P.S. MAHAL & ORS. A

*v.*

UNION OF INDIA & ORS.

*23rd May, 1984* B

[P.N. BHAGWATI AND R.S. PATHAK, JJ.]

*Executive Engineers, Central Engineering and Central Electrical Engineering Service (Group A) (Regulation of Seniority) Rules, 1976, brought into force with retrospective effect from 10th December, 1974—Rules 2(ii) and 2(iv)—Constitutional validity of—Whether the rules violate the provisions of Articles 14 and 16.(i) of the Constitution.* C

*Inter-se Seniority of Executive Engineers promoted regularly within their respective quota from and after 22nd December 1959 but before 11th December, 1974 from the posts of Assistant Executive Engineers governed by the Central Engineering Service (Class-I) Recruitment Rules, 1954 and Assistant Engineers governed by Central Engineering Service (Class-II) Recruitment Rules 1954, as refixed by the Seniority List dated August 14, 1975—Whether irregular and contrary to the guidelines indicated in the decisions reported as A.K. Subraman v. Union of India [1975] 2 S.C.R. 979=Qnota rule in Rule 4 of the Central Engineering Service (Class-I) Rules, 1954 when applicable.* D

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In the Central Public Works Department of the Ministry of Works and Housing, Government of India, the promotions to the posts of Executive Engineers are made from amongst Assistant Executive Engineers (Class-I) who have rendered more than five years of their service in their grade on the basis of seniority-cum fitness and also from Assistant Engineers (Class-II) who have rendered more than eight years of service in their grade on the basis of merit, the selection being made through a F departmental promotion committee presided over by a member of the Union Public Service Commission, since for the latter the post of Executive Engineer is a selection post. For promotion to the grade of Exective Engineers, for the first time, on 25th August, 1949, a quota in the ratio of 75% to 25% was prescribed by the Central Government. This was continued right upto the Recruitment Rules 1954 were enacted for these two categories. From September 7, 1955, this quota was altered with retrospective effect to 66-2/3% and 33$^{1}$/3% and it was again altered with effect G from April 1, 1972 to 50 : 50 for a period of seven years.

However, at the time of promotions not only the quota was not adhered to with the result that Assistant Engineers came to be promoted H

with Executive Engineers far in excess of their quota, while there was a shortfall in the promotions of Assistant Executive Engineers, so far as their quota was concerned, but all of them were treated as officiating Executive Engineers.

There was no statutory rules governing *inter-se* seniority of Executive Engineers promoted from these two grades. They were therefore, governed by the Memorandum issued by the Home Ministry on June 22nd, 1949 which laid down the general principles of seniority applicable to all departments of the government. The Memorandum provided that "in respect of persons employed in any particular grade, seniority should, as a general rule, be determined on the basis of length of service in that grade as well as service in an equivalent grade irrespective whether the latter was under Central or Provincial Government in India or Pakistan." The length of continuous officiation in the grade was thus taken as the yardstick for the purpose of determining seniority in all departments of the government and *a fortiorari*, in the grade of Exective Engineers. On the basis of this yardstick, Assistant Engineers promoted as officiating Executive Engineers within their quota would clearly be senior to Assistant Executive Engineers promoted later as officiating Executive Engineers.

Respondents 1 to 3 issued a seniority list on Ist July, 1971 in which Executive Engineers promoted from the grade of Assistant Engineers in regular manner on the basis of selection made by Departmental Promotion Committee and within their quota were shown as junior to several Executive Engineers promoted much later from the grade of Assistant Executive Engineers. Respondents 1 to 3, in making this seniority list proceeded on the basis that the quota rule specified in the last part of sub-rule (2) of Rule 4 of the Recruitment Rules necessarily implied a system of rotation and it was required to be strictly applied at the stage of confirmation in the grade of Executive Engineers. In other words, out of three vacancies in the grade of Executive Engineers, unless two reserved for promotion of Assistant Executive Engineers were filled up by confirmation of such promotees, the third one for confirmation of an Assistant Engineer promoted as Executive Engineer could not be filled. Consequently, all Assistant Engineers were treated as *ad-hoc* appointees without any claim to seniority until such time as they were confirmed as Executive Engineers within their quota. The impact of this decision of Respondents Nos. 1 to 3 was disastrous for a large number of Executive Engineers promoted from the grade of Assistant Engineers on officiating basis, since many of them had to retire without being confirmed and therefore, without any claim of seniority in the grade of Executive Engineers and the position continues to exist till date. Therefore the aggrieved Assistant Engineers filed a writ petition before the Delhi High Court. The Full Bench of that Court dismissed, the said petitions. In the appeals, by a common judgment reported as *A. K. Subraman and Ors.* v. *Union of India and Ors.* [1975] 2 S.C.R. 979; the Supreme Court accepted the contention of the petitioners that the quota rule was to be applied at the stage of initial promotion in officiating capacity to the grade of Executive Engineers and not at the stage of confirmation and that it did not necessarily imply the rotational system and since the general principles

for determining seniority laid down in the Memorandum dated 22nd June, 1949 were, on their plain terms, applicable, seniority in the grade of Executive Engineers was liable to be fixed on the basis of length of continuous officiation in that grade as provided in the Memorandum. The Court allowed the appeal after summarising its conclusions in the form of following six propositions nemely : A

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(1) When Assistant Engineers (Class-II) are initially appointed in a regular manner in accordance with the rules to officiate as Executive Engineers, their seniority in the service in Grade-I will count from the date of their initial officiating appointment in Class I provided their initial officiating appointment as Executive Engineers was within their quota;

(2) Their seniority will not be reckoned from the date of their future confirmation in Class-I. The above principle is, however, subject to one reservation, namely, if an Assistant Engineer, before his confirmation in Class II were appointed to officiate in Class I in the grade of Executive Engineer, although within his quota, his seniority will count only from the date of his confirmation in Class II as permanent Assistant Engineer notwithstanding his earlier officiating appointment as Executive Engineer; C

D

(3) The quota rule will be enforeed at the time of initial recruitment, in an officiating capacity to the grade of Executive Engineer and not at the time of confirmation;

(4) The quota rule will be enforced with reference to vacancies in all posts, whether permanent or temporary including in the sanctioned strength of the cadre (except such vacancies as are purely of a fortuitous or adventitious nature) and the operation of the quota rule will depend upon the availability or non availability of Assistant Executive Engineers for appointment as Executive Engineers. The non-availability of Assistant Executive Enginenrs for recruitment to the grade of Executive Engineer will not postpone the regular recruitment of the Assistant Executive Engineers within their quota. E

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(5) Once the Assistant Engineers are regularly appointed to officiate as Executive Engineers within their quota they will be entitled to consideration in their own rights as Class I officers to further promotions. Their "birth marks" in their earlier service will be of no relevance once they are regularly officiating in the grade of Executive Engineer within their quota. G

(6) If Assistant Engineers are recruited as Executive Engineers in excess of their quota in a particular year they will be pushed down to later years for absorption when due within their quota." and directed the respondents Nos. 1 to 3 to amend and revise the seniority list of 1st July 197; in the light of the directions given in the judgment and to give effect to the revised seniority list so prepared. H

Respondents Nos. 1 to 3, thereafter, issued a seniority list on 14th August, 1975 accompanied by a memorandum bearing the same date in which it was stated that the seniority list of Executive Engineers had been raised in the light of the judgment of the Supreme Court dated 11th December, 1974 in accordance with the principle set out in the memorandum. For the purpose of determining the seniority in the grade of Executive Engineers from and after 22nd December, 1959 respondents Nos. 1 to 3 introduced the carry forward principle and applied the rotational formula. The officers who had been, with the concurrence of the Union Public Service Commission, officiating as Executive Engineers prior to 25th August, 1949 and continued to do so thereafter were shown *en bloc* senior to the officers appointed after 25th August, 1949 and so far as the period between 25th August 1949 and 21st December, 1959 was concerned the *inter se* seniority of persons promoted during that period from the grades of Assistant Engineers and Assistant Executive Engineers within their respective quotas was determined in accordance with the length of their regular continuous service as Executive Engineers, subject to the qualification that in case of Assistant Engineers who were promoted as Executive Engineers the length of their regular continuous service as Executive Engineers for the purpose of determining seniority would be computed only from the date when they were confirmed as Asssistant Engineer.

But with effect from 22nd December 1959, a departure was made by respondent Nos. 1 to 3 from the principle of continuous officiation and "carry forward principle was applied by providing that 86 posts earmarked for promotion of Assistant Executive Engineers to the grade of Executive Engineers in accordance with their quota during the period prior to 22nd December, 1959 which had remained unfilled owing to non-availability of Assistant Executive Engineers upto 22nd December 1959 should be carried forward and 86 Assistant Executive Engineers promoted after 22nd December, 1959 should be adjusted against these posts and they should be assigned seniority *en-bloc* immediately below the last Executive Engineer promoted regularly prior to 22nd December, 1959. The result was that the Assistant Engineers who had been promoted as Executive Engineers regularly within their quota subsequent to 22nd December 1959 became junior to the Assistant Evecutive Engineers promoted against these 86 carried forward posts, even though they might have been promoted as Executive Engineers long prior to the promotion of such Assistant Executive Engineers. The Assistand Executive Engineers promoted and adjusted against these 86 carried forward posts were given seniority above the Assistant Engineers promoted regularly within their quota after 22nd December, 1959 irrespective as to when such Assistant Executive Engineers were actually promoted. These posts were adjusted on the basis of the order in which the vacancies in the respective quotas of Assistant Executive Engineers and Assistant Engineers for promotion as Executive Engineers were allocated from time to time. The seniority *inter-se* of Assistant Executive Engineers and Assistant Engineers promoted regularly within their respective quotas subsequent to 22nd December, 1959 was thus determined by the application of the rotational formula based on the quota prevailing at the relevant time. But since it had not been possible to fill all the posts allocated to the Assistant Executive Engineers' quota and some posts remained unfilled, they were shown as vacant

in the seniority list prepared according to the roster based on the rotational formula so that as and when Assistant Executive Engineers might be promoted as Executive Engineers regularly within their quota, they would occupy the vacant posts earmarked for them in the seniority list. The disastrous effect of the revised seniority list was that most of the Assistant Engineers promoted as Executive Engineers regularly within their quota subsequent to 22nd December, 1959 lost a considerable number of places in seniority and were placed in a much worse situation than what they were in under the seniority list dated Ist July, 1971 which was quashed at their instance, in writ petitions. A contempt application against respondents Nos. 1 to 3 was therefore moved but, before the Court could hear the objections against the seniority list on merits, the first respondent issued on 8th June, 1976 the Executive Engineers, Central Engineering and Central Electrical Engineering Service (Group A) (Regulation of Seniority) Rules 1976. These rules were deemed to have come into force with effect from 10th December, 1974, that is one day before the delivery of Judgment by this Court and they substantially enacted in statutory form the same principles which were set out in the memorandum that accompanied the seniority list dated 14th August, 1975 and on which that seniority list was based.

The petitioners, thereupon, filed the present writ petitions contending that the Rules of 1976 were not applicable to the petitioners and other Assistant Engineers promoted as Executive Engineers regularly within their quota prior to 10th December 1974 and if these Rules were held to be applicable, they were unconstitutional and void. The petitioners challenged the validity of the seniority list dated 14th August, 1975 and the Rules of 1976 on the following grounds, namely; (i) that it was the case of the petitioners and other Executive Engineers promoted from the grade of Assistant Engineers regularly within their quota from and after 22nd December 1959 but before 11th December, 1954 is covered by the decision of this Court in *A. K. Subraman's* case; (ii) that they are entitled to claim seniority, on the basis of length of continuous officiation, over Assistant Executive Engineers promoted as Executive Engineers later in point of time; (iii) that the Assistant Executive Engineers promoted and adjusted against 86 carried forward posts cannot be given seniority *en bloc* over Assistant Engineers promoted as Executive Engineers earlier; (iv) that the rotational formula cannot be applied retrospectively so as to deprive Assistant Engineers promoted as Executive Engineers of their seniority on the basis of length of continuous officiation in the grade of Executive Engineers; (v) that the Rules of 1976 are, to that extent, unconstitutional and void as being outside the power of the Central Government; (vi) that since the Rules of 1976 have been brought into force with effect from 10th December, 1974, they cannot affect the petitioners and other Assistant Engineers promoted as Executive Engineers regularly within their quota prior to that date and their seniority vis-a-vis Assistant Executive Engineers promoted as Executive Engineers must continue to be governed by the principle of length of continued officiation in the grade of Executive Engineers; and (vii) that if the Rules of 1976 are applicable for determining *inter se* seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers within their respective quotas from and after 22nd December, 1959, they are unconstitutional and

void as offending Articles 14 and 16 of the Constitution, since the seniority rules enunciated in the Rules of 1976 being closely linked with the quota rule continued massive departure from the quota rule over a long period of time must result in the break down of the seniority rules and to apply the seniority rules in such a situation would create gross inequality of opportunity of employment violative of Articles 14 and 16.

Allowing the petitions, the Court,

HELD : 1.1 Rule 2(iii) of the Central Engineering and Central Electrical Engineering Service Rules, 1976, in so far as it gives *en bloc* seniority to the Assistant Executive Engineers promoted to the eighty six vacancies carried forward from the period prior to 22-12-1959 irrespective of the date when they were actually promoted and pushed down in seniority Assistant Engineers though promoted regularly within their quota prior to the actual promotion of such Assistant Executive Engineers, merely prejudicially affecting their promotional opportunities is violative of Articles 14 and 16 of the Constitution. [906B-D]

1.2 Rule 2(iv) of the said Rules also suffers from the same infirmity as it provides for rotational rule of seniority based on the prevailing quota for determining *inter-se* seniority between Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers from and after 2nd December, 1959, subject to an *en bloc* seniority being given to the Assistant Executive Engineers promoted to the eighty six "carried forward" vacancies as set out in Rule 2(iii). Obviously, if Rule 2(iii) providing for *en bloc* seniority to be given to the Assistant Executive Engineers promoted to the eighty six "carried forward" vacancies is unconstitutional and void, Rule 2(iv) is also unconstitutional and void, when there has been enormous deviation from the quota rule in the promotions of Assistant Executive Engineers and such deviation has continued from year to year over a period of almost twenty five years. [906D-H]

1.3 The rotational rule of seniority is inextricably linked up with the quota rule, and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would grossly be indiscriminatory and unjust to give effect to the rotational rule of seniority. The rotational rule of seniority must obviously break down when there is such massive departure from the quota rule regularly from year to year leading to continuously increasing deficiency in promotions of Assistant Executive Engineers and corresponding excess in promotions of Assistant Engineers. [908C-D, 909D-E]

*T. Devdasan* v. *Union of India*, AIR, [1964] S.C. 179; *Mervin Contindo* v. *The Collector of Customs, Bombay* [1966] 3 SCR 600; *G.D. Kelkar* v. *Chief Collector of Imports and Exports* [1967] 2 SCR 29; *V.S. Badami* v. *State of Mysore* [1976] 1 SCR 815; *N.K. Chauhan* v. *State of Gujarat*, [1973] SCR 1037; *A. Janardhan* v. *Union of India* AIR [1983] SC 769; *Bishan Swarup Gupta* v. *Union of India* [1975] 1 SCR 104 referred to.

2.1 Notwithstanding Rules 2(iii) and 2(iv) of the Rules of 1976, the *inter se* seniority between Assistant Engineers and Assistant Executive Engineers promoted regularly within their respective quota upto 11th December, 1974 must be determined on the basis of length of continuous officiation in the grade of Executive Engineers, subject of course to the length of continuous officiation in the case of Assistant Engineers being computed from the date of their confirmation as Assistant Engineers in view of decision of the Supreme Court in Subraman's case. In this view carrying forward of eighty six posts of Executive Engineers allocable to Assistant Executive Engineers and giving up seniority *en bloc* to the Assistant Executive Engineers promoted to the 'carry forward posts' by applying the rotational formula for the purpose of determining seniority amongst Assistant Engineers and Assistant Executive Engineers promoted to the subsequent vacancies is ineffective *quota* Assistant Engineers and Assistant Executive Engineers promoted upto 11th December 1974 and so far as these Assistant Engineers and Assistant Executive Engineers are concerned, their *inter se* seniority must be held to be governed by the length of continuous officiation in the grade of Executive Engineers. [888H, 889A-B] A B C

2.2 On a plain reading of the decision in *Subraman's* case, it is obvious that the direction given by it in regard to determination of *inter se* seniority on the basis of length of continuous officiation was not limited to Executive Engineers promoted from the grade of Assistant Engineers and Assistant Executive Engineers upto 2nd December, 1959 but was on its plain terms applicable to all Executive Engineers promoted from the grade of Assistant Engineers and Assistant Executive Engineers within their respective quota right upto 11th December, 1974 being the date of the decision of the Court. But the revised seniority list dated 14th August, 1975 issued by the Government of India was plainly in defiance of this direction given by the Court. [872A-C, F-G] D E

2.3 When this Court in so many terms laid down that the *inter se* seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers upto December 11, 1974 must be held to be governed by the rule of length of continuous officiation and the Government of India has been directed by a writ of the Court to amend and revise the seniority, the effect of this decision cannot be set at naught and the binding character of the writ issued against the Government of India can be abrogated by the mere promulgation of the Rules of 1976 with retrospective effect from 10th December 1974. It is significant to note that the Explanatory Memorandum which was in the nature of statement of objects and reasons for the Rules of 1976 did not seek to override the effect of the decision in *Subraman's* case but on the contrary affirmed that the principles of seniority set out in those rules were laid down on the basis of the said decision. Since the Rules of 1976 purports merely to carry out the direction given in the said decision they cannot have the effect of overriding that decision and absolving the Govt. of India and the Government of India, must, therefore, amend and revise the seniority list of 1st July, 1971 by applying the rule of seniority based on length of continuous officiation for determining F G H

A *inter se* seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers upto 11th December, 1974. The relative position of the Executive Engneers in regard to their *inter se* seniority having been crystallised in the decision in *Subraman's* case and a writ having been issued by he Court directing the *inter se* seniority of the Executive Engineers to be fixed on the basis of length of continuous officiation the Executive Engineers promoted from the grade of Assistant Engineers
B were entitled to enforce the writ for determining the *inter se* seniority with the Executive Engineers in accordance with the rule of length of continuous officiation. The right of the Executive Engineers promoted from the grade of Assistant Engineers under the said decision could not be taken away by anything contained in the Rules of 1976. The decision in *Subaraman's* case continued to subsist and the Government of India was bound to a determine *inter se* seniority amongst Executive Engineers in accordance with the direc-
C tion contained in that decision. If by reason of retrospective alteration of the rule of seniority the decision is rendered erroneous, the remedy may be by way of review, but so long as the decision stands, it cannot be disregarded or ignored and it must be obeyed by the Government of India, despite Rule 2(iii) and 2(iv) so far as the Executive Engineers promoted from the grade of Assistant Engineers and Assistant Executive Engineers upto 11th December, 1974 are concerned. [873E-H, 874B-F, 877A-B]

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Further, the rule of seniority set out in paragraphs 5(ij) and 6 of the Memorandum of the Ministry of Home Affairs dated 22.12.1959 has no application to the instant case. [878E]

*M.M. Pathak* v. *Union of India* and *Ors.* [1978] 3 SCR 346 followed.

E *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality* [1970] 1 SCR 388 distinguished.

*Patel Gordhandas Haigovindas* v. *Municipal Commissioner, Ahmedabad* [1964] 2 SCR 608 referred to.

F 3.1 If a vacancy arises on account of an incumbent going on leave or for training or on deputation for a short period, it would be a fortuitous or adventitious vacancy and the quota rule would not be attracted in case of such a vacancy. But where a vacancy arises on account of the incumbent going on deputation for a reasonably long period and there is no reasonable likelihood of the person promoted to fill such vacancy having to revert; the vacancy would be subject to the quota rule, because it would be a regular
G vacancy in the post of Executive Engineers and the person promoted to fill the vacancy would be an officiating Executive Engineer would continue as such without reversion until confirmed and his promotion would, therefore, be by way of recruitment to the cadre of Executive Engineers. Of course, the vacancy which attracts the applicability of the quota rule, is the vacancy in the post included in the sanctioned strength of the cadre of Executive Engineers and not the vacancy in the deputation post. There may be a
H vacancy in a deputation post in another department or organisation and an Executive Engineer holding a post included in the sanctioned strength of the cadre of Executive Engineers may be sent to such deputation post, but the

vacancy which would call for the application of the quota rule in such a case would be the vacancy arising in the post of Executive Engineer within the cadre by reason of the incumbent of that post going to the deputation post and not the vacancy in the deputation post which would be filled up by the Executive Engineer going on deputation. Therefore, what has to be considered for the applicability of the quota rule is a vacancy in a post included in the sanctioned strength of the cadre of Executive Engineers and the sanctioned strength which has to be taken into account, is not merely the sanctioned strength of the cadre of Executive Engineers in the entire Central Engineering Service, Class I. The sanctioned strength of the cadre of Executive Engineers in the Central Engineering Service, Class I, may include not only posts of Executive Engineers in the Central Public Works Department but also posts of Executive Engineers in other departments and organisations. [890H, 891A-G]

A B C

5.2 Therefore, it cannot be said that promotion to the post of Executive Engineer contemplated under the Rules can be made only where there is no lien of any officer on that post because promotion according to the quota rule is initial promotion in officiating capacity and not concerned with confirmation. It is true that a confirmed Executive Engineer who goes on deputation may revert to the post on which he has a lien and so also an officiating Executive Engineer who goes on deputation may revert back on termination of his deputation and theoretically, in either case, an Assistant Engineer or Assistant Executive Engineer who is promoted to fill the vacancy arising on account of deputation may have to revert, but in actual practice and reality, not a single Assistant Engineer or Assistant Executive Engineer promoted to fill a vacancy arising on account of deputation, has had to revert, because deputation is a normal feature in this service and 20 to 25 per cent of the Executive Engineers are continuosly on deputation. Even, if one Executive Engineer comes back on termination of his deputation, another has to be sent in his place and deputations thus go on rotating with the result that the vacancy in the post of Executive Engineer arising on account of deputation does not cease and the Assistant Engineer or Assistant Executive Engineer promoted as Executive Engineer to fill the vacancy does not ever have to revert and consequently the vacancy filled by him is really and truly a permanent and long term vacancy which has to be filled according to the quota rule. In fact, if the quota rule were not to be applied with reference to such a vacancy, the position would be that whenever an Executive Engineer goes on deputation for a period which may extend anything between three to five years, the Central Government would be entitled to promote an Assistant Engineer ignoring the claims of Assistant Executive Engineers and this would totally be arbitrary in a situation where 20 to 25 per cent of Executive Engineers are on deputation. For this purpose the vacancies in the posts of Executive Engineers arising on account of deputation of Executive Engineers to other departments, organisations and public undertakings for a period of one or more years were long term vacancies and they could not be regarded as fortuitous or adventitious in character and hence they were subject to the quota rule. [891G-H, 895H, 896A, 897A-F, G]

D E F G H

A 3 3 However, the vacancy *pro tempore* filled irregularly by an Assistant Engineer would continue to belong to the quota of Assistant Executive Engineers and it can be filled only by the Assistant Executive Engineer, if the quota rule is to be strictly observed. The death or retirement of an irregular promotee to the vacancy cannot therefore give rise to a fresh vacancy : it is the same vacancy which continues until properly filled by promotion of an Assistant Executive Engineer at a subsequent date. If in B such a case the death or retirement of an irregular appointed Assistant Engineer were to be treated as creating a fresh vacancy, it would lead to gross distortion. Similarly while pushing down Executive Engineers promoted from the grade of Assistant Engineers in excess of their quota in a subsequent year, the Government must treat them as absorbed from the date when a vacancy in that year arises in the quota of Assistant Engineers and not on a national basis from 1st January of that year.

C [900 C-G, 901 C-D]

ORIGINAL JURISDICTION Writ Petition Nos. 157-162 of 1976
(Under article 32 of the Constitution of India)

D *M.C. Bhandare, A.K. Ganguli, D.P. Mukherjee* and *Miss C.K. Suchirata* for the Petitioners.

*M.M. Abdul Khader, Girish Chandra* and *Miss A. Subhashini* for Respondent.

*M.K. Ramamurthi, J. Romamurthi* and *Mrs. R. Vaigai* for E Respondent.

The Judgment of the Court was delivered by

BHAGWATI, J. This writ petition marks yet another round of litigation between two groups of Executive Engineers in Central F Public Works Department of the Ministry of Works and Housing, Government of India, one group consisting of promotees from the grade of Assistant Executive Engineers and the other consisting of promotees from the grade of Assistant Engineers. The dispute between these two groups in regard to seniority has been going on for quite some time and it has created considerable discord and bitterness G between these two groups which must inevitably affect the efficiency of the Service. It is really a matter of regret that the Central Government should not have been able to bring these two groups together and evolve a commonly agreed formula acceptable to both sides. We hope that our decision in this writ petition will finally ring the curtain down on this unfortunate controversy and both H groups of Executive Engineers will accept the decision ungrudgingly without any rancour or resentment and wholeheartedly engage themselves in the nation building task entrusted to them.

There is in the Central Public Works Department of Ministry of Works and Housing, Government of India a Service known as Central Engineering Service (Class I). This Service comprises various grades; the highest grade is that of Engineer-in-Chief and then in descending hierarchical order are the grades of Chief Engineer, Superintending Engineer, Executive Engineer and Assistant Executive Engineer. The Central Government has made rules of recruitment to this Service known as the Central Engineering Service (Class I) Recruitment Rules 1954 (hereinafter referred to as 'Recruitment Rules') and they are issued under SRO 1841 dated 21st May 1954. Part I of the Recruitment Rules contains the definition and Clause (c) of Rule 2 occurring in this Part defines "Service" as Central Engineering Service Class I. Rules 3, 4 and 5 contained in Part II of the Recruitment Rules lay down the modes of recruitment to various grades in this Service in the following terms :

"3. Recruitment to the service shall be made by any of the following methods ;—

(a) By competitive examination in India in accordance with Part III of these rules.

(b) By promotion in accordance with Part IV of these rules.

(c) By transfer in accordance with Part V of these Rules.

4. (1) All appointments to the service or to posts borne upon the cadre of the Service shall be made by Government.

(2) Subject to the provisions of the rule 3 Government shall determine the method or methods of requirement (Sic) (recruitment ?) to be employed for the purpose of filling any particular vacancies in the Service or such vacancies therein as may be required to be filed during any particular period and the number of candidates to be recruited by each method.

Provided that all recruitment by competitive examination (vide Part III of the rules) shall be to the grade of Assistant Executive Engineer, Class I only.

Seventy-five per cent of the vacancies in the grade of Executive Engineer, Class I, shall be filled by promotion of Assistant Executive Engineers, Class I, the rest of the vacancies being filled by promotion and/or by transfer in accordance with Parts IV and V of the Rules respectively.

5. Appointment to the Service made otherwise than by promotion will be subject to orders issued from time to time by the Ministry of Home Affairs regarding special representation in the Services for specific sections of the people".

Assistant Executive Engineers belong to the lowest grade in this service and they are recruited only through a competitive examination in accordance with Part III of the Recruitment Rules. On their initial recruitment, Assistant Executive Engineers are required to undergo a period of probation for two years and they are confirmed in the grade of Assistant Executive Engineers after successful completion of the period of probation.

There is also another Service in the Central Public Works Department called Central Engineering Service Class II. This Service consists only of the grade of Assistant Engineers. The rules of recruitment to the grade of Assistant Engineers are to be found in the Central Engineering Service Class II Recruitment Rules. There are two modes of recruitment laid down in these Rules; one is by direct recruitment through the same competitive examination which is held for selection of Assistant Executive Engineers, the candidates lower down in rank than those selected for the grade of Assistant Executive Engineers being selected for the grade of Assistant Engineers and the other is by process of selection from a subordinate Service called Class III Service. Assistant Engineers belong to Class II service, unlike Assistant Executive Engineers who belong to Class I Service but the posts which they hold are interchangeable, each of them being in charge of a sub-division and the nature of work, responsibilities, powers and duties discharged by them all is identical. There is only a minor difference in the pay scales but otherwise for all practical purposes, there is no difference between them so far as their functions powers and duties are concerned.

The next higher grade above that of Assistant Executive Engineers is that of Excecutive Engineers. Recruitment to the grade of Executive Engineers is made by promotion from two sources, namely Assistant Executive Engineers and Assistant Engineers. Assistant Executive Engineers are eligible for promotion to the grade of Executive Engineers after completion of five years of service and they are promoted on the basis of seniority-cum-fitness. Assistant Engineers on the other hand are eligible for promotion to the grade of Executive Engineers only after eight years of Service in their grade and for them, the post of Executive Engineer is a selection post and they are selected

for promotion on the basis of merit; the selection being made through a departmental promotion committee presided over by a member of the Union Public Service Commission. Prior to 25th August 1949, there was no quota for promotion to the grade of Executive Engineers from the grades of Assistant Executive Engineers and Assistant Engineers but for the first time on 25th August 1949, a quota was prescribed by the Central Government and it was provided that the vacancies in the grade of Executive Engineers shall be filled by promotion from the grades of Assistant Executive Engineers and Assistant Engineers in the ratio of 75% to 25%. This continued right up to the time the Recruitment Rules were enacted in 1954 and that is why the last part of clause (2) of Rule 4 of the Recruitment Rules provided that 75% of the vacancies in the grade of Executive Engineers shall be filled by promotion of Assistant Executive Engineers, the rest of the vacancies being filled by promotion and or by transfer in accordance with Parts IV and V of the Recruitment Rules. This quota was altered with retrospective effect from 7th September 1955 from 75 and 25 per cent to 66⅔ and 33⅓ per cent and it was again altered with effect from 1st April 1972 to 50 : 50 for a period of seven years.

It appears that whenever Assistant Executive Engineers and Assistant Engineers were promoted to the grade of Executive Engineers, they were first appointed on officiating basis. The quota was however, for reasons which we shall presently discuss not adhered to at the time of such promotions with the result that Assistant Engineers came to be promoted as officiating Executive Engineers far in excess of their quota while there was a shortfall in the promotions of Assistant Executive Engineers so far as their quota was concerned. Now there were no statutory rules governing *inter se* seniority of Executive Engineers promoted from the grades of Assistant Executive Engineers and Assistant Executive Engineers but there was a Memorandum issued by the Home Ministry on 22nd June 1949 which laid down general principles of seniority applicable to all departments. This Memorandum provided that "in respect of persons employed in any particular grade, seniority should, as a general rule, be determined on the basis of length of service in that grade as well as service in an equivalent grade irrespective of whether the latter was under Central or Provincial Government in India or Pakistan." The length of continuous officiation in the grade was thus taken as the yardstick for the purpose of determining seniority in all departments of the government and a *fortiorari*, in the grade of Executive Engineers. On the basis of this yardstick, Assistant Engineers promoted as officiating

A Executive Engineers within their quota would clearly be senior to Assistant Executive Engineers promoted later as officiating Executive Engineers.

However, Respondent No. 1 to 3 issued a seniority list on 1st July 1971 in which Executive Engineers promoted from the grade of B Assistant Engineers in regular manner on the basis of selection made by Departmental Promotion Committee and within their quota were shown as junior to several Executive Engineers promoted much later from the grade of Assistant Engineers. Respondent No. 1 to 3 in making this seniority list proceeded on the basis that the quota C rule specified in the last part of sub-rule (2) of Rule 4 of the Recruitment Rules necessarily implied a system of rotation and it was required to be strictly applied at the stage of confirmation in the grade of Executive Engineers. In other words, out of three vacancies in the grade of Executive Engineers, unless two reserved for promotion of Assistant Executive Engineers were filled up by confirmation of D such promotees, the third one for confirmation of Assistant Engineer promoted as Executive Engineer could not be filled. Consequently, all Assistant Engineers were treated as ad-hoc appointees without any claim to seniority until such time as they were confirmed as Executive Engineers within their quota. The impact of this decision of Respondent No. 1 to 3 was disastrous for a large E number of Executive Engineers promoted from the grade of Assistant Engineers on officiating basis, since many of them had to retire without being confirmed and therefore, without any claim of seniority in the grade of Executive Engineers and even today, according to the petitioners, there are hundreds of officiating Executive Engineers promoted from the grade of Assistant Engineers who are working F in the Central Public Works Department for decades without confirmation and according to the principle adopted in preparing the seniority list of 1st July 1971, they would have no claim to seniority in the grade of Executive Engineers and would become junior even to recent promotees from the grade of Assistant Executive G Engineers.

The seniority list dated 1st July 1971 was preceded by provisional seniority lists which were prepared annually on the basis of the same formula and some of the Executive Engineers promoted from the grade of Assistant Engineers, therefore, without waiting H for the publication of the final seniority list dated 1st July 1971 preferred writ petitions in the Delhi High Court challenging the validity of the provisional seniority lists. There writ petitions were

referred to a Full Bench since they involved questions of some importance and the Full Bench by a common judgment dated 20th May 1971 rejected the contentions of the petitioners and concurring with the stand adopted by respondent Nos. 1 to 3, held that the quota rule applied not at the stage of initial promotion on officiating basis but at the stage of confirmation and rotational formula for the purpose of determining seniority was implicit in the quota rule and on this view, the Full Bench upheld the provisional seniority lists which, as already pointed out above, were on the same lines as the final seniority list dated 1st July 1971 and which fixed seniority in the grade of Executive Engineers according to the rotational formula based on the quota rule. The petitioners in these writ petitions thereupon preferred Civil Appeal Nos. 1745, 1746 & 1747 of 1974 after obtaining special leave to appeal against the judgment of the Delhi High Court. Some other Executive Engineers promoted from the grade of Assistant Engineers also filed a direct writ petition in this Court being writ petition 489 of 1972, challenging the seniority list of 1st July 1971 on the ground that the seniority worked out by applying the quota rule at the stage of confirmation and adopting the rotational formula was illegal and that the seniority ought to have been fixed on the basis of length of continuous officiation in the grade of Executive Engineers. These three civil appeals and writ petition were heard together and decided by a common judgment of this Court dated 11th December 1974 vide : *A.K. Subraman & Ors. etc. v. Union of India &* ors.(1). This Court accepted contention of the petitioners that the quota rule was to be applied at the stage of initial promotion in officiating capacity to the grade of Executive Engineers and not at the stage of confirmation and that it did not necessarily imply the rotational system and since the general principles for determining seniority laid down in the Memorandum dated 22nd June 1949 were, on their plain terms, applicable, seniority in the grade of Executive Engineers was liable to be fixed on the basis of length of continuous officiation in that grade as provided in the Memorandum dated 22nd June 1949. Some of the Executive Engineers promoted from the grade of Assistant Executive Engineers who were respondents in the writ petition as also in the civil appeal tried to meet the contention of the petitioner by relying on a subsequent Memorandum dated 22th December 1959 issued by the Ministry of Home Affairs, Government of India but the learned Solicitor General appearing on behalf of the Union of India conceded that the said Memorandum had no application to the case and was irrelevant and this Court also accepted the same view. This

(1) [1975] 2 S.C.R. 979

A Court pointed out that since the cadre of Executive Engineers consisted both of permanent as well as temporary posts, the vacancies referred to in the quota rule comprised vacancies not only in the permanent posts but also in the temporary posts included in the sanctioned strength of the cadre, barring only such vacancies as were purely of a fortuitous or adventitious nature and the quota rule applied at the stage when Assistant Engineers and Assistant Executive Engineers were promoted even if it be in an officiating capacity, irrespective of whether the vacancies were in permanent posts or in temporary posts. This Court also observed that for the purpose of applying the quota rule, the year must be taken as a unit and the quota rule must be applied in relation to the vacancies occuring in any particular year. This Court also held, relying on the observations in *Bishan Swaroop Gupta v. Union of India & Ors*(1). (hereinafter referred to as the Ist Bishan Swaroop Gupta case) that the ratio of promotions in the grade of Executive Engineers in any particular year was not dependant upon whether any persons from one class or the other were promoted or not and this was made clear by giving an Illustration that if there were three vacancies in a particular year, two would go to Assistant Executive Engineers while one would go to the Assistant Engineers and even if there were no eligible Assistant Executive Engineers who could be promoted to fill in the two vacancies belonging to their quota, one vacancy would have to be filled by promotion of an Assistant Engineer. If in such a case, having regard to the exigencies of the situation two vacancies belonging to the quota of Assistant Executive Engineers had to be filled in by Assistant Engineers for want of availability of eligible Assistant Executive Engineers, the appointment of Assistant Engineers to fill in such two vacancies would be irregular because that would be outside their quota but in that event, observed the Court, they would have to be pushed down to later years when their appointment could be regularised as a result of absorption in their lawful quota for those three years. These conclusions reached by the court were summarised in the form of following six propositions at the close of the judgment:

(1) When Assistant Engineers Class (II) are initially appointed in a regular manner in accordance with the rules to officiate as Executive Engineers, their seniority in service in Grade I will count from the date of their initial officiating appointment in Class I provided their initial officiating appointment as Executive Engineers was within their quota.

(1) [1975] Supp. S.C.R. 491

(2) Their seniority will not be reckoned from the date of their future confirmation in Class I. A

The above principle is, however, subject to one reservation, namely, if an Assistant Engineer before his confirmation in Class II were appointed to officiate in Class I in the grade of Executive Engineer, although within his quota, his seniority will count only from the date of his confirmation in Class II as permanent Assistant Engineer notwithstanding his earlier officiating appointment as Executive Engineer. B

(3) The quota rule will be enforced at the time of initial recruitment, in an officiating capacity, to the grade of Executive Engineer and not at the time of confirmation. C

(4) The quota rule will be enforced with reference to vacancies in all posts, whether permanent or temporary including in the sanctioned strength of the cadre (except such vacancies as are purely of a fortuitous or adventious nature) and the operation of the quota rule will depend upon the availability or non-availability or Assistant Executive Engineers for appointment as Executive Engineers. The non-availability of Assistant Executive Engineers for recruitment to the grade of Executive Engineer will not postpone the regular recruitment of the Assistant Executive Engineers within their quota. D E

(5) Once the Assistant Engineers are regularly appointed to officiate as Executive Engineers within their quota they will be entitled to consideration in their own rights as Class I Officers to further promotions. Their "birth marks" in their earlier service will be of no relevance once they are regularly officiating in the grade of Executive Engineer within their quota. F G

(6) If Assistant Engineers are recruited as Executive Engineers in excess of their quota in a particular year they will be pushed down to later years for absorption when due within their quota. H

This Court accordingly allowed the writ petition and the civil appeals and directed respondent Nos. 1 to 3 to amend and revise the

A seniority list of 1st July 1971 in the light of the directions given in the judgment and to give effect to the revised seniority list so prepared.

Though the aforesaid directions were given by this Court for preparation of a revised seniority list as far back as 11th December B 1974 respondents Nos. 1 to 3 delayed implementation of those directions for a period of over three months and hence the petitioners in writ petition No. 489 of 1972 as also petitioner No. 3 in the present writ petition filed CMP No. 2563/75 on 18th April 1975 for taking action against respondent Nos. 1 to 3 for contempt of court. C Respondent No. 1 however, instead of complying with the directions given by this Court and purging itself of the contempt alleged to have been committed by it, filed CMP No. 3911 of 1975 dated 18th July 1975 for clarification of the judgment on the ground that they felt some difficulty in implementing the directions issued by the Court. This application for clarification was rejected by the Court on 21st D July 1975 on the ground that the principles laid down in the judgment dated 11th December 1974 were clear and the Court did not "see need to clarify them any further," and once again the Court ordered the first respondent to prepare and publish a final seniority list in compliance with the directions given on 11th December 1974. The Court kept the application for contempt pending and adjourned E it to 1st September 1975. Respondent Nos. 1 to 3 thereafter issued a revised seniority list on 14th August 1975. This seniority list was accompanied by a Memorandum also dated 14th August 1975 in which it was stated that the seniority list of Executive Engineers had been revised in the light of the judgment of this Court dated 11th December 1974 in accordance with the principles set out in that F Memorandum. We shall discuss these principles in detail when we deal with the various arguments advanced on behalf of the parties. We may, however, point out at this stage that, broadly speaking, for the purpose of determining seniority in the grade of Executive Engineers from and after 22nd December 1959, respondent Nos. G 1 to 3 introduced the carry forward principle and applied the rotational formula. The officers who had been, with the concurrence of the Union Public Service Commission, officiating as Executive Engineers prior to 25th August 1949 and continued to do so thereafter were shown *en bloc* senior to the officers appointed after 25th August 1949 and so far as the period between 25th August 1949 and H 21st December 1959 was concerned, the *inter se* seniority of persons promoted during that period from the grades of Assistant Engineers and Assistant Executive Engineers within their respective quotas was

determined in accordance with the length of their regular continuous service as Executive Engineers, subject to the qualification that in case of Assistant Engineers who were promoted as Executive Engineers prior to their confirmation in the grade of Assistant Engineers, the length of their regular continuous service as Executive Engineers for the purpose of determining seniority would be computed only from the date when they were confirmed as Assistant Engineers. So far there was no dispute raised on behalf of the petitioners and it was conceded that the principle for determining seniority applied by respondent Nos. 1 to 3 for the period upto 21st December 1959 was valid. The petitioners also conceded that those Assistant Engineers who had been promoted in excess of their quota were rightly pushed down and adjusted within their quota in subsequent years. Thus, for example, Shri A.K. Subraman, the first petitioner in writ petition No. 489 of 1972, though promoted in officiating capacity as Executive Engineer on 27th December 1956 with the approval of the Departmental Promotion Committee was pushed down, since his promotion was not within the quota of Assistant Engineers at the time when he was promoted and his promotion was regularised on absorption within his lawful quota in a subsequent year. But with effect from 22nd December 1959 a departure was made by respondent Nos. 1 to 3 from the principle of continuous officiation and carry forward principle was applied by providing that 86 posts earmarked for promotion of Assistant Executive Engineers to the grade of Executive Engineers in accordance with their quota during the period prior to 22nd December 1959 which had remained unfilled owing to non-availability of Assistant Executive Engineers upto 22nd December 1959 should be carried forward and 86 Assistant Executive Engineers promoted after 22nd December 1959 should be adjusted against these posts and they should be assigned seniority *en bloc* immediately below the last Executive Engineer promoted regularly prior to 22nd December 1959. The result was that the Assistant Engineers who had been promoted as Executive Engineers regularly within their quota subsequent to 22nd December 1959 became junior to the Assistant Executive Engineers promoted against these 86 carried forward posts, even though they might have been promoted as Executive Engineers long prior to the promotion of such Assistant Executive Engineers. The Assistant Executive Engineers promoted and adjusted against these 86 carried forward posts were given seniority above the Assistant Engineers promoted regularly within their quota after 22nd December, 1959, irrespective as to when such Assistant Executive Engineers were actually promoted. After the Assistant Executive Engineers promoted

A B C D E F G H

as Executive Engineers were adjusted against these 86 carried forward posts and given seniority *en bloc* over all Assistant Engineers promoted regularly within their quota subsequent to 22nd December 1959, the rotational formula was applied in respect of the posts for the period subsequent to 22nd December 1959 and these posts were adjusted on the basis of the order in which the vacancies in the respective quotas of Assistant Executive Engineers and Assistant Engineers for promotion as Executive Engineers were allocated from time to time. The seniority inter-se of Assistant Executive Engineers and Assistant Engineers promoted regularly within their respective quotas subsequent to 22nd December 1959 was thus determined by the application of the rotational formula based on the quota prevailing at the relevant time. But since it had not been possible to fill all the posts allocated to the Assistant Executive Engineers' quota and some posts remained unfilled, they were shown as vacant in the seniority list prepared according to the roster based on the rotational formula, so that as and when Assistant Executive Engineers might be promoted as Executive Engineers regularly within their quota, they would occupy the vacant posts earmarked for them in the seniority list. The disastrous effect of this seniority list was that most of the Assistant Engineers promoted as Executive Engineers regularly within their quota subsequent to 22nd December 1959 lost a considerable number of places in seniority and were placed in much worse situation than what they were in under the seniorty list dated 1st July 1971 which was quashed at their instance in writ pettion no. 489 of 1972. The petitioners in writ petition no. 489 of 1972 therefore filed an additional affidavit on 26th August 1975 pointing out that the seniority list dated 14th August 1975, though purporting to be in compliance with the directions given by this court, was totally in defiance of such directions and respondent Nos. 1 to 3 should therefore be committed for contempt of this court. It seems that some of the Assistant Executive Engineers promoted as Executive Engineers were also dissatisfied with the seniority list dated 14th August 1975 since it took into account deputation vacancies in the grade of Executive Engineers as regular vacancies for the purpose of application of the quota rule and they also therefore filed their objections to this seniority list. The parties filed their respective affidavits in answer to the objections raised against the seniority list and after the record was completed, the court was invited to decide the entire controversy between the parties on the basis of these objections and affidavits. But before the court could hear the objections against the seniority list on merits, the first respondent issued on 8th June, 1976 the Executive Engineers, Central

Engineering and Central Electrical Engineering Service (Group A) (Regulation of Seniority) Rules 1976 (hereinafter referred to as the Rules of 1976) in exercise of the power conferred under the proviso to Article 309 of the Constitution. These Rules were deemed to have come into force with effect from 10th December 1974, that is one day before the delivery of judgment by this Court in writ petition no. 489 of 1972 and they substantially enacted in statutory form the same principles which were set out in the Memorandum that accompanied the seniority list dated 14th August 1975 and on which that seniority list was based. Rules 2(iii) and 2(iv) which are the material rules provided inter alia as under :

"2(iii) : The vacancies in the grade of Executive Engineer, which were earmarked for promotion from the grade of Assistant Executive Engineer in accordance with quotas prescribed for them during the period from 25th August, 1949 to 21st December, 1959, but could not be filled would be carried forward and filled by Assistant Executive Engineers promoted on or after 22.12.1959. The inter se seniority of such officers will be determined in the order of their seniority in the grade of Assistant Executive Engineer—those who were considered unfit for promotion being omitted and they will rank immediately below the last Executive Engineer, promoted prior to (22.12.1959).

(iv) After all the vacancies in the grade of Executive Engineer, which were earmarked for promotion from the grade of Assistant Executive Engineer in accordance with the quotas prescribed for them during the period from 25th August, 1949 to 21st December, 1959, but could not be filled, are filled by Assistant Executive Engineers promoted on or after 22.12.1959 and such officers assigned seniority as indicated in (iii) above, all subsequent vacancies in the grade of Executive Engineer will be filled by rotation of vacancies between the Assistant. Executive Engineers and Assistant Engineers on the basis of quotas prescribed for them for promotion as Executive Engineer from time to time. The inter se seniority of Assistant Executive Engineers and Assistant Engineers so promoted to the grade of Executive Engineer,

will also be determined on the basis of such rotation of quotas. For this purpose, the recruitment roster shall be drawn as under :—

(a) When the reservation of the vacancies in the grade of Executive Engineer for Assistant Executive Engineer and Assistant Engineer is 66-2/3% and 33-1/3% respectively (that is, upto 31.3.1972)

1st Position )
) Asstt. Executive Engineer
2nd Position )
3rd Position Assistant Engineer
4th Position )
) Assistant Executive Engineer
5th Position )
6th Position Assistant Engineer and so on.

(b) When the reservation of the vacancies in the grade of Executive Engineer for Assistant Executive Engineers, and Assistant Engineers, is 50% each (i.e. from 1.4.1972 and for a period of 7 years.)

| | |
|---|---|
| 1st Position | Asstt. Executive Engineers |
| 2nd Position | Asstt. Engineer |
| 3rd Position | Asstt. Executive Engineer |
| 4th Position | Asstt. Engineer and so on." |

The petitioners thereupon filed the present writ petition contending that the Rules of 1976 were not applicable to the petitioners and other Assistant Engineers promoted as Executive Engineers regularly within their quota prior to 10th December 1974 and if these Rules were held to be applicable then they were unconstitutional and void. The petitioners, in the circumstances, prayed in the writ petition that the seniority list dated 14th August 1975 should be quashed and a new seniority list should be prepared on the basis of length of continuous officiation in the grade of Executive Engineers so that Assistant Engineers promoted as Executive Engineers regularly within their quota should have seniority over Assistant Executive Engineers promoted later in point of time. The writ petition was admitted and *rule nisi* was issued upon it and after affidavits in reply were filed on behalf of the respondents, the writ

petition taken up for hearing by this Court. In the course of the hearing, we made a strenuous effort to bring about settlement of this long standing dispute between Assistant Engineer and Assistant Executive Engineers promoted as Executive Engineers but our effort proved futile and hence we are now proceeding deliver our judgment.

The petitioners challenged the validity of the seniority list dated 14th August 1975 and the Rules of 1976 on the following grounds :

(A) The case of the petitioners and other Executive Engineers promoted from the grade of Assistant Engineers regularly within their quota from and after 22nd December 1959 but before 11th December 1974 is covered by the decision of this Court in Writ Petition No. 489 of 1972 and Civil Appeal Nos. 1745 to 1747 of 1974 and hence they are entitled to claim seniority, on the basis of length of continuous officiation, over Assistant Executive Engineers promoted as Executive Engineers later in point of time and the Assistant Executive Engineers promoted and adjusted against 86 carried forward posts cannot be given seniotity *en bloc* over Assistant Engineers promoted as Executive Engineers earlier nor can the rotational formula be applied retrospectively so as to deprive Assistant Engineers promoted Executive Engineers of their seniority on the basis of length of continuous officiation in the grade of Executive Engineers and the Rules of 1976 are, to that extent, unconstitutional and void as being outside the power of the Central Government.

(B) Since the Rules of 1976 have been brought into force with effect from 10th December 1974, they cannot affect the petitioners and other Assistant Engineers promoted as Executive Engineers regularly within their quota prior to that date and their seniority vis-a-vis Assistant Executive Engineers promoted as Executive Engineers must continue to be governed by the principle of length of continuous officiation in the grade of Executive Engineers.

(C) If the Rules of 1976 are applicable for determining inter se seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers within their respective quotas from and after 22nd December 1959, they are unconstitutional and void

A as offending Articles 14 and 16 of the Constitution, since the seniority rules enunciated in the Rules of 1976 being closely linked with the quota rule continued massive departure from the quota rule over a long period of time must result in the break down of the seniority rules and to apply the seniority rules in such a situation would create B gross inequality of opportunity of employment violative of Articles 14 and 16.

These were the broad grounds of challenge urged on behalf of the petitioners and we shall now proceed to deal with them in the order C in which we have set them out.

RE : GROUND (A). This ground is based on the decision rendered by this Court in writ Petition No. 489 of 1972 and Civil Appeals Nos. 1745 to 1747 of 1974. It is necessary in order to D appreciate this ground to know who were the parties in writ petition No. 489 of 1972 and Civil Appeal Nos. 1745 to 1747 of 1974. The petitioners in writ Petition No. 489/1972 were Assistant Engineers promoted as Executive Engineers between 27th December 1956 and 8th September, 1959 by a properly constituted Departmental Promotion Committee and barring one petitioner, all the E others had been promoted to the grade of Executive Engineers prior to their confirmation as Assistant Engineers. The promotion of each of the petitioners when made was in excess of the quota of Assistant Engineers and all of them were therefore required to be pushed down to later years for absorption in their lawful quota for F those years and through this process, their promotions were regularised on different dates subsequent to 22nd December 1959. The petitioners were thus all officiating Executive Engineers promoted from the grade of Assistant Engineers regularly within their quota after 22nd December 1959. The contesting respondents Nos. 4 to 66 were Assistant Executive Engineers promoted as Executive G Engineers within their quota between 11th March 1957 and 23rd February 1966 and obviously therefore some of them were Assistant Executive Engineers promoted on dates subsequent to 22nd December 1959. The contest between the petitioners and respondent Nos. 4 to 66 was therefore not confined only to those Assistant Engineers H and Assistant Executive Engineers who were promoted as Executive Engineers regularly within their respective quota prior to 22nd December 1959 but it extended also to Assistant Engineers and

Assistant Executive Engineers promoted as executive Engineers subsequent to that date. The same position obtained also in regard to the contest between the appellants and the respondents in C.A. Nos. 1745-1747 of 1974. The appellants in these appeals were all Assistant Engineers promoted as Executive Engineers, and though some of them were promoted prior to 22nd December 1959, they were regularised in their appointment by absorption within their legitimate quota subsequent to 22nd December 1959, since at the time when they were in initially promoted, their promotions were in excess of the quota of Assistant Engineers and they were therefore required to be pushed down to later years for absorption within their quota. The large majority of the appellants, if not all, were thus Assistant Engineers promoted as Executive Engineer regularly within their quota after 22nd December 1959 and in C.A. Nos. 1745-47 of 1974 preferred by them, they claimed seniority over the contesting respondents who were Assistant Executive Engineers promoted later in point of time. This claim of the appellants was disputed on behalf of the contesting respondents who submitted that they had been rightly given seniority over the appellants by adopting the rotational formula. This controversy as to seniority between two groups of Executive Engineers, on the one hand, the petitioners and the appellants, a large number of whom were promoted within their quota subsequent to 22nd December 1959 and on the other, the contesting respondents of whom also a sizeable number were promoted as Executive Engineers after 22nd December 1959, was resolved by this Court by its decision dated 11th December 1974 and it was held that the quota rule has to be applied at the time of initial recruitment in offiiciating capacities to the grade of Executive Engineers and if any Assistant Engineers are promoted Executive Engineers in excess of their quota in a particular year, they would have to be pushed down to later years for absorption when due within their quota and more importantly, when Assistant Engineers are promoted as officiating Executive Engineers regularly within their quota, their seniority in the grade of Executive Engineer would count from the date of their regular promotion within their quota and on the basis of this holding, the Union of India was directed to amend and revise the seniority list and to give effect to the seniority lists so revised. It is therefore clear and we do not think this position can admit of any doubt whatsoever, that even in regard to Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers subsequent to 22nd December 1959, the direction given by the Court was that their seniority inter se should be determined on the basis of length of continuous officiation

A in the grade of Executive Engineers counted from the date of their regular promotion within the respective quota. It is also obvious on a plain reading of the decision of this Court that the direction given by it in regard to determination of *inter se* seniority on the basis of length of continuous officiation was not limited to Executive B Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers upto 22nd December 1959 but was on its plain terms applicable to all Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers within their respective quota right upto 11th December 1974 being the date of the decision of the Court. Moreover, it may C also be noted, and this is a circumstance of considerable weight, that in any event the seniority list which was directed to be amended and revised by following the rule of seniority based on length of continuous officiation was seniority list of 1st July 1971 which determined inter se seniority amongst the Executive Engineers promoted from the grades of Assistant Engineers and Assistant D Executive Engineers right upto June, 1971. It is the inter se seniority amongst these Executive Engineers covered by the seniority list of 1st July 1971 that was directed to be amended and revised on the basis of length of continuous officiation in the grade of Executive Engineers. The Government of India was therefore bound E to revise the seniority list of Executive Engineers on the basis that the inter se seniority of Executive Engineers drawn from the grades of Assistant Engineers and Assistant Executive Engineers should be determined on the basis of length of continuous officiation in service after regular appointment within their respective quota irrespective of whether such regular promotion within the respective quota was F before or after 22nd December 1959. But the revised seniority list dated 14th August 1975 issued by the Government of India was plainly in defiance of this direction given by the Court and what the Government of India did was to adjust the first 86 Assistant Executive Engineers promoted after 22nd December 1959 against 86 carried forward posts and to give them seniority en bloc over all G Assistant Engineers promoted as Executive Engineers regularly within their quota subsequent to 22nd December 1959 and then to apply the rotational formula in regard to the other vacancies subsequent to 22nd December 1959. The result was that most of the Assistant Engineers promoted as Executive Engineers lost a large H number of places in seniority and were reduced to a position much worse than that in which they were under the earlier seniority list of 1st July 1971. The success which the petitioners and the appellants

had achieved in writ petition No. 489 of 1974 and Civil Appeal Nos. 1745-47 of 1974 was turned into a defeat and they were badly mauled in the ultimate result. The question is whether despite the direction given by this Court in its decision dated 11th December 1974 and in face of it, the Government of India was justified in fixing inter se seniority between Assistant Engineers and Assistant Executive Engineers promoted regularly within their quota from and after 22nd December 1959 on the basis set out in the Memorandum dated 14th August 1975 and the Rules of 1976.

The Government of India sought to avoid the binding obligation of the direction given by the Court in its decision dated 11th December 1974 by making the Rules of 1976 effective from 10th December 1974, one day prior to the date of the decision. The assumption underlying this menoeuvre on the part of the Government of India was that if the Rules of 1976 were brought into force with effect from a date prior to the decision of the Court in *A.K. Subraman's* case (supra) they would nullify that decision and notwithstanding that decision recognising and giving effect to a different rule of seniority, namely, the rule of length of continuous officiation, the Rules of 1976 would prevail and the *inter se* seniority between Executive Engineers promoted form the grades of Assistant Engineers and Assistant Executive Engineers subsequent to 22nd December 1959 would be governed by those Rules. This assumption, we are afraid, is wholly unfounded and the argument based upon it cannot be sustained. When this Court has in so many terms laid down that the *inter se* seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers upto 11th December 1974 must be held to be governed by the rule of length of continuous officiation and the Government of India has been directed by a writ of the Court to amend and revise, the seniority list of 1st July 1971 on the basis of this rule of seniority, it is difficult to see how the effect of this decision can be set at naught and the binding character of the writ issued against the Government of India can be abrogated by the mere promulgation of the Rules of 1976 with retrospective effect from 19th December 1974. It is significant to note that the Explantory Memorandum which was in the nature of statement of objects and reasons for the Rules of 1976 did not seek to override the effect of the decision in *A.K. Subraman's* case (supra) but on the contrary affirmed that the principles of seniority set out in those rules were laid down on the basis of the decision in *A.K. Subraman's* case (supra), The Rules of 1976 were in no way intended to set at

naught the decision in *A.K.Subraman's* case (supra) in so far as it laid down the rule of seniority based on length of continuous officiation for Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers, but it was claimed that they were made with a view to giving effect to the direction contained in that decision. That is the reason why we do not find any non-obstante clause giving overriding effect to the rules of seniority enunciated in the Rules of 1976 notwithstanding the decision in *A.K. Subraman's* case (supra). Since the Rules of 1976 purport merely to carry out the direction given in the decision in *A.K. Subraman's* case (supra) they cannot have the effect of overriding that decision and absolving the Government of India from the obligation to implement this direction and the Government of India must therefore amend and revise the seniority list of 1st July 1971 by applying the rule of seniority based on length of continuous officiation for determining *inter se* seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers upto 11th December 1974. The relative position of the Executive Engineers in regard to their *inter se* seniority having been crystallised in the decision in *A.K. Subarman's* case (supra) and a writ having been issued by this Court directing the *inter se* seniority of the Executive Engineers to be fixed on the basis of length of continuous officiation, the Executive Engineers promoted from the grade of Assistant Engineers were entitled to enforce the writ for determining their *inter se* seniority with the Executive Engineers promoted from the grade of Assistant Executive Engineers in accordance with the rule of length of continuous officiation. This right of the Executive Engineers promoted from the grade of Assistant Engineers under the decision in *A.K. Subraman's* case (supra) could not be taken away by anything contained in the Rules of 1976. The decision in *A.K. Subraman's* case (supra) continued to subsist and the Government of India was bound to determine *inter se* seniority amongst the Executive Engineers in accrodance with the direction contained in that decision.

The respondents in answer to this contention of the petitioners leaned heavily on the decision of this Court in *Shri Prithvi Cotton Mills Ltd.* v. *Broach Borough Municipality*[1] and submitted that whatever might have been the rule of seniority on which the decision of this Court in *A.K. Subraman's* case (supra) was based, the basis

(1) [1970] 1 SCR 388.

of that decision was fundamentally altered in so far as *inter se* seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers subsequent to 22nd Decemeber 1959 was concerned, because Rules 2(iii) and 2(iv) of the Rules of 1979 retrospectively provided for a different rule of seniority and that rendered the decision ineffective and not binding on the parties We have carefully considered the decision of this Court in *Shri Prithvi Cotton Mills case* (supra) but we do not think that this decision lays down any such wide proposition as is contended for on behalf of the respondents. It does not say that whenever any actual or legal situation is altered by retrospective legislation, a judicial decision rendered by a Court on the basis of such factual or legal situation prior to the alteration would straight away without more, cease to be effective and binding on the parties. It is true that there are certain observations in this decision which seem to suggest that a court decision may cease to be binding when the conditions on which it is based are so fundmentally altered that the decision could not have been given in the altered circumstances. But these observations have to be read in the light of the he question which arose for consideration in that case. There, the validity of the Gujorat imposition of Taxes by Municipaltities (Validation) Act, 1963 was assailed on behalf of the petitioners. The Validation Act had to be enacted because it was held by this Court in *Patel Gordhandas Hargovindas* v. *Municipal Commissioner, Ahmedabad*[1] that since section 73 of the Bombay Municipality Boroughs Act, 1925 allowed the Municipality to levy a 'rate' on buildings or lands and the term 'rate' was confined to an imposition on the basis of annualetting value, tax levied by the Municipality on lands and buildings on the basis of capital value was invalid. Section 3 of the Validation Act provided that notwithstanding any thing contained in any judgment, decree or order of a court or tribunal or any other authority, no tax assessed or purported to have been assessed by a municipality on the basis of capital value of a building or land and imposed, collected or recovered by the municipality at any time before the commencement of the Validation Act shall be deemed to have invalidly assessed, imposed, collected or recovered and the imposition, collected or recovery of the tax so assessd shall be valid and shall be deemed to have always been valid and shall not be called in question merely on the ground that the assessment of the tax on the basis of capital value of the building or land

(1) [1964] 2 S.C.R. 608.

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was not authorised by law and accordingly any tax so assessed befor the commencement of the Validation Act and leviable for a period prior to such commencement but not collected or recovered before such commencement may be collected or recovered in accrodance with the relevant municipal law. It will be seen that by section 3 of the impugned Act the Legsilature retrospectively imposed tax on building or land on the basis of capital value and if the tax was already imposed, levied and collected on that basis, made the imposition levy, collection and recovery of the tax valid, notwithstanding the declaration by the Court that as 'rate', the levy was incompetent. This was clearly permissible to the Legislature because in doing so, the Legislature did not seek to reverse the decision of this Court on the interpretation of the word 'rate', but retrospectively amended the law by providing for imposition of tax on land or building on the basis of capital value and validated the imposition, levy collection and recovery of tax on that basis. The decision of this Court holding the levy of tax to be incompetent on the basis of the unamended law, therefore, became irrelevant and could not stand in the way of the tax being assessed, collected and recovered on the basis of capital value under the law as retrospectively amended. That is why this Court held that the Validation Act was effective to validate imposition, levy, collection and recovery of tax on land or building on the basis of capital value. It is difficult to see how this decision given in the context of a validating statute can be of any help to the respondens. Here the decision in *A.K. Subraman's* case (supra) which is relied upon by the petitioners is not a mere declaratory judgment holding an impost or tax to be invalid, so that a validation statute can remove the defect pointing out by that judgment and validate such impost or tax. But it is a decision giving effect to the right of the Executiue Engineers promoted from the grade of Assistant Engineers to have their *inter se* seniority with Executive Engineers promoted from the grade of Assistant Executive Engineers determined on the basis of rule of length of continuons officiation by issue of a writ directing the Government of India to amend and revise the seniority list in accordance wirh such rule of seniority. Rules 2(iii) and 2(iv) seek to substitute with retrospective effect a totally different rule of seniority in place of that recognised and given effect by the decision in *A.K. Subraman's* case (supra). That obviously cannot be done. Rules 2(iii) and 2(iv) cannot by retrospective alter ation of the rule of seniority nullify the decision in *A.K. Subraman's* case which has recognised and given effect to an existing rule of seniority and issued a writ against

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the Government of India on that basis. If by reason of retrospective alteration of the rule of seniority the decision is rendered erroneous, the remedy may be by way of review, but so long as the decision stands, it cannot be disregarded or ignored and it must be obeyed by the Government of India despite Rules 2(iii) and 2(iv) so far as the Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers upto 11th December 1974 are concerned. This view taken by us finds complete support from the judgment of one of us namely Bhagwati, J. in *M.M. Pathak* v. *Union of India & Ors.*(1)

The respondents also relied heavily on the decision of this Court in *Bishan Sarup Gupta* v. *Union of India*(2) (hereinafter referred to as the *2nd Bishan Sarup Gupta case*). It was contended on behalf of the respondents that in the *2nd Bishan Sarup Gupta case*, this Court upheld the rotational rule of seniority which determines seniority according to a roster of 1:1 amongst direct recruits and promotees in the Income-Tax Officers (Class I) Service in the circumstances closely resembling the present case and Rules 2(iii) and 2(iv) of the Rules of 1976 in so far as they gave seniority *en bloc* to the Assistant Executive Engineers promoted to the 86 carried forward posts of Executive Engineers and applied the rotational formula for the purpose of determining seniority amongst Assistant Engineers and Assistant Executive Engineers promoted to the subsequent vacancies in the grade of Executive Engineers, must, therefore, be upheld by us on analogical reasoning. This contention, plausible though it may seem, is, in our opinion, without force and must be rejected. The situation in the *2nd Bishan Sarup Gupta case* was fundamentally different from that in the present case. The Court, in the *1st Bishan Sarup Gupta case*, came to the conclusion that on 16th January, 1959 the quota rule for filling up vacancies amongst Income-Tax Officers (Class I) collapsed by reason of upgrading of 100 Class II posts and with that also went the seniority rule set out in Rule 1 (f) (iii), because this rule of seniority could be upheld as constitutionally valid only if the quota rule was strictly observed, with only minor deviations permitting, and the question, therefore, arose that "if the seniority rule 1 (f) (iii) ceased to be operative from 16th January, 1959' how is the inter-se seniority between the direct recruits and the promotees to be fixed thereafter ?" There was no

(1) [1978] 3 SCR 346.
(2) [1975] 1 SCR 104.

specific seniority rule to determine inter-se seniority between the direct recruits and the promotees appointed regularly within their respective quota from and after 16th January, 1959 and though, in the absence of any specific seniority rule, the Court could have applied the residuary rule based on length of continuous officiation, the Court did not do so because it felt that since the old seniority rule had ceased to operate by reason of the infringement if the quota rule, it would be for the Government to devise "a Just and fair seniority rule as between the direct recruits and the promotees for being given effect to from 16th January, 1959." It was pursuant to this direction given by the Court that the rotational rule of seniority impugned in the *2nd Bishan Sarup Gupta* case was made the Government and this seniority rule did not seek to undo the effect of that decision. Now, in the present case also, by reason of clause 3 of the Memorandum dated 22nd December, 1959, the rule of seniority based on length of continuous officiation enunciated in the Memorandum dated 22nd June, 1949 came to an end and thereafter until the Rules of 1976, were formulated, there was no specific rule of seniority which governed inter-se seniority between Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers regularly within their respective quota subsequent to 22nd December, 1959. The Memorandum dated 22nd December, 1959 was undoubtedly in force, but for reasons which we shall presently state, neither Paragraph 5(ii) relied on by the petitioners nor paragraph 6 relied on by the respondents had any application for determining inter-se seniority in the grade of Executive Engineers. The Court could have, therefore, followed the same course as in the *1st Bishan Sarup Gupta* case and in the absence of a spcific rule of seniority to determine *icter se* seniority amougst Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers from and after 22nd December, 1959, the Court could have directed the Government of India to evolve a new rule of seniority. But the Court instead chose to adopt the rule of seniority based on length of continuous officiation and directed *inter se* seniority amongst Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers regularly within their respeetive quota upto the date of its decision, to be determined on the application of this rule of seniority based on length of contiuuous officiation. This course, the Court was clearly entiled to adopt, because, as we shall presently point out, when there is no specific rule governing determination of seniority in a grade, the normal rule applicable would be

to determine seniority on the basis of length of continuous officiation in the grade and the Court could certainly adopt this residuary rule and direct *inter se* seniority in the grade to be fixed on the application of this seniority rule. It will thus be seen that while in *1st Bishan Sarup Gupta* case, the Court left it to the Government to decide what rule of seniority should be devised for determining *inter se* seniority between the direct recruits and the promotees appointed from and after 16th January, 1959, the Court in the present case did not leave it to the Government to evolve a new Rule of seniority for determining *inter se* seniority amongst Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers from and after 22nd December, 1959 but itself laid down that such *inter se* seniority shall be determined on the application of the rule of seniority based on length of continuous officiation. This constituted a vital difference between the *1st Bishan Swarup Gupta* case and the present case and the Government was not entitled, as in the case of Bishan Swarup Gupta and other Income-Tax Officers, to evolve a new rule of seniority different from that recognised and given effect to by the Court in *A.K. Subraman's* decision for determining seniority amongst Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers regularly with in their respective quota from and after 22nd December, 1959. To permit the Government to do so would be in plain defiance of the direction given by the Court in *A.K. Subraman's* case.

The petitioners reiled strongly on paragraph 5 (ii) of the Memorandum dated 22nd December, 1959 and contended that the seniority rule laid down in this Paragraph governed the determination of seniority amongest Executive Engineers promoted from the Grades of Assistant Engineers and Assistant Executive Engineers from and after 22nd December, 1959 and if this rule of seniority was applied, the Assistant Engineers promoted regularly within their quota after selection by the Departmental promotion Committee in any year would rank higher than the Assistant Executive Engineers promoted in the subsequent years and in that view, the seniority list dated 14th August, 1975 and the Rules of 1976 in so far as they give seniority *en bloc* to the Assistant Executive Engineers promoted to the 86 carried forward posts of Executive Engineers and apply the rotational formula for the purpose of determining seniority amongst Assistant Engineers and Assistant Executive Engineers promoted to the subsequent vacan-

A cies in the Grade of Executive Engineers, would clearly be unconstitutional and void as retrospectively affecting the seniority of the Executive Engineers promoted from the Grades of Assistant Engineers and Assistant Executive Engineers within their respective quota from and after 22nd December, 1959. This contention was B urged before us with a certain degree of plausibility but on close scrutiny we find that it is not well founded. There are two formidable answers to this contention and each answer is sufficient to warrant rejection of this contention.

C In the first place, it may be pointed out that this contention is no longer open to the petitioners in view of the decision in *A.K. Subraman's* case where the Court applied the rule of seniority based on length of continuous officiation for determining inter-se seniority amongst Assistant Engineers and Assistant Executive Engineers D promoted as Executive Engineers regularly within their respective quota upto 11th December, 1974, being the date of the decision and directed such inter-se seniority to be determined on the application of this seniority rule. Even if the rule of seniority set out in Paragraph 5(ii) were otherwise applicability must stand negatived by the decision in *A.K. Subraman's* case which is binding on the E parties. Moreover, it may noted that in *A.K. Subraman's* case it was conceded on behalf of respondents Nos. 1 and 2 that this Memorandum was not relevant to the question of determination of seniority between the petitioners and the respondents. In that case though the promotion of some of the petitioners was regularised by F absorption in their lawful quota subsequent to 22nd December, 1959 and some of the respondents were also promoted as officiating Executive Engineers within the their quota after that date, the learned counsel appearing on behalf of the petitioners did not contend that Paragraph 5(ii) of the Memorandum dated 22nd December, 1959 was applicable to determine inter-se seniority G amongst such of the petitioners and respondents as were promoted after 22nd December, 1959 and agreed with the concession made on behalf of respondents Nos. 1 and 2 that the Memorandum dated 22nd December 1959 was irrelevant and likewise no discordant notewas struck also by the learned counsel appearing on behalf of the H respondent Assistant Executive Engineers and it was not contended on their behalf that so far as the petitioners and the respondent Assistant Executive Engineers promoted regularly within their lawful quota subsequent to 22nd December, 1959 were concerned, their seniority

was governed by Paragraph 5(ii) or any other paragragh of the Memorandum dated 22nd December, 1959. Therefore, it was the common case of all the parties including the Assistant Engineers and the Assistant Executive Engineers promoted as Executive Engineers that neither the rule of seniority set out in paragraph 5(ii) nor the seniority rule set out in any other paragraph of the Memorandum dated 22nd December, 1959 was applicable.

But, since the case has been argued fully before us we would consider the applicablity of Paragraph 5(ii) of the Memorandum dated 22nd December, 1959 on merits. There can be no doubt that the contention of the petitioners based on Paragraph 5(ii) would have had great force if on a true interpretation of that paragraph, the rule of seniority set out in that provision could be held to govern the determination of seniority amongst the Executive Engineers promoted from the Grades of Assistant Engineers and Assistant Executive Engineers from and after 22nd December, 1959 being the date when this rule of seniority came into force. But we are of the view that the rule of seniority set out in Paragraph 5(ii) of the Memorandum dated 22nd December, 1959 could have no application in case of promotions made to the Grade of Executive Engineers from the Grades of Assistant Engineers and Assistant Executive Engineers. Paragraph 5(ii) of the Memorandum dated 22nd December, 1959 read as follows :

> "5(ii) : Where promotions to a grade are made from more than one grade, the eligible persons shall be arranged in seperate lists in the order of their relative seniority in their respective grades. Thereafter, the Departmental Promotion Committee shall select persons for promotion from each list upto the prescribed quota and arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of the persons on promotion to the higher grade."

and the rule of seniority set out in this provision was explained by the following illustration given in an Explanatory Note attached to the Memorandum dated 22nd December, 1959 :

> "Note : If separate quotas for promotion have not already been prescribed in the relevant recruitment rules, the Ministries/Departments may do so, now in consultation with the Commission wherever necesssary."

This rule of seniority, on the plain terms of Paragraph 5(ii) applied only in a situation "where promotions to a Grade are made from more than one Grade" and the argument of respondents Nos. 4 to 190 was that when this provision spoke of promotions to a Grade from more than one Grade, it referred to promotions within the same service, that is, where the grades from which promotions are made as also the grades of promotion are all grades within the same service, but where one of the grades from which promotions are made belongs to a lower service than the grade of promotion and the promotion is therefore from a lower service to a higher service, the rule of seniority set out in this provision could have no application. Respondents Nos. 4 to 190 in the circumstances submitted that since the grade of Assistant Engineers was in Class II Service while the grade of Executive Engineers was in Class I Service, the rule of seniority laid down in this provision was not applicable for determining seniority in the grade of Executive Engineers. We do not think this argument advanced on behalf of respondents Nos. 4 to 190 is well-founded. The postulate for the applicability of the rule of seniority set out in this provision simply reads : "Where promotions to a Grade are made from more than one Grade" and it does not introduce any requirement that the grades from which the promotions are made should belong to the same service as the gaade of promotion. It is no doubt true that the illustration given in the Explanatory Note refers to promotions from the grades of Upper Division Clerks and store keepers to the grade of Head Clerk and all these grades belong to Class III Service but it would not be right to limit the applicability of the seniority rule set out in this provision by reading into it a limitation which is not there, merely because an illustration of the applicability of the seniority rule given in the Explanatory Note relates to a case where the grades are all in the same service. If the interpretation contended for on behalf of respondents Nos. 4 to 190 were correct, the rule of seniority set out in this provision would not be applicable where both the grades, from which the promotions are made, belong to a lower service while the grade of promotion belongs to a higher service and for such a case, there would be no rule of seniority laid down in the Memorandum date 22nd December, 1959 which would be applicable. We are clearly of the view that the rule of seniority set out in Paragraph 5(ii) would be attracted in all cases where promotions to a grade are made from more than one grade, irrespective as to whether these grades all belong to the same service or not and, therefore, the applicability of of this rule of seniority could not be repelled in the present case on

the ground that the grade of Assistant Engineers belongs to Class II Service while the grade of Executive Engineers belongs to Class I Service.

But, there is a more fundmental reason why the rule of seniority set out in paragraph 5(ii) of the Memorandum dated 22nd December, 1959 must be held to be inapplicable in the case of promotion to the grade of Executive Engineers. The promotion from the grade of Assistant Executive Engineers was by selection on merit while the promotion from the grade of Assistant Engineers was on the basis of seniority-cum-fitness. There was no element of selection on merit in the case of Assistant Engineers as in the case of Assistant Executive Engineers and the entire basis of promotion from the two grades was different. Moreover, this provision postulated the existence of one single Departmental Promotion Committee for the selecting persons the promotion from the grades of Assistant Engineers and Assistant Executive Engineers and it was this single Departmental Promotion Committee, which was to "arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of persons on promotion" to the grade of Executive Engineers. Now, there was some controversy between the parties whether in the case of promotions to the grade of Executive Engineers, there was one single Departmental Promotion Committee for selecting person from the grades of Assistant Engineers and Assistant Executive Engineers or there were separate Departmental Promotion Committees—one for selection from the grade of Assistant Engineers and the other for selection from the grade of Assistant Executive Engineers. Respondents Nos. 1 and 2 in the counter affidavit filed by S.R. Roy Choudhury asserted that in case of selection from the grade of Assistant Engineers, the Union Public Service Commission was associated with the Departmental Promotion Committee while in case of selection from the grade of Assistant Executive Engineers, the Union Public Service Commission was not so associated and a combined grouping of the persons sought to be promoted from the two groups was, therefore, not possible. The first petitioner however, in the rejoinder affidavit filed by him on behalf of the petitioners disputed the correctness of this avernment made on behalf of respondents Nos. 1 and 2 and submitted that it was wrong to suggest "that the UPSC is not associated with the DPC because in all the selections concerned with the petitioners and the respondents, a Member of the UPSC

was on both the DPCS" and in this connection he relied on rule 4 of Section 7 of Chapter V at page 48 of the CPWD Manual, Volume I (1970 Edition). It is not necessary for the purpose of determining the applicability of the rule of seniority in Paragraph 5(ii) of the Memorandum dated 22nd December, 1959 to decide whether a Member of the Union Public Service Commission was associated with the Departmental Promotion Committee for selection of Assistant Executive Engineers or not. It is implicit in the statement of the first petitioner in his rejoinder affidavit that there were two different Departmental Promotion Committees for selecting persons for promotion from the grades of Assistant Engineers and Assistant Executive Engineers. The composition of the Departmental promotion Committees being different and the criteria for promotion to the grade of Executive Engineers also being different in the case of Assistant Engineers and Assistant Executive Engineers, it is difficult to conceive how combined merit rating on the persons sought to be promoted from the two groups could possibly be made as envisaged in paragraph 5(ii) of the Memorandum dated 22nd December, 1959. It was suggested that a comparative assessment of the merits of the persons chosen from two groups could made on the basis of still be as to which Departmental Promotion Committee would their confidential reports, but the question would still be as to which Departmental Promotion Committee would make the comparative assessment and even if the Departmental Promotion Committee for selection of persons to be promoted from the two groups was the same, it is difficult to appreciate how and comparative assessment of the merits could be made on the basis of confidential reports. The confidential reports of the officers from the two groups would not be written by the same officer or even by officers of equivalent rank, because in the case of Assistant Engineers promoted as officiating Executive Engineers in excess of their quota and consequently pushed down for being absorbed within their quota in later years, their confidential reports for the preceding three years would be written in respect of their performance as officiating Executive Engineers by the Superintending Engineers, while in the case of Assistant Executive Engineers, their confidential reports for the preceding three years would be wrirten in respect of their performance as Assistant Executive Engineers by the Executive Engineers. Thus at the point of time when in any particular year, the officers of the two streams meet for their seniority in the grade of Executive Engineers, their confidential reports would not be by the same officers or even by officers of equivalent rank and it would be almos t

impossible to arrive at a comparative assesment of their respective merits for the purpose of working out the seniority rule in Paragraph 5(ii) of the Memorandum dated 22nd December, 1959. Moreover, in fact this seniority rule was never regarded as applicable in case of promotions to the grade of Executive Engineers and the procedure set out there was not followed at any time while making promotions from the grades of Assistant Executive Engineers and Assistant Engineers to the grade of Executive Engineers. It is, therefore, clear that the seniority rule set out in Paragrah 5(ii) of Memorandum dated 22nd December, 1959 could not be invoked for determining *inter se* seniority between Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers and the petitioners could not legistimately found any argument upon that seniority rule for the purpose of invalidating the seniority list dated 14th August, 1975 and the Rules of 1976.

It is interesting to note that while the petitioners relied on Paragraph 5(ii) of the Memorandum dated 22nd December 1959, respondent Nos. 4 to 190 rested their argument on Paragraph 6 of this Memorandum. They contended that the rotational formula adopted for determining seniority amongst Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers from and after 22nd December, 1959, subject to precedence being given *en bloc* to Assistant Exeeutive Engineers promoted to fill in 86 carried forward posts of Executive Engineers, was in consonance with Paragraph 6 of the Memorandum dated 22nd December, 1959 and did not in any way affect retrospectively the *inter se* seniority of the Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers. We are afraid this contention is not open to respondent Nos. 4 to 190 in view of the decision of this Court in *A K. Subraman's* case and moreover as already pointed out by us while rejecting the contention of the petitioners based on Paragraph 5(ii), it was the common case of all the parties including the Assistant Engineers and the Assistant Executive Engineers promoted as Executive Engineers that the Memorandum dated 22nd December, 1959 was irrelevant for the purpose of determining the *inter se* seniority amongst the Assistant Engineers and Assistant Executive Engineers promoted from and after 22nd December 1959 and neither the seniority rule set out in Paragraph 5(ii) nor that set out in Paragraph 6 was applicable. But even so since full arguments have been advanced before us, we propose to consider the applicability of Paragraph 6 on merits. It is necessary in order to appreciate the contention raised on behalf

of respondent Nos. 4 to 190 to examine the scope and ambit of Paragraph 6 of the Memorandum dated 22nd December, 1959 which reads as follows :

> "6. *Relative seniority of Direct Recruits and Promotees :*
>
> The relative seniority of Direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recurits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules."

This paragraph on its plain terms laid down a rule for determining the relative seniority of direct recruits and promotees in a grade to which appointments were required to be made by direct recruitment and promotion according to a certain fixed quota. This rule of seniority obviously could have no application for determining *inter se* seniority in the grade of Executive Engineers, since both Assistant Engineers and Assistant Executive Engineers were inducted in the grade of Executive Engineers by promotion and Assistant Executive Engineers apointed in the grade of Executive Engineers did not bear the character of direct recruits. It is, of course, true that Assistant Executive Engineers wete initialy taken up as direct recruits in the grade of Assistant Executive Engineers in fact that was only method of entry into the grade of Assistant Executive Engineers—but when they entered the grade of Executive Engineers, they did so by way of promotion just like the Assistant Engineers. There was, therefore, in the present case, no question of determining relative seniority between direct recruits and promotees. Both the Assistant Engineers as well as the Assistant Executive Engineers were promotees to the grade of Executive Engineers and Paragraph 6 of the Memorandum dated 22nd December, 1959 had, therefore, no application for determining *inter se* seniority between them in the grade of Executive Engineers.

We have considered the applicability of Paragraphs 5(ii) and 6 of the Memorandum dated 22nd December, 1959 on merits and come to the conclusion that the rule of seniority set out in neither of these two paragraphs could have any application in the present case. But at the same time, we cannot escape the conclusion that by reason of clause 3 of the Memorandum dated 22nd December,

1959, the rule of seniority prescribed in the Memorandum dated 22nd June, 1949 stood repealed, except in regard to determination of seniority of persons appointed to the grade of Executive Engineers prior to 22nd December, 1959. There was, therefore, no rule of seniority laid down either statutorily or by any executive order or instruction for determining seniority amongst Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers regularly within their respective quota from and after 22nd December, 1959. But it is now well-settled as a result of several decisions of this Court that in the absence of any statutory rule or executive memorandum or order laying down a rule for determining seniority in a grade, the normal rule applicable would be to determine seniority on the basis of length of continuous officiation in service. *Vide* the observations of Palekar J. in *B.S. Gupta* v. *Union of India.*[1] To the some effect we find the observations Krishna Iyer, J., speaking on behalf of the Court in *Chauhan* v. *State of Gujarat*[2] where the learned Judge said at page 1057 of the report :

> "Seniority, normally, is measured by length of continuous officiating service—The actual is easily accepted as the legal."

Chandrachud, J., as he then was, also reiterated the same principle when he said in *S.B. Patwardhan* v. *State of Maharashtra*[3] that "all other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, dircharge similar functions and bear similar responsibilities." The *inter se* seniority of Executive Engineers promoted from the grades of Assistant Engineers and Assistant Executive Engineers regularly within their respective quota from and after 22nd December, 1959 was, therefore, determinable on the basis of length of continuous officiation in the grade of Executive Engineers and the Court was, in the circumstances, justified in *A.K. Subraman's* case in holding in paragraph 1 of the summary of its conclusions that "when Assistant Engineers (Class II) are initially appointed in a regular manner in accordanee with the rules to officiate as Executive Engineer, their senio-

(1) [1975] 1 S.C.R. 104 at 113.
(2) [1977] 1 S.C.R. 1037.
(3) [1977] 3 S.C.R. 775 at Page 800.

rity in service in Grade I will count from the date of their initial officiating appointment as Executive Engineers was within their quota." It is undoubtedly true that in reaching this conclusion the Court proceeded on the assumption that "the Memorandum dated 22nd June 1949 was clearly applicable" and equally it must be conceded that this assumption was erroneous in so far as inter se seniority between Assistant Engineers and Assistant Executive Engineerrs promoted from and after 22nd December, 1959 was concerned, since the rule of seniority based on length of continuous officiation enunciated in the Memorandum dated 22nd June, 1949, was repealed by the Memorandum dated 22nd December, 1959. But it can hardly be disputed that the conclusion reached by the Court was correct in law, because in the absence of any specific rule of seniority governing determination of inter-se seniority between Assistant Engineers and Assistant Executive Engineers promoted from and after 22nd December, 1959, their inter-se seniority was clearily governed by the rule of seniority based on length of continuous officiation. We do not think it would be right to assume that the Court in *A.K. Subraman's* case overlooked that the rule of seniority laid down in the Memorandum dated 22nd June, 1949 was repealed by the Memorandom dated 22nd December, 1959 and it is, therefore, quite possible that when the Court said that "the Memorandum of June 22, 1949 will clearly apply", what the Court meant was that the rule of seniority based on length of continuous officiation would clearly apply for determination of inter-se seniority between Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers. We may point out that in any event the decision in *A.K. Subhraman's* case holding that the inter-se seniority between Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers should be governed by the rule of seniority based on length of continuous officiation and that their inter-se seniority should be determined on the application of this rule of seniority, must be regarded as binding on the parties and it is not open to the petitioners or to the respondents to raise any contention contrary to this conclusion reached by the Court. This conclusion, we may repeat, was not limited to Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers prior to 22nd December, 1959 but also covered Assistant Engineers and Assistant Executive Engineers promoted subsequent to that date right upto the date of the decision of the Court. We must, therefore, hold that, notwithstanding Rules 2(iii) and 2(iv) of the

Rules of 1976, the inter-se seniority between Assistant Engineers and Assistant Executive Engineers promoted regularly within their respective quota upto 11th December, 1974 must be determined on the basis of length of continous officiation in the grade of Executive Engineers, subject of course to the length of continuous officiation in the case of Assistant Engineers being computed from the date of their confirmation as Assistant Engineers.

Before we proceed to consider grounds B and C it would be conventions at this stage to deal with some of the contentions advanced by respondent Nos. 4 to 190 on behalf of the Assistant Executive Engineers promoted as Executive Engineers against the validity of the seniority list dated 14th August 1975 in so far as certain aspects of that seniority list are concerned. Though the seniority list dated 14th August, 1975 was substantially in favour of Assistant Executive Engineers promoted as Executive Engineers, they were not wholly satisfied with it and they attacked it in three respects. They urged that respondent Nos. 1 to 3 had egregiously erred in formulating the seniority list dated 14th August, 1975 in as much as (1) respondents Nos. 1 to 3 had treated vacancies arising on account of deputation of Executive Engineers to other organisation or departments as vacancies to be filled up in accordance with the quota and so also where an Assistant Engineer or Assistant Executive Engineer was promoted for being sent on deputation as Executive Engineer in another organisation or department, respondent Nos. 1 to 3 had treated such promotion as filling up of vacancy subject to the quota rule; (2) respondent Nos. 1 to 3 had included, for the purpose of allocation of quota, also those vacancies which arose on account of death or retirement of Executive Engineers who were promoted from the grade of Assistant Engineers in excess of their quota and whose promotions were not regularised within their quota prior to their death or retirement, as if those vacancies were fresh vacancies governed by the quota rule and (3) while pushing down Executive Engineers who were promoted from the grade of Assistant Engineers in excess of their quota and adjusting them within their quota in a subsequent year, respondent Nos. 1 to 3 had treated them as absorbeb not from the date when the vacancy arose in their quota but from 1st January of that year. This three-fold grievance made on behalf of respondent Nos. 4 to 190 cannot be said to be wholly unjustified. We find that the second and third heads of grievance are well-founded while the first is not. Our reasons for saying so are as follows.

A So far as the first head of the grievance of respondent Nos. 4 to 190 is concerned, their argument was that on a true interpretation of the judgment of this Court in A. K. Subraman's case, the quota rule was applicable only to permanent vacancies in the posts, whether permanent or temporary, included in the sanctioned strength of the cadre of Executive Engineers "except such vacancies as B were purely of a fortuitors or adventitious character" and since the vacancies arising on account of deputation of Executive Engineers to other organisations or department could not be regarded as permanent vacancies but were vacancies of fortuitous or adventitious character, they were not subject to the quota rule and could not be C taken into account for applicability of the quota rule. This argument, plausible though it may seem at first sight, cannot be sustained. It is, first of all, necessary to clear the ground by pointing out that according to the judgment of this Court in A.K. Subraman's case, the quota rule was to be applied not with reference to the posts in the cadre of Executive Engineers but with reference to vacancies in D such posts. There might be more than one vacancy in a post in the course of a year or any other unit of time and it was with reference to each such vacancy that the quota rule had to be applied. Now a vacancy may arise in a post on account of death, retirement or resignation of the incumbent of the post or it may arise on account E of his dismissal, discharge a reversion from the post or promotion to a higher post or by reason of his deputation to another department or organisation. Whenever, therefore, a vacancy arises in a post, whatever be the reason by which the vacancy is caused, it would have to be filled up by promotion of an Assistant Engineer or an Assistant Executive Engineer and the quota rule would apply so F long as the vacancy is a permanent vacancy, that is to say, in the words of Palekar J. in the 1st Bishan Sarup Gupta's case, a acancy which is not "for a few days or a few months" or otherwise adventitious". We have in these words of Palekar, J., adopted wholly and completely in A.K. Subraman's case, a negative definition of what may be regarded as a permanent vacancy for the purpose of appli- G cation of the quota rule and it clearly shows that a vacancy which is of a short duration arising on account of fortuitous or adventitous circumstances would not be regarded as permanent vacancy and in such a case, by reason of the very nature of the vacancy, there would be no question of making recruitment to the cadre as to attract the H applicability of the quota rule. It is therefore obvious that if a vacancy arises on account of an incumbent going on leave or for training or on deputation for a short period, it would be a fortui-

tous or adventitious vacancy and the quota rule would not be attracted in case of such a vacancy. But where a vacancy arises on account of the incumbent going on deputation for a reasonably long period and there is no reasonable likelihood of the person promoted to fill such vacancy having to revert, the vacancy would be subject to the quota rule, because it would be a regular vacancy in the post of Executive Engineer and the person promoted to fill the vacancy would be an officiating Executive Engineer who would continue as such without reversion until confirmed and his promotion would, therefore, be by way of recruitment lo the cadre of Executive Engineers. Of course, it should be made clear that the vacancy which attracts the applicability of the quota rule, is the vacancy in the post included in the sanctioned strength of the cadre of Executive Engineers and not the vacancy in the deputation post. There may be a vacancy in a deputation post in another department or organisation and an Executive Engineer holding a post included in the sanctioned strength of the cadre of Executive Engineers may be sent to such deputation post, but the vacancy which would call for the application of the quota rule in such a case would be the vacancy arising in the post of Executive Engineer within the cadre by reason of the incumbent of that post going to the deputation post and not the vacancy in the deputation post which would be filled up by the Executive Engineer going on deputation. It is, therefore, apparent that what has to be considered for the applicability of the quota rule is a vacancy in a post included in the sanctioned strength of the cadre of Executive Engineers and the sanctioned strength, which has to be taken into account, is not merely the sanctioned strength of the cadre of Executive Engineers in the Central Public Works Department but the sanctioned strength of the cadre of Executive Engineers in the entire Central Engineering Servicc, Class I. The sanctioned strength of the cadre of Executive Engineers in the Central Engineering Service, Class I, may include not only posts of Executive Engineers in the Central Public Works Department but also posts of Executive Engineers in other departments and organisations.

Now, so far as the Central Engineering Service, Class I, is concerned, the deputation of officers in various grades including the grade of Executive Engineers is a normal feature of the Service. The Central Public Works Department is an agency of the Central Government operating throghout Country for construction, maintenance and repair of all works and buildings financed from Civil

Works Budget except for certain departments which had their own engineering units or which may get their Civil works executed through private agencies. The officers borne on the cadres of Chief Engineers, Superintending Engineers and Executive Engineers in the Central Engineering Service, Class I, are therefore sent on deputation to various departments and organisations and some of them are also on deputation with the Government of Bhutan, Delhi Municipal Corporation, New Delhi Municipal Committee and various other public undertakings. The normal duration of such deputation is one to three years and it may even be extended beyond three years. The record shows that the number of Chief Engineers, Superintending Engineers and Executive Engineers on deputation to various departments, organisations and public sector undertakings has always been substantial and by way of illustration, it may be pointed out that there were as on 1st January, 1975, 90 out of approximately 360 Executive Engineers, 33 out of 80 Superintending Engineers and 8 out of 20 Chief Engineers on deputaiion. On an average, about 25 to 40% of the Executive Engineers are on deputation to various organisations, departments and public sector undertakings and whenever any such Executive Engineers are sent on deputation and the vacancies in the posts arising on account of such deputation are filled up by Assistant Engineers or Assistant Executive Engineers regularly selected through Departmental Promotion Committee, such promotees have never had to revert, because the deputations are for a minimum period of one year and in most cases for three years and they go on rotating. The vacancies arising in the posts of Executive Engineers on account of deputation to other departments, organisations and public sector undertakings are, therefore, long term vacancies and cannot be characterised as vacancies of fortuitous or adventitious character and, consequently, according to the judgment in A.K. Subraman's case, the quota rule must be held to be applicable with reference to such vacancies. This has always been the view taken by the Government of India, as is clear from the letter dated 19th October, 1971 addressed by the Ministry of Works and Housing, Government of India to the Secretary, Union Public Service Commission, where, we find the following observation :

> "In accordance with the recruitment rules the posts at the level of Executive Engineers are to be filled by promotion of Assistant Executive Engineers and Assistant Engineers in the ratio of 2:1. This ratio is applicable to

both permanent and temporary Vacancies *including the deputation vacancies*". (Emphasis supplied) A

It is significant to note that the view that deputation vacancies being long term vacancies should be regarded as permanent vacancies for the applicability of the quota rule prevailed with the Government of India as far back as 19th October 1971 long before the present controversy arose between the parties and even prior to the decisions in Bishan Sarup Gupta's cases and A.K. Subraman's case. We find that this view was reaffirmed by the Government of India in the Office Memorandum dated 30th December. 1976 issued by the Department of Personnel and Administrative Reforms, Cabinet Secretariat where it has been stated as follows under the heading "Determination of Regular Vacancies":— B C

> "It is essential that the number of vacancies in respect of which a panel is to be prepared by a D.P.C. should be estimated as accurately as possible. For this purpose the vacancies to be taken into account should be the clear vacancies arising in post/ grade/service due to death, retirement, resignation, regular long term promotion, of incumbents of one post/grade to higher post/ grade and vacancies arising from creation of additional posts on a long term basis and these arising out of deputation. As regards vacancies arising out of deputation it is clarified that for the purpose of drawing up a select list for promotion, vacancies arising out of deputation for periods more than one year should be taken into account, due note however being kept also of the number of the deputationists likely to return to the cadre and who gave to be provided for. Purely short term vacancies arising as a result of officers proceeding on leave, on deputation for a shorter period, training etc., should not be taken into account for the purpose of preparation of a panel". D E F G

The same stand has been consistently taken by the Government of India in the various affidavits filed on its behalf in these proceedings as also in the miscellaneous proceedings arising in A.K. Subraman's case. We may usefully reproduce the following paragraphs from the Counter Affidavit filed on behalf of the Government of India in C.M.P.No. 6689 of 1975 in A.K. Subraman's case : H

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"8. With reference to paragraph 2(a), I submit that this Hon'ble Court, no doubt, stated that all the vacancies except fortuitous and adventitious ones in the sanctioned strength in the cadre have to be taken into account. So far as the deputation vacancies are concerned, the position is B that the post of the borrowing authority to which a deputation is made is certainly outside the cadre of the Central Engineering and Electrical Engineering Service, but the consequential vacancies which arise because of the deputation are certainly vacancies in the cadre. The deputations are generally for a period of a year and more and the con- C sequential vacancies are also long term vacancies, which cannot be called fortuitious or adventitious". "15. With reference to paragraph 4 (8) (1) (a), I say that the post in the borrowing department is certainly a post outside the sanctioned strength of the C.P.W.D. However, deputation of an officer belonging to the C.P.W.D. to fill such a post D causes a vacancy in the C.P.W.D. It is this vacancy which has been added and not then post on the borrower's establishment. This has been done because in our case, the quota allocation is linked to vacancies and not to post ; of course, the vacancies must be in posts in the cadre".

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So also the Union of India reiterated the same view in the Counter Affidavit filed on its behalf in C.M.P. No. 2663 of 1975 in A.K. Subraman's case :

"Vacancies : The quota system, based on which F the date of commencement of the regular appointment of either side had to be fixed, in accordance with the directives of the Hon'ble Court, had been introduced by the Central Engineering Service (and Central Electrical Engineering Service) Recruitment Rules promulgated on 25.8.1949. Hence the vacancies had to be identified right G from this date.

Vacancies in the grade of Executive Engineers had occurred not only due to death, retirement, resignation etc. in the grade but also because of promotion (to higher grade) dismissal from this or higher grades, reversion to H lower grades and deputation to other organisations like the Delhi Development Authority, undertaking, he retains his lien on the post in the parent department and he has a

right to come back to that post which he can exercise at any time and hence the vacancy caused by his deputation cannot be regarded as a permanent vacancy liable to be filled by regular recruiment to the cadre of Executive Engineers. It was urged that so long as an Executive Engineer who has gone on deputation retains his lien on the post in the parent department, that post cannot be filled by promotion of another Assistant Engineer or Assistant Executive Engineer by way of substantive recruitment to the cadre of Executive Engineers, because two officers cannot hold a lien on the same post simultaneously. We do not think this argument is well-founded. There is here no question of violation of the basic principle of service jurisprudence that two officers cannot simultaneously have a lien on the same post. It is significant to note, and this was common ground between the parties, that the vacancy which atrracts the applicability of the quota rule is not only a vacancy in a permanent post but also a vacancy in a temporary post and obviously no Executive Engineer can have a lien on a temporary post and therefore, extinguishment of a lien on a post is not necessary in order that there should be an available vacancy for the applicability of quota rule. It is now settled as a result of the decision A.K. Subraman's case that the quota rule is to be applied at the time of initial other Central or State Government undertakings or Departments, UN assignments etc. none of which could be called fortuitous or adventitious because they were all long term appointments covering a period of one to two years or more.

Calculations of all such vacancies with reference to the case and circumstances as called out from the original papers right from 25.9.1949 was a herculean task and it was difficult to be sure that there had been no errors or omissions. Hence, to be sure, the answering respondents decided to treat each long term promotion to the grade of Executive Engineer, for whatever reasons, as a vacancy, on the assumption that such a promotion could not have been made without the existence of a vacancy".

It is thus clear that the vacancies in the posts of Executive Engineers arising on account of deputation of Executive Engineers

A to other departments, organisations and public undertakings for a period of one or more years were long term vacancies and they could not be regarded as fortutitous or adventitious in character and hence they were subject to the quota rule.

But the answer sought to be given on behalf of respondents B Nos. 4 to 190 to repel this conclusion was that when an Executive Engineers goes on deputation to another department, organisation or public sector recruitment in an officiating capacity to the cadre of Executive Engineers and not at the time of confirmation. It is, therefore, not necessary that the lien of an officer on a post of Executive Engineer must be extinguished before any promotion to C that post can be made in accordance with the quota rule. Even where a confirmed Executive Engineer is promoted to the post of Superintending Engineer but continuous to have his lien on the post of Executive Engineer, a vacancy would undoubtedly arise in the post of Executive Engineer by reason of his promotion and such vacancy would clearly be a permanent vacancy liable to be filled D according to the quota rule. So also a vacancy attracting the applicability of the quota rule would arise where an Assistant Engineer or Assistant Executive Engineer regularly promoted within his lawful quota dies or retires before confirmation. The occurrence of a vacancy in the post of Executive Engineer inviting the E application of the quota rule has, therefore, nothing to do with the extinguishment of lien on the post. The argument of respondents Nos. 4 to 190 proceeds on the assumption that promotion to the post of Executive Engineer contemplated under the recruitment rules can be made only when there is no lien of any other officer on that post, for otherwise there will be two officers having lien on F the same post. But this assumption is wholly fallacious, because promotion according to the quota rule envisaged in the Recruitment Rules is, as pointed out in A.K. Subraman's case, initial promotion in an officiating capacity and has nothing to do with confirmation. The contention of respondents Nos. 4 to 190 would G have had considerable force if promotion to the cadre of Executive Engineers were dependent on confirmation and the quota rule were applicable at the stage of confirmation. But this position stands completely negatived by the decision in A.K. Subraman's case. Therefore, Whenever there is a permanent vacancy, that is H to say, a long term vacancy in a post of Executive Engineer, it would have to be filled according to the quota rule irrespective of the fact whether there is any officer having a lien on that post,. It

is true that a confirmed Executive Engineer who goes on deputation may revert to the post on which he has a lien and so also an officiating Executive Engineer who goes on deputation may revert back on termination of his deputation and theoretically, in either case, an Assistant Engineer or Assistant Executive Engineer who is promoted to fill the vacancy arising on account of deputation may have to revert, but in actual practice and reality, not a single Assistant Engineer or Assistant Executive Engineer promoted as Executive Engineer to fill a vacancy arising on account of deputation, has had to revert, because deputation is a normal feature in this service and 20 to 25 per cent of the Execvtive Engineers are continuously on deputation. Even if one Executive Engineer comes back on termination of his deputation, another has to be sent in his place and the deputations thus go on rotating with the result that the vacancy in the post of Execvtive Engineer arising on account of deputation does not cease and the Assistant Engineer or Assistant Executive Engineer promoted as Executive Engineer to fill the vacancy does not ever have to revert and consequently, the vacancy filled by him is really and truly a permanent or long term vacancy which has to be filled according to the quota rule. In fact, if the quota rule were not to be applied with reference to such a vacancy, the position would be that whenever an Executive Engineer goes on deputation for a period which may extend to anything between three to five years, the Central Government would be entitled to promote an Assistant Engineer ignoring the claims of Assistant Executive Engineers and this would be totally arbitrary in a situation, where, as mentioned above, 20 to 25 per cent of Executive Engineers are on deputation.

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But then it was contended on behalf of respondents Nos. 4 to 190 that even if a vacancy arising by reason of an Executive Engineer going on deputation were regarded as a permanent vacancy attracting the applicability of the quota rule, the position would be different where an Assistant Engineer or Assistant Executive Engineer was promoted for being posted as Executive Engineer in a deputation post. To such a promotion, it was urged, the quota rule would not apply, because the promotion in such a case would not be to fill a post in the sanctioned strength of the cadre of Executive Engineers but would be to fill a deputation post of Executive Engineer in another department, organisation or public sector undertaking. This argument, plausible though it may seem at first sight, is in our opinion not sustainable. When a

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department, organisation or public sector undertaking requests the Central Public Works Department to make available the services of an Executive Engineer on deputation, The Central Public Works Department has two options available to it: either to send an Executive Engineer who is occupying a post in the cadre of Executive Engineers, whether confirmed or on officiating basis or to promote an Assistant Engineer or Assistant Executsve Engineer as Executive Engineer and straightaway send him outside to the deputation post. Now if the former mode of proceeding could lead to a vacancy attracting the applicability of the quota, it is difficult to appreciate how the latter mode of proceeding should not lead to a similar result. In both cases, the ultimate result would be promotion of an Assistant Engineer or Assistant Executive Engineer as Executive Engineer against demand for deputation. Where an Assistant Engineer or Assistant Executive Engineer is promoted as Executive Engineer and immediately sent to a deputation post in another department, organisation or public sector undertaking, what really happens is that in the eye of law, a post is temporary created in the cadre of Executive Engineers to which the Assistant Engineer or Assistant Executive Engineer is promoted and then sent on deputation. Obviously, an Assistant Engineer or Assistant Executive Engineer cannot be promoted directly to the post of Executive Engineer in another department, organisation or public sector undertaking: he can be promoted only to a post of Executive Engineer in Central Engineering Service Class I and then asked to go on deputation. Of course, an Assistant Engineer or Assistant Executive Engineer can be directly sent on deputation to the post of Executive Engineer in another department, organisation or public sector undertaking without being promoted as Executive Engineer in his own department and in such a case there will be no question of filling a vacancy according to the quota rule. The Assistant Engineer or Assistant Executive Engineer who goes on deputation as Executive Engineer in another department, organisation or public sector undertaking would in such a case continue to remain an Assistant Engineer or Assistant Executive Engineer in his own department, but would be merely occupying the post of Executive Engineer in the other department, organisation or public sector undertaking as a deputationist and on the termination of his deputation, he would revert as Assistant Engineer or Assistant Executive Engineer in his own department. Such a deputation cannot be regarded as filling of a vacancy in the post of Executive Engineer in the Central Engineering Service Class I so as to attract

the applicability of the quota rule. But when an Assistant Engineer or Assistant Executive Engineer is promoted as Executive Engineer in his own department and simultaneously with such promotion, he is sent on deputation to another department, organisation or public sector undertaking, he goes on such deputation as Executive Engineer, so that if for any reason his deputation comes to an end, he reverts to his own department as Executive Engineer and not as Assistant Engineer or Assistant Executive Engineer. The petitioner filed before us several orders of promotion of Assistant Engineers as Executive Engineers for being sent on deputation to other departments or organisations and these orders clearly showed that the Assistant Engineers in respect of whom these orders were passed, were promoted as Executive Engineers and then, simultaneously, under the same orders, sent on deputation to other departments or organisations. Obviously, in cases of this kind, the promotion of the Assistant Engineer or Assistant Executive Engineer would be to a post in the cadre of Executive Engineers and it would be subject to the quota rule. The present contention of respondents Nos. 4 to 190 seeking exclusion of deputation vacancies from the applicability of the quota rule must, therefore, be rejected, provided of course the promotion of the Assistant Engineer or Assistant Executive Engineer to a deputation vacancy is a regular promotion, that is, after selection by the Departmental Promotion Committee and is not an ad hoc promotion.

Respondent Nos. 4 to 190 are however on firmer ground in regard to the second head of complaint urged by them against the validity of the seniority list dated 14th August, 1975 It is true that in preparing the seniority list dated 14th August, 1975 respondent Nos. 1 to 3 included, for the purpose of allocation of quota, also those vacancies which arose on account of death or retirement of Executive Engineers who were promoted from the grade of Assistant Engineers in excess of their quota and whose promotions were not regularised by absorption within their quota prior to their death or retirement and treated these vacancies as if they were fresh vacancies governed by the quota rule. This was clearly an error on the part of respondent Nos. 1 to 3. It is difficult to see how a vacancy in the post of Executive Engineer which, according to the quota rule, is allocable to an Assistant Executive Engineer but which is filled up by irregular appointment of an Assistant Engineer can be treated as a fresh vacancy when the Assistant Engineer irregularly promoted

A dies or retires from service before regularisation of his promotion by absorption within his quota. So long as the quota rule is binding and enforceable, the Assistant Engineer who is irregularly promoted to fill in a vacancy which belongs to the quota of Assistant Executive Engineers is an illegal occupant of the vacancy and the vacancy continues to be a vacancy belonging to the quota of Assistant Executive Engineers and liable to be filled by promotion of an Assistant Executive Engineer. In fact, the promotion of an Assistant Engineer to the vacancy would be invalid as being contrary to the quota rule, but in the 1st Bishan Sarup Gupta case, the Court, in order to obviate undue hardship, evolved the theory of temporary invalidity of the promotion by holding that the promotion would only be irregular and it could be regularised by absorption within the quota in later years. The vacancy though *pro tempore* filled irregularly by an Assistant Engineer would continue to belong to the quota of Assistant Executive Engineers and it can be filled only by an Assissant Executive Engineer if the quota rule is to be strictly observed. The death or retirement of an irregular promotee to the vacancy cannot therefore give rise to a fresh vacancy : it is the same vacancy which continues until properly filled by promotion of an Assistant Executive Engineer at a subsequent date. If in such a case the death or retirement of an irregularly appointed Assistant Engineer were to be treated as creating a fresh vacancy, if would lead to gross distortion. Let us take a hypothetical case where in a particular year say 1956, there are 12 vacancies in the posts of Executive Engineers out of which 8 vacancies belong to the quota of Assistant Executive Engineer and 4 vacancies belong to the quota of Assistant Engin er but only 2 Assistant Executive Engineers are available with the result that 6 Assistant Engineers are irregularly appointed to fill the remaining 6 vacancies allocable to the Assistant Executive Engineers. Now suppose in the next year 1957 there are no new allocable vacancies but 6 Assistant Engineers irregularly appointed in the earlier year 1956 die or retire. If the so-called vacancies arising by reason of the death or retirement of these 6 irregularly appointed Assistant Engineers were to be treated as fresh vacancies 4 out of them would go to Assistant Executive Engineers while 2 would go to Assistant Engineers The result would be that the Assistant Engineers would get 2 more vacancies which they would not have

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got if all the 8 vacancies allocable to Assistant Executive Engineers in the year 1956 had been filled by promotion of Assistant Executive Engineers and there had been no irregular promotion of 6 Assistant Engineers. Thus the Assistant Engineers would gain two more vacancies within their quota by reason of irregular appointment of 6 Assistant Executive Engineers. That would be allowing Assistant Engineers to profit from irregular appointments which result can never be countenanced. We must, therefore, accept the contention of respondent Nos. 4 to 190 under the second head of complaint.

The third head of complaint urged on behalf of respondent Nos. 4 to 190 must also likewise be held to be well-founded. Respondent Nos. 4 to 190 are right in contending that while pushing down Executive Engineers promoted from the grade of Assistant Engineers in excess of their quota and adjusting them within their quota in a subsequent year, respondent Nos. 1 to 3 must treat them as absorbed from the date when a vacancy in that year arises in the quota of Assistant Engineers and not on a notional basis from 1st January of that year. What the decision in A.K. Subraman's case requires is that Assistant Engineers promoted as Executive Engineers in excess of their quota must be pushed down and their promotion must be regularised by absorption when due within their quota in a subsequent year and therefore they can be adjusted only in a vacancy which arises in that year and is allocable to the quota of Assistant Engineers. There is nothing in the decision in A.K. Subraman's case which warrants that when Assistant Engineers promoted in excess of their quota are pushed down and absorbed within their quota in a subsequent year, their absorption should be reckoned nationally from 1st January of that year. What respondent Nos. 1 to 3 have done is that all Assistant Engineers who had been promoted in excess of their quota and who having been pushed down were entitled to be absorbed within their quota in a particular year, are treated as absorbed from 1st January of that year and placed *en bloc* senior to the Assistant Executive Engineers promoted tn that year within their quota. There can be no doubt that respondent Nos. 1 to 3 were not entitled to determine seniority on this basis. This Assistant Engineers promoted in excess of their quota and therefore pushed down for absorption within their quota in a subsequent year could be absorbed only in a vacancy arising in that year and allocable to the quota of Assistant Engineers.

*Re : Ground B*

This ground of challenge is clearly unsustainable and must be rejected. It is true that the Rules of 1976 have been brought into force with effect from 10th December, 1974 but in rules 2(iii) and 2 (iv) they lay down a rule of seniority affecting Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers regularly within their respective quota from and after 22nd December, 1959. It is therefore not possible to say as a matter of plain grammatical construction that the Rules of 1976 cannot affect the petitioners and other Assistant Engineers promoted regularly within there quota prior to 10th December, 1974. The question would however remain whether Rules 2 (iii) and 2 (iv) of the Rules of 1976 in so far as they lay down a rule of seniority different from the rule of length of continuous officiation for Executive Engineers promoted from and after 22nd December, 1959, are constitutionally valid. This is the question which we shall proceed to consider under Ground C.

*Re : Ground C.*

We have already pointed out that though the Rules of 1976 have been brought into force with effect from 10th December 1974, they do not have the effect of over-riding the decision in A.K. Subraman's case directing the Government to amend and revise the seniority list so as to fix *inter se* seniority between Assistant Engineers and Assistant Executive Engineers promoted regularly within their respective quota up to 11th December 1974, by applying the rule of seniority based on length of continuous officiation. On this view, Rules 2(iii) and 2(iv) of the Rules of 1976, in so far as they provide for seniority being given *en bloc* to the Assistant Executive Engineers promoted to the 86 carried forward posts of Executive Engineers and apply the rotational formula for the purpose of determining seniority amongst Assistant Engineers and Assistant Executive Engineers promoted to the subsequent vacancies, must be held to be ineffective qua Assistant Engineers & Assistant Executive Engineers promoted upto 11th December, 1974 and so far as these Assistant Engineers and Assistant Executive Engineers are concerned, their *inter se* seniority must be held to be governed by the length of continuous officiation in the grade of Executive Engineers. But the question would still survive whether *inter se* seniority between Assistant Engineers and Assistant Executive Engineers promoted subsequent to 11th December, 1974 would have to be determined in accordance with the rotational rule of seniority set out in Rule

2(iv) or this rotational rule of senirioty is unconstitutional and void as offending Articles 14 and 16 of the Costitution. It may also be considered in the alternative, on the assumption that Rules 2(iii) and 2(iv) of the Rules of 1976 govern the determination of *inter se* seniority between Assistant Engineers and Assistant Executive Engineers promoted from and after 22nd December, 1959 despite the decision in A.K. Subraman case, whether tnese rules can successfully meet the challenge of Article 14 and 16 or they would be liable to be condemned as constitutionally invalid.

We may first consider the constitutional validity of Rules 2(iii) and 2(iv) of the rules of 1976 in so far as they affect the *inter se* seniority of Assistant Engineers and Assistant Executive Engineers promoted regularly within their respective quota from and after 22nd December, 1959. Now the position which obtained on 22nd December 1959 was that there were 86 Assistant Engineers who had been promoted in excess of their quota and correspondingly there was short-fall of 86 in promotions of Assistant Executive Engineers. We are not sure whether in the light of what we have said above, the excess in promotions of Assistant Engineers and the deficiency in promotions of Assistant Executive Engineers would stand reduced, but that would not make any difference so far as the present question is concerned and we shall therefore proceed on the footing that the excess in promotions of Assistant Engineers and the short-fall in promotions of Assistant Executive Engineer s was 86. The question is whether, consistently with the constitutional requirement of Articles 14 and 16, *en bloc* seniority could be given to the Assistant Executive Engineers promoted to fill the 86 vacancies allocable to the quota of Assistant Executive Engineers and remaining unfilled by them up to 22nd December 1959. These 86 vacancies were under Rule 2(iii) directed to be carried forward and filled by Assistant Executive Engineers promoted on or after 22nd December 1959 and the Assistant Executive Engineers no promoted were given seniority *en bloc*. The petitioners objected to this provision in Rule 2(iii) for carry forward of these 86 vacancies and contended that there could be no carry forward of any vacancies which were not filled by Assistant Executive Engineers and so promotions of Assistant Executive Engineers could be made to fill such vacancies as from the date when they arose in any particular year. This objection raised on behalf of the petitioners is partly sustainable and partly not. Where the quota rule is a statutory rule which has to be scrupulously observed, the vacancy which according to the quota rule is allocable to promotees

from one source cannot be filled by a promotee from another source and if, notwithstanding the quota rule, the vacancy is filled by a promotee from that other source, such promotion would be irregular and as pointed out above, the vacancy would continue to remain a vacancy liable to be filled by a promotee from the first mentioned source. It would not be strictly accurate to say that in such a case the vacancy is carried forward in the sense in which that exepression has been used in *T. Devdasan* v. *Union of India*(1). It was pointed out by this Court in *Mervin Coutinhs* v. *The Collector of Customs, Bombay* (2) : ".....in the case of the carry forward rule certain quota is fixed annually for a certain class of persons and it is carried forward from year to year. This is very different from a case where a service is divided into two parts and there are two sources of recruitment, one of promotion and the other by direct recruitment. In such a case the whole cadre of a particular service is divided into two parts and there is no question of carrying anything forward from year to year in the matter of annual intake". These observations were quoted with approval by a Bench of Five Judges of this Court in *G.D. Kelkar* v. *Chief Collector of Imports and Exports*(3). What therefore happens in such a case is that the vacancy which is pro tempore irregularly occupied by a promotee from another source remains available for being filled by a promotee from the source to which the vacancy belongs and in that sense, it may loosely be said that the vacancy is carried forward from the year in which it arose to a subsequent year in which it is properly filled by a promotee from the right source. This is precisely what Ray, C.J. speaking on behalf of the Court in *V. S. Badami* v. *State of Mysore*(4) said at page 823 of the Report :

> ".....if promotions are made to vacancies in excess of the promotional quota, the promotions may not be total illegal but would be irregular. The promotees cannot claim any right to hold the promotional posts unless the vacancies fall within their quota. If promotees occupy any vacancies which are within the quota of direct recruits when direct recruitment takes place the direct recruit will occupy the vacancies within their quota. Promotees who were occupying the vacancies within the quota of direct recruits will

(1) AIR [1964] S.C. 179.
(2) [1966] 3 SCR 600.
(3) [1967] 2 SCR 29.
(4) [1976] 1 SCR 815.

either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of a case." A

We must therefore hold that Respondent Nos. 1 to 3 were right in proceeding on the basis that 86 vacancies allocable to the quota of Assistant Executive Engineers remained unfilled as on 22nd December, 1959 and were available for being filled by Assistant Executive Engineers subsequent to that date. B

But the question arises whether the Assistant Executive Engineers promoted to fill these 86 vacancies which were, to use the expression in Rule 2(iii), carried forward from the period prior to 22nd December 1959 could be deemed to have been promoted from the dates when these 86 vacancies arose or they could be said to have been promoted only from the dates of their actual appointment. Now obviously there could not be any appointment of Assistant Executive Engineers to these 86 vacancies with retrospective effect and they must be taken to have been promoted to these 86 vacancies only from the dates of their actual appointment and from no earlier dates. If that be so, it is difficult to appreciate how, consistently with the mandate of Articles 14 and 16 of the Constitution, an Assistant Executive Engineer appointed to one of these 86 vacancies could under Rule 2(iii) be given seniority as if he were promoted to that vacancy on 22nd December 1959, though he might in fact have been promoted years later and on this basis given precedence over Assistant Engineers promoted regularly within their quota long prior to the actual promotion of such Assistant Executive Engineer. The consequence of giving effect to Rule 2(iii) providing *en bloc* seniority to the Assistant Executive Engineers promoted to fill these 86 vacancies would be that a large number of Assistant Engineers though promoted regularly within their quota *years before* the actual promotion of such Assistant Executive Engineers would become junior to such Assistant Executive Engineers and their promotional opportunities would be seriously prejudiced. In fact, they would have to wait until the Assistant Executive Engineers promoted to these 86 vacancies were promoted further as Superintending Engineers and then only they would have a chance of being considered for further promotion and even such chance would recede and be reduced to almost nil if the rotational rule of seniority were to be applied in respect of promotions to subsequent vacancies as set out in Rule 2(iv). This would become amply clear if we look at the chart Annexure I to the writ petition which reproduces the seniority list dated 14th August 1975 along with other particulars relating C D E F G H

A to the Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers. The Assistant Executive Engineers promoted to these 86 'carried forward' vacancies figure in the seniority list dated 14th August 1975 at Sr. Nos. 100 to 185 and the particulars given in regard to them in the chart Ex. I show that though the Assistant Executive Engineers at Sr. Nos. 122 to 185 B were promoted as Executive Engineers after 1962, they were placed higher in seniority than petitioner No. 1 who was as Assistant Engineer promoted as Executive Engineer and absorbed within his legitimate quota in 1962 and so also the Assistant Executive Engineers at Sr. Nos. 173 to 185 though promoted after 1966 were C given seniority above petitioner No. 2 who was an Assistant Engineer promoted as Executive Engineer and absorbed within his lawful quota in 1966, Rule 2(iii) in so far as it gives *en bloc* seniority to the Assistant Executive Engineers promoted to these 86 vacancies irrespective of the date when they were actually promoted and pushes down in seniority Assistant Engineers though D promoted regularly within their quota prior to the actual promotion of such Asstt. Executive Engineers, thereby prejudicially affecting their promotional opportunities, must therefore be held to be violative of Articles 14 and 16 of the Constitution.

We find that rule 2(iv) also suffers from the same infirmity. E It provides for rotational rule of seniority based on the prevailing quota for determining *inter se* seniority between Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers from and after 22nd December 1959 subject to *en bloc* seniority being given to the Assistant Executive Engineers promoted to the 86 'carried forward' vacancies as set out in Rule F 2(iii). Obviously, if Rule 2(iii) providing for *en bloc* seniority to be given to the Assistant Executive Engineers promoted to the 86 'carried forward' vacancies is unconstitutional and void as held by us in the preceding paragraph of this judgment, it must follow that the *inter se* seniority between Assistant Engineers and Assistant Executive Engineers promoted from and after 22nd December 1959 G would be governed wholly by the rotational rule of seniority set out in Rule 2(iv). Now there can be no doubt that a rule of seniority based on rotation of vacancies according to the quota prevailing at the time would be constitutionally acceptable if the quota rule were strictly implemented, barring minor deviations. It is well settled as H a result of several decision of this Court that there is nothing inherently wrong in working out the quota rule by adopting the rotational rule of seniority. But, as pointed out by this Court in

*N.K. Chauhan* v. *State of Gujarat* (supra) quota is not 'so inter-locked with rota that where the former is expressly prescribed, the latter is impliedly inscribed". The quota rule does not inevitably invoke the application of the rotational rule of seniority. Even where a quota is prescribed for recruitment from different sources, there may be different modes prescribed for determining seniority of officers on entry into the cadre. In fact, right from 25th August, 1949 when the quota rule was introduced upto 22nd December, 1959, the seniority amongst Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers was governed not by the rotational rule by but the length of continuous officiation. It is therefore obvious that even where there is a quota rule governing recruitment to a cadre from different sources it is not necessary that there should be any particular rule of seniority. The Government may in its wisdom adopt an appropriate rule of seniority which may be based on length of continuous officiation or may follow a roster arranged in conformity with the quota rule so that seniority may be determined according to the rotation of vacancies under the quota rule. There may also be any other appropriate rule for determining seniority in a cadre. Indeed, as pointed out by Krishna Iyer, J. in N.K. Chauhan's case, myriad ways can be conceived "for determining seniority of officers on entry into a cadre." But whatever may be the rule of seniority adopted by the Goverment, it is well settled that it must satisfy the best of equality enshrined in Articles 14 and 16 of the Constitution. The question in each case would be whether on the facts and circumstances of the case, the rule of seniority prescribed by the Government meets the challenge of the constitutional provision enacted in Articles 14 and 16.

We have already pointed out that there is no inherent vice in the quota rule being operated through the rotational rule of seniority. Where the rotational rule of seniority is adopted, the relative seniority of promotees from different sources has to be determined on the basis of a roster maintained in accordance with the quota rule, so that when promotion of an officer is regularly made within his quota, he is fitted into the vacancy reserved for promotees from his source and his seniority is reckoned from the date when such vacancy arose. But this rotational rule of seniority can work only if the quota rule is strictly implemented from year to year. Some slight deviations from the quota rule may not be material but as pointed out by Palekar, J. in the Bishan Swarup Gupta's case, "if there is enormous deviation, other considerations may arise". If the rota-

A tional rule of seniority is to be applied for determining seniority amongst officers promoted from different sources, the quota rule must be observed. The application of the rotational rule of seniority when there is large deviation from the quota rule in making promotions is bound to create hardship and injustice and result in impermissible discrimination. That is why this court pointed out B in *A. K. Subarmans's* case that "when recruitment is from two or several sources, it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation. The existence of a quota and rotational rule, by itself, will not violate Article 14 or Article 16 of the Constitution C .....It is the unreasonable implementation of the same which may, in a given case, attract the frown of the equality clause." The rotational rule of seniority is inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule D of seniority. We agree wholly with the observation of D.A. Desai, J. in *A. Janardhan* v. *Union of India*(1) that "the quota rule is linked with the seniority rule; if the first breaks down or is illegally not adhered to, giving effect to the second would be unjust, inequitous and improper". This was precisely the reason why the Court in the first *Bishan Sarup Gupta's* case held that with the collapse of the E quota rule, the rule of seniority set out in Rule 1(f) (iii) also went.

Now in the present case the record shows that there has been enormous deviation from the quota rule in the promotions of Assistant ExecutiveEngineers and such deviation has continued from year to year over a period of almost 25 years. We have in an earF lier part of this judgment adverted to the fact that as on 22nd December, 1959 there was a short fall in the promotions of Assistant Executive Engineers to the extent of 86, because the quota rule had not been properly implemented from 1953 up to 22nd December, 1959 and promotions of Assistant Executive Engineers had not been effected according to the quota applicable to them. It is interesting to note that even after 22nd December, 1959, the quota was consistently breached from year to year except for four or five years and G there was massive under recruitment of Assistant Executive Engineers with the result that as on 31st July, 1975, the cumulative shortfall in promotions of Assistant Executive Engineers was 206 H while there was corresponding excess in promotions of Assistant

(1) CA No. 360 of 1980 decided on 26th April, 1983

Engineers to the extent of the same number. Though there was such large deficiency in promotions of Assistant Executive Engineers and corresponding excess in promotions of Asstt. Engineers upto 31st July, 1975, no attempt was made by the Government to set right this imbalance by stepping up the recruitment of Assistant Executive Engineers in the subsequent years so as to restore the balance in the composition of the cadre of Executive Engineers. On the contrary, the under recruitment of Assistant Executive Engineers continued uninterrupted and by the end of 1981 the short-fall in the promotions of Assistant Executive Engineers increased to 247 with corresponding excess in the promotions of Assistant Engineers. This enormous deviation from the quota rule on account of massive under recruitment of Assistant Executive Engineers has led to grave distortion and it is difficult to see how, in this situation, the rotational rule of seniority can be applied consistently with the mandate of equality enshrined in Articles 14 and 16. The rotational rule of seniority must obviously break down when there is such massive departure from the quota rule regularly from year to year leading to continuously increasing deficiency in promotions of Assistant Executive Engineers and corresponding excess in promotions of Assistant Engineers.

It is obvious that by reason of under-recruitment of Assistant Executive Engineers and over-recruitment of Assistant Engineers in breach of the quota rule over a period of almost 25 years, most of the Assistant Engineers having been promoted in excess of their quota would have to be pushed down to subsequent years when they could be absorbed within their lawful quota and many of them would have to wait for 7 to 12 years on an average before their promotions could be regularised by absorption within their quota. But, despite regularisation of their promotions after a wait of seven to twelve years, they would not be entitled to claim seniority over Assistant Executive Engineers promoted later in point of time because by reason of the application of the rotational rule of seniority based on the roster maintained in accordance with the quota rule, the Assistant Executive Engineers though promoted subsequently would be entitled to have their seniority reckoned from the date when the vacancy allocable to their quota arose. The Assistant Executive Engineers though promoted long after the regularisation of the promotion of the Assistant Engineers would gain seniority over such Assistant Engineers, because they would be fitted into the vacancies kept reserved for them and artificial seniority would be given to them on

A the fictional hypothesis that such vacancies were filled by them at the time when they arose. The result would be that Assistant Executive Engineers who were promoted years after the regularisation of the promotions of Assistant Engineers by absorption within their quota -which regularisation also would have taken place after they had been working as Executive Engineers for a period of about 7 to 12 years -would become senior to such Assistant Engineers even though at the time when they were promoted, such Assistant Engineers would have already been functioning as Executive Engineers for a number of years. The Assistant Executive Engineers promoted later in point of time would shoot up in seniority irrespective of the length of their service in the grade of Executive Engineers, by reason of the rotational rule of seniority based on the roster maintained in accordance with the quota rule. It is obvious that giving such artificial seniority to Assistant Executive Engineers promoted years after the regular promotions of Assistant Engineers would completely blight the promotional opportunities of such Assistant Engineers, because for promotion to the higher grade of Superintending Engineers, they would have to wait for consideration of their case until the Assistant Executive Engineers who are given artificial seniority over them are promoted, even though they would have put in a much longer period of service as Executive Engineers than such Assistant Executive Engineers. The point we are making would become obvious if we consider a few illustrative instances. Take, for example, the case of petitioner No. 1. He was promoted as Executive Engineers on 1st October, 1956 but since his promotion was out side the quota of Assistant Engineers, he had to be pushed down and he was ultimately absorbed within his lawful quota in 1962 and though he became a regular promotee within his quota since 1962, he was placed at serial No. 273 in the seniority list dated 14th August 1975 while many Assistant Executive Engineers promoted much later in point of time than 1962 were placed higher than him in seniority. The result was that he never got a chance for being considered for promotion as Superintending Engineer and he ultimately retired as Executive Engineer on 31st January, 1978. The case of petitioner No. 1 may now be contrasted with that of J.P. Singhal, who was recruited as Assistant Executive Engineer on 1st February, 1967 and who was promoted as Executive Engineer on 14th January, 1972. Though J.P. Singhal was not even in service at the date when petitioner No. 1 became a regular promotee Executive Engineer in 1962 and he was promoted as Executive Engineer almost ten years after the regular promotion of petitioner No. 1 by absorption within his quota, J.P. Singhal was placed in seniority at Sr. No. 113 while, as pointed out

above, petitioner No. 1 was placed at Sr. No. 273 in the seniority list dated 14th August 1975, with the result that J.P. Singhal came to be promoted as Superintending Engineer on 15th February 1979 while petitioner No. 1 did not even have a chance of being considered for such promotion. Similarly we may also contract the case of petitioner No. 2 with that of R.A. Armugam. Petitioner No. 2 was promoted as Executive Engineer on 7th April, 1959 but since his promotion was not within the quota of Assistant Engineer, he had to be pushed down and he was ultimately absorbed within his quota in 1966 and though he was regularly promoted as Executive Engineer within his quota since 1966, he was placed at serial No. 396 in the seniority list dated 14th August, 1975 while R.A. Armugam who was recruited for the first time as Assistant Executive Engineer on 20th January 1971 and promoted as Executive Engineer only on 14th April, 1975 was placed higher in seniority at serial No. 260. Thus, the result of the application of the rotational rule of seniority was that R.A. Armugam who was not even in service at the date when petitioner No. 2 became a regularly promoted Executive Engineer and who was promoted as Executive Engineer 9 years after petitioner No. 2, acquired several places above petitioner No. 2 in seniority. It is not necessary for us to multiply instances where Assistant Executive Engineers promoted years after the regular promotion of Assistant Engineers have shot up in seniority above such Assistant Engineers by reason of the applicability of the rotational rule of seniority, with devastating effect on the promotional chances of such Assistant Engineers. Such instances are legion and, in fact, almost every Assistant Engineer has in the process suffered loss of seniority vis-a-vis Assistant Executive Engineers promoted years later in point of time. The application of the rotational rule of seniority has thus resulted in gross discrimination against Asstt. Engineers promoted as Executive Engineers, in so far as their opportunities for promotion to the higher grades are concerned. The seed of discrimination attracting the frown of the equality clause has germinated from the fact of regular undue deviation in actual implemenation of the quota rule and obviously the deviation from the quota rula, the greater and more intense is the discrimination. We have already pointed out the enormity of the deviation from the deviation from the quota rule in the present case and this deviation continued from year to year for a period of over 25 years has considerab y aggravated the discrimination against the Assistant Engineers.

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Now it is obvious that if Assistant Executive Engineers recruited at a young age are given artifical seniority several years above the Assistant Engineers who have already been pushed down 7 to 12 years before absorption within their lawful quota, they would get chances of promotion much earlier than the Assistant Engineers and once promoted, they being young in age would occupy the posts in the higher grades for a much longer period and that to a large extent block the chances of promotion of Assistant Engineers even when their turn comes for consideration though at a much belated point of time. If officers from two sources are promoted according to quota, then officers from both sources get promotion to posts in the higher grade on the basis of continuous officiating service in the grade, reckoned from the initial date of appointment subject, of course, to merit and this process goes on continuously due to progressive retirement of officers in the higher grades, such officers being of an appropriate higher age group. But if, as in the present case, relatively younger officers drawn from one source are given artificial seniority over older offiicers promoted from the other source, such younger officers would, by the reason of the artificial seniority given to them progressively occupy most of the posts in the higher grades and because they belong to a younger age group, they would block the promotional avenues open to the officers drawn from the other source. This disastrous situation has occurred here because of the rotational rule of seniority and the result is that, as at the end of 1981, out of 101 Superintending Engineers 93 were from the source of Assistant Executive Engineers and so far as the higher cadre of Chief Engineers is concerned, all the 19th Chief Engineers were from the same source, namely, Assistant Executive Engineers, though in the grade of Executive Engineers, out of a total of 384 Executive Engineers, 103 only were from the source of Assistant Executive Engineers while 281 were from the source of Assistant Engineers. These statistics clearly highlight how discriminatory and unjust has been the application of the rotational rule of seniority to the Assistant Engineers.

It was contended on behalf of respondent Nos. 4 to 190 that the under recruitment of Assistant Executive Engineers during the period from 1949 to 31st July, 1975 was due to the fact that the Government took the view, which of course was found erroneous by the court in A.K. Subraman's case that the quota rule was to be applied only at the stage of confirmation and it was because a different view was taken in A.K. Subraman's case, namely, that the

quota rule was applicable at the stage of initial promotion in an officiating capacity to the grade of Executive Engineers and not at the time of confirmation that this imbalance in seniority took place. This contention is clearly unfounded but even if it were not so, it is entirely immaterial, because the constitutional validity of the rotational rule of seniority cannot depend upon what the government thought to be the correct position in regard to the applicability of the quota rule. The question whether the rotational rule of seniority is constitutionally valid or not has got to be determined in the light of the interpretation placed on the application of the quota rule by the decision in A.K. Subraman's case, because that must be accepted as the correct interpretation and in the context of that interpretation, the constitutional validity of the rotational rule of seniority must be judged. But, as pointed out above, we do not think this contention urged on benalf of respondent Nos. 4 to 190 is correct. We are not inclined to accept the submission of respondent Nos. 4 to 190 that under-recruitment of Assistant Executive Engineers took place because the government thought that the quota rule was to be applied only at the stage of confirmation. There is considerable material placed before the court to show that the government rightly understood the quota rule to be applicable at the stage of initial promotion but failed to strictly implement it. Paragraph 4 of the minutes of the meeting held on 14th May, 1968 in the office room of Shri B.R. Patel, Secretary, Ministry of Works and Supply, clearly emphasizes this position by stating that "the intake of Assistant Executive Engineers should be increased by considering 2/3rd of *all the temporary and deputation* posts in the grade of Executive Engineers and above in the department as permanent ones for the purpose of working out the strength at the junior scale." So also we find a categorical statement to the same effect in the letter dated 19th October, 1971 addressed by Shri Kartar Singh, Joint Secretary to the Government of India, Ministry of Works and Housing-a letter to which we have already referred earlier. The Government also took up a positive stand in the affidavit in reply filed by P.B. Kulkarni in A.K. Subraman's case where it was stated: "I submit that the quota rule is to be applied as and when vacancies in the grade of Executive Engineers are required to be filled but as already stated earlier, it has not been possible to apply this quota rule rigidly *at the time of officiating promotions* as promotions from the grade of Assistant Engineers have been in excess of their quota." (Emphasis supplied). It will thus be seen that the government was under no illusion in regard to the true position relating to the applicability of the quota rule. But the government deliberately resorted to the policy of under-

A recruitment of Assistant Executive Engineers because, as set out in the Note regarding Cadre Review of the Central Engineers Service Class I, prepared and submitted to the Government in June, 1978, it was felt that "it is not possible to recruit enough officers in Class I junior scale to fill up the quota at Executive Engineers level as it would worsen the promotion prospects of direct recruits to class I B and make the service totally unattractive". The Note regarding Cadre Review also pointed out :

> "A perusal of form VI would indicate that in the next five years the annual recruitment would be of the order of 80 and in the subsequent five years it would be of the order C of 40. According to the existing Rules, the vacancies in the grade of Executive Engineers are to be filled up by the promotion of Asstt. Executive Engineers (Group A) and Asstt. Engineers (GroupB) in the ratio of 1 : 1Since the annual intake of Asstt. Executive Engineers is to be co-related with the vacancies that would be available in the D grade of Executive Engineers, the annual intake of Asstt. Executive Engineers (CES GROUP A) would be 40 in the next five years and 20 in the subsequent five years. It has been already explained in para 2 : 3 : 6 that when the annual recruitment was less than 10, the direct recruits were able E to reach the Junior Administrative grade in 10 to 11 years. When this was subsequently increased to 20 per annum the period taken for promotion has increased to 14 years which is likely to increase further if the annual intake is maintained at the same level. For this reason, it is not considered desirable to appoint direct recruits to C.E.S. Group A in F large number. In the Indian Railways Service of Engineers, the recruitment to the Junior Scale in Group 'A' is related to the number of posts at the level of Chief Engineer and above and the annual intake has generally been less than the number of posts of Chief Engineers. In the CPWD we have only 12 posts of Chief Engineers and it is, therefore, G recommended that the annual intake to Junior Scale Class I through UPSC competitive Examination should be restricted to 10 only."

There can be no doubt that the failure to recruit Assitant Executive Engineers in sufficient numbers, so that when vacancies in the H grade of Executive Engineers allocable to the quota of Asstt. Executive Engineers arose from year to year, there would be Asstt.

Executive Engineers available for promotion to fill such vacancies, was responsible for the gross distortion which took place in the cadre of Executive Engineers over the years. A

We must in the circumstances hold that Rules 2(iii) and 2(iv) of the Rules of 1976 are violative of Articles 14 and 16 of the Constitution and they must be declared to be unconstitutional and void. It that be so, then obviously the seniority between Assistant Engineers and Assistant Executive Engineers regularly promoted within their respective quota must be determined by the length of continuous officiation in service in the grade of Executive Engineers, subject to the qualification that in case of Assistant Engineers the length of continuous officiation shall be reckoned from the date when their promotion is regularised by absorption within their lawful quota. B C

We would therefore allow the writ petition and quash and set aside the Memorandum and the seniority list dated 14th August 1975 and the Rules of 1976. We would direct the government to prepare a new seniority list of Executive Engineers in the light of the observations contained in this judgment. The Government will prepare such seniority list within a period of two months from today. When the seniority in the grade of Executive Engineers is rearranged in accordance with the directions given in the judgment, the cases of Assistant Engineers who would have been due for considaration for promotion as Superintending Engineers and thereafter as Chief Engineers on the basis of their revised seniority, will be considered by a duly constituted Departmental Promotion Committee as on the dates on which they would have been due for such consideration if the correct seniority had been given to them, and if on the basis of their performance and record as on those dates they would have been selected for promotion, they must be given promotion with retrospective effect from such dates and if necessary, supernumerary posts in the grades of Superintending Engineers and Chief Engineers shall be created for the purpose of accommodating them and all arrears of salary and allowances shall be paid to them on the basis of such retrospective promotions. We may make it clear that those Assistant Executive Engineers who have been promoted as Superintending Engineers or Chief Engineers upto the date of this judgment shall not, on account of revised seniority in the grade of Executive Engineers, be disturbed from the positions which they are occupying at present but their seniority in such higher grades will D E F G H

A have to be rearranged on the basis of the directions given in the judgment.

We hope and trust that this judgment will put a quietous to the long ranging controversy between Assistant Engineers and Assistant Executive Engineers. The writ petition will stand disposed of in the above terms with no order as to costs.

B

S.R. *Petitions allowed.*