rule 11 of the Delhi Judicial Service Rules.

A The decision of this Court in *Kunnathat Thathunni Moopil Nair* v. *The State of Kerala and another*(1) relied on by the petitioners is clearly distinguishable. Sinha, C.J. in his judgment at page 92 pointed out the nature of equal burden of tax placed upon unequals and said "It is clear, therefore, that inequality is writ large on the Act and is inherent in the very provisions of the taxing section. It is also B clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid classification. It is one of those cases where the lack of classification creates inequality." In the instant case for the purpose of fixing the seniority at the stage of the initial recruitment to the Delhi Judicial Service, no other classification, no different yardstick was possible. The inequality was avoided to a large extent C by rule 11.

The case of *Jalan Trading Co.* (*Private Ltd.*) v. *Mill Mazdoor Union*(2) is also of no help to the petitioners. Distinguishing *Moopil Nair's* case—[1961(3) S.C.R. 77] Shah, J. as he then was pointed out at page 36 : "If the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or D inequality of burden.....Equal treatment of unequal objects, transactions or persons is not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by the law." The principles enunciated when applied correctly to the facts of the instant case rather go against the petitioners. "Equal treatment of unequal objects" even if we prefer to call them different classes, is not discriminatory in this case E as there is a rational relation to the object intended to be achieved by the law. The object of the Delhi Judicial Service Rules was to create a service by integration of different classes of persons already working as Judicial officers. The fixation of seniority on the basis of length of service in their respective parent cadres had a rational nexus to the object intended to be achieved. One of us in the case of *The State of Gujarat and another etc.* v. *Shri Ambica Mills Ltd. Ahmedabad etc*(3) F delivering the judgment on behalf of the Court has pointed out at page 1313 : "A reasonable classification is one which includes all who are similarly situated and non who are not. The question then is : what does the phrase 'similarly situated' mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose G of a law may be either the elimination of a public mischief or the achievement of some positive public good." In the instant case treating the two classes as one for the purpose of initial recruitment and fixation of seniority was reasonable as the classification was one which included all persons who were similarly situated with respect to the purpose of the law. We have therefore no difficulty in rejecting the argument put forward on behalf of the petitioners that rule 11 of Delhi H Judicial Service Rules is bad as being violative of Arts. 14 and 16 of

(1) [1961] 3 S.C.R. 77. (2) [1967] 1 S.C.R. 15.
(3) A.I.R. 1974, S.C. 1300.

of the Constitution. It was not suggested on behalf of the petitioners and rightly so that fixation of their seniority vis-a-vis respondents 3 to 6 in the Delhi Judicial Service was not in accordance with rule 11.

Two more facts need be noted here in connection with the question of seniority and they are these : A notification dated September 30, 1967 was issued by the Governor of U.P., a copy of which is Annexure 'H' to the rejoinder on behalf of the petitioners to the counter-affidavit filed by respondent 2 under Art. 237 of the Constitution directing that the remaining provisions of Chapter VI of Part VI of the Constitution shall, with effect from October 2, 1967, apply in relation to such magistrates including additional District Magistrates (Judicial), in the State as belong to the Uttar Pradesh Judicial Officers Service as they apply in relation to persons appointed to the Judicial Service of the State subject to the certain exceptions and modifications mentioned in the said notification. It is no doubt true that respondents 3 to 5 were already on deputation to the Union territory of Delhi. Yet they could not be denied the advantage of this notification in principle. They were doing the judicial work in Delhi and on initial recruitment to the Delhi Judicial Service became its fulfledged members. The letter dated September 29, 1967, a copy of which is Annexure R-4/5 to the supplementary affidavit of the respondent no. 4 written by the Chief Secretary to the Govt. of U.P. to the Registrar, High Court of Allahabad also supports the above position. It is admitted that on or from 2.10.1969 there was no separation of Executive and Judiciary in Delhi also and all officers working on the judicial side were placed under the control of the Delhi High Court.

Annexure "A" to the counter-affidavit of respondent no. 2 is a copy of the order dated 18th December, 72 passed by Hon'ble Mr. Justice V. S. Deshpande and Hon'ble Mr. Justice S. Rangarajan of the Delhi High Court. The representations of the petitioners were rejected. The order indicates that the initial recruits were given seniority according to the length of service in their cadres. The representationists accepted this position and the matter was close. Their new stand that since they belonged to the selection grade of Subordinate Judges in the Punjab and Haryana Judicial Service cadre they ought to have been appointed to such a grade in Delhi Judicial Service even at the time of initial recruitment was not accepted to be correct. It is, therefore, plain that on initial recruitment to the Delhi Judicial Service all those who are recruited including the petitioners and respondents 3 to 6 were at par and the fixation of their seniority in accordance with rule 11 of the Delhi Judicial Service Rules was legal and valid.

The facts in relation to the 6th respondent are these. This respondent also formerly belonged to the combined Punjab Civil Service (Judicial) P.C.S. cadre. This respondent and petitioner no. 1 were selected in the open competition together and later joined the Judicial Service in the year 1956. Both were confirmed in the year 1958. Petitioner no. 1 was senior to respondent no. 6 Petitioners 2 to 4 joined the same service later and were junior to respondent no. 6. When the State of Punjab was bifurcated into two States of Punjab and Haryana of 1.11.1966 the petitioners were allotted the cadre of

A Punjab and respondent no. 6 came to the cadre of Haryana. On Constitution of the Delhi Judicial Service, respondent no. 6 was recommended by the Haryana State and was initially recruited to the Delhi Service which he joined on 1.9.1971. Eventually respondent no. 6 was placed in the selection grade w.e.f. 25.3.1972 and he was promoted as Additional District & Sessions Judge w.e.f. 1.6.1973. It would thus be seen that allocation of a place of seniority in the Delhi B Judicial Service to respondent no. 6 below petitioner no. 1 and above petitioners 2 to 4 was valid and justified.

Coming to the Delhi Higher Judicial Service Rules, 1970 we find that under rule 6 the initial recruitment to the higher service was made. None of the petitioners or the respondents was initially recruited. The regular recruitment to the higher service after the initial recruit- C ment has been provided in rule 7 in these terms :

"7. Regular recruitment-Recruitment after the initial recruitment shall be made :

(a) by promotion from the Delhi Judicial Service;

(b) by direct recruitment from the Bar.

D Provided that not more than 1/3rd of the substantive posts in the service shall be held by direct recruits."

Rule 8 prescribes the mode of determination of inter-se seniority of the promotees and the seniority of the direct recruits vis-a-vis promotees. It runs as follows :

E "8. (1) The inter-se seniority of members of the Delhi Judicial Service promoted to the service shall be the same as in the Delhi Judicial Service.

(2) The seniority of direct recruits vis-a-vis Promotees shall be determined in the order of rotation of vacancies between the direct recruits and promotees based on the quotas of vacancies reserved for both categories by rule 7 provided that the first available vacancy will F be filled by a direct recruit and the next two vacancies by promotees and so on." We may notice here two rules viz. Rules 16 and 17 relating to temporary appointments forming part V of the Delhi Higher Judicial Service Rules. They read as follows :

"16 (1) The Administrator may create temporary posts in the service.

G (2) Such posts shall be filled, in consultation with the High Court, from amongst members of the Delhi Judicial Service."

"17. Notwithstanding anything contained in these rule the Administrator may, in consultation with the High Court, fill substantive vacancies in the service by making temporary appointments thereto from amongst members of the Delhi Judicial Service."

H It would thus be seen that there are two types of appointments to Delhi Higher Judicial Service—one by regular recruitment, the source of which is by promotion from the Delhi Judicial Service and by direct

recruitment from the Bar. Rule 8 prescribes the mode of determination of seniority of such regular recruits. The inter-se seniority of the members of the Delhi Judicial Service promoted to the higher service has got to be the same as in the lower rank. As a matter of construction it necessarily follows that it would be the same provided the promotion from the lower to the higher service is at the same time. Learned Solicitor General appearing for respondent no. 2 in his usual fairness conceded to this interpretation and added that it cannot but be so. If a member of the Delhi Judicial Service is superseded at the time of recruitment under rule 7 by his junior but gets a chance of promotion later, it is obvious that he cannot retain his seniority in the lower rank. All candidates on appointment to the higher service have got to be on probation for a period of two years under rule 12(2) and ordinarily and generally they would be confirmed at the end of the said period of two years in accordance with rule 13. Strictly speaking the question of determination of inter-se seniority under rule 8 will crop up at the time of the confirmation of the appointee. In *Chandramouleshwar Prasad* v. *Patna High Court & Ors.*(1) referring to the relevant rules of the Bihar Superior Judicial Service Rules, Mitter, J delivering the judgment on behalf of this Court said at page 671 : "It may be noted at this stage that the gradation of the officers by the High Court or maintaining any list showing such gradation is not sanctioned by any service rules. The Bihar Superior Judicial Service Rules to which our attention was drawn do not contain any provision which would entitle the High Court to make such a gradation or act thereon. Rule 5 of the said Rules prescribes that ordinarily appointments to the post of Additional District and Sessions Judges shall be made by the Government in consultation with the High Court and under R. 8 a person appointed either on substantive or officiating basis to the post of Additional District and Sessions Judge shall draw pay on the lower time basis. Rule 16(b) provides that seniority inter-se of promoted officers shall be determined in accordance with the dates of their substantive appointments to the service and R. 16(d) lays down that more than one appointment is made by promotion at one time, the seniority inter-se of the officers promoted shall be in accordance with the respective seniority in the Bihar Civil Service (Judicial Branch). The question of seniority therefore has to be determined when the persons appointed either temporarily or on an officiating basis are given substantive appointments. So far as the petitioner and the three respondents are concerned that time is yet to come."

On a parity of reasoning it follows that question of determination of seniority comes in at the time of confirmation of the appointees. Two members of the Delhi Judicial Service confirmed in the higher service at the same time will retain their inter-se seniority as in the lower service. But if they are not confirmed at the same time then one who is confirmed earlier will be senior to the one who is confirmed later, even though they might have been appointed on probation under rule 7 at the same time. We may, however, add that for practical purposes and for the facility of administration the High Court for the

(1) [1970] 2 S.C.R. 666.

A time being may consider the promoted probationers as retaining their inter-se seniority of the lower service if they are appointed at the same time until they are confirmed.

In our judgment members of the Delhi Judicial Service coming to the higher service on temporary appointments either under rule 16 or rule 17 of the Delhi Higher Judicial Service Rules cannot claim B the benefit of the inter-se seniority under rule 8. There are no rules prescribing the mode of determination of inter-se seniority of such temporary appointees or permitting them to count their officiation in the temporary appointments for the purpose of their seniority on their being appointed substantively. The question of determination of inter-se seniority of the promotees under rule 8(1) as already stated would crop up only after the promotees have been substantively appointed. C We may add here also that as between the temporary appointees for practical purposes and for the facility of the administation it will be open to the High Court to permit the promotees to retain their seniority in the lower judicial service after they are temporarily appointed at the same time till they continue in the temporary appointments.

The vires of rule 8(1) of the Delhi Higher Judicial Service Rules D was challenged by Mr. Tarkunde, learned counsel for the petitioners on the ground that rule 8(1) equates all who are promoted to the higher service and permits them to retain their seniority in the lower service irrespective of the time of their appointment. Counsel submitted that those who came earlier to the higher service whether under rule 7 or under rule 16 or 17 should have been allowed to rank senior to those who came to be appointed either substantively or E temporarily to the higher service later. The attack on the constitutionality of rule 8(1) is obliterated if by construction it is held, as it has been done above, that the question of retention of seniority in the lower service arises only when the promotion is at the same time and not otherwise. In absence of such an interpretation it would be a truism to say that rule 8(1) would be discriminatory and violative of Art. 14 of the Constitution. But with the aid of well-established F cannons of interpretation we see no difficulty in saving the constitutionality of the rule by interpreting it in a reasonable, sensible and just manner as we have done in this case. The second part of the argument of Mr. Tarkunde to rope in the temporary appointees for the purpose of determination of inter-se seniority of the promotees under rule 8(1) is obviously wrong and cannot be accepted as sound. It may also be added that sub-rule (2) of rule 8 will militate against G the acceptance of the submission aforesaid.

Judging the facts of the instant case in the light of the interpretation which we have put to the relevant rules of the Delhi Higher Judicial Service it will be noticed that the grievance of the petitioners in relation to the seniority of respondents 3 to 6 is either unjustified or premature. Even though respondent no. 3 has already retired H and determination of such a question vis-a-vis him would be futile, while referring to the relevant facts of the case we may point out that the grievance of the petitioners as against respondents 3 and 4 is wholly unjustified.

Annexure 'J' is a copy of the notification dated 20th January, 1972 whereby the Administrator of Delhi was pleased to appoint in consultation with the High Court /Shri Joginder Nath, petitioner no. 1 and one Om Prakash Singla, members of the Delhi Judicial Service, to the Delhi Higher Judicial Service, temporarily till further orders. The appointment was under rule 17 of the Delhi Higher Judicial Service Rules against the 14th and 15th vacancies. In paragraph 15 of the counter-affidavit filed on behalf of respondent no. 2 reason has been given as to why petitioner no. 1 was temporarily appointed and the appointments of respondents 3 to 5 was deferred. It was not because they were found unfit that they were not appointed but to enable them to have more experience of the civil work they were made Subordinate Judges. After sometime respondents 3 and 4 were appointed on probation for 2 years under rule 7 against the 14th and 15th vacancies. By another notification of the same date issued under rule 17, petitioner no. 1 and respondent no. 5 were temporarily appointed in officiating capacity till further orders. Four temporary posts were created by a notification dated 13th March, 1974. Petitioners 2, 3 and 4 were temporarily appointed to three of these posts by notification dt. 22nd March, 72 by the Administrator of Delhi in exercise of his powers under rule 16(2) of the Delhi Higher Judicial Service Rules. Copies of these notifications issued under Rules 7, 17 and 16 of the Delhi Higher Judicial Service Rules are collectively Annexure 'B' to the counter-affidavit of respondent no. 2. Respondents 3 and 4 have been confirmed during the pendency of this Writ petition in the higher service by notification dated 13.6.1974-Annexure R-4/4 w.e.f. 2nd June, 1974. The petitioners have not challenged the notifications appointing them temporarily to the higher service under rule 16 or rule 17 and appointing respondents 3 and 4 substantively under rule 7. The confirmation of the latter therefore is perfectly in order and it goes without saying that they will be senior to such members of the Delhi Judicial Service who would be substantively appointed and confirmed later. A copy of the notification appointing respondent no. 6 to the higher judicial service from 1.6.1973 does not seem to be in the records of this case. We were however informed at the Bar that he was also temporarily appointed either under rule 16 or rule 17. That being so it was not clear to us whether the grievance of the petitioners in paragraph 19 of the writ petition that respondent no. 6 inspite of his appointment as Additional District Judge later than petitioners 2 to 4 was allowed to rank senior to them on the basis of rule 8 of the Delhi Higher Judicial Service Rules, is correct or justified. The question of the 6th respondent's ranking senior to any of the petitioners will not arise until they are substantively appointed to the higher judicial service. We may, however, reiterate our observation that from a practical point of view and for the facility of administration, in the temporary appointments, respondent no. 6 who came later than the petitioners cannot rank senior to any of them.

In the well-known case of *Parshotam Lal Dhingra* v. *Union of India*(1) Das C.J. delivering the judgment on behalf of majority of

(1) [1958] S.C.R. 828.

A this Court pointed out at pages 841 and 842 thus : "The appointment of a Government servant to a permanent post may be substantive or on probation or on an officiating basis.....An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to
B an end on the return of the incumbent substantively holding the post from leave in the former case or on substantive appointment being to that permanent post in the later case.....". In the instant case it is clear that due to justifiable reasons, the appointment of respondents 3 and 4 substantively to the 14th and the 15th vacancies was deferred and petitioner no. 1 was made to officiate in a temporary capacity against the substantive vacancy. But such an officiation
C came to an end on the substantive appointment of either of respondents 3 or 4.

For the reasons aforesaid we hold that the petitioners have made out no case entitling them to any relief asked for by them in this writ petition. It accordingly fails and is dismissed without costs.

P.H.P. *Petition dismissed*