SURAJ PARKASH GUPTA AND OTHERS A

v.

STATE OF J & K AND OTHERS

APRIL 28, 2000

[M. JAGANNADHA RAO AND A.P. MISRA, JJ.] B

Service Law :

J & K (Classification Control and Appeals) Rules 1956—Rules 5 & 23—J & K Engineering (Gazetted) Service Recruitment Rules, 1978—Rule 5(4)—J & K Public Service Commission (Limitation of functions) Regulations, 1957—Regulation 4(d)(ii)—Appointment—To the post of Assistant Engineers—On ad hoc promotion for a period more than six months without consulting Public Service Commission—Regularisation thereof—By relaxing recruitment rules—And granting them, seniority within their quota as well as from the quota of direct recruits—Delayed recruitment of direct recruits—No evidence that suitable candidates were not available for direct recruitment—Held, The wholesale regularisation by way of implied relaxation of the recruitment rule to the gazetted category is invalid as it has been done without following the quota rule and without consulting the Service Commission—Power under rule 5 to relax rules cannot be treated as wide enough to include a power to relax rule of recruitment—The ad hoc/stop gap service of the promotees cannot be treated as non-est merely because P.S.C. was not consulted in respect of continuance of the ad hoc/stop gap service beyond six months—Such service is capable of being regularised under Rule 23, and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors—Service outside promotee quota cannot count for seniority—In Service Jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment—He cannot claim seniority from a date when he was not born in the service—Constitution of Jammu and Kashmir—Section 133.

The present appeals raise the question whether the Government has power to appoint officers on promotion temporarily for a period of more than six months without consulting Public Service Commission, to regularise them and to grant them seniority within as well as outside their quota.

The recruitment to the posts of Assistant Engineers of all the wings viz. Mechanical, Electrical and Civil Engineering in the State of Jammu &

A **Kashmir, as per rules was that 20% posts were to be filled by direct recruitment, 60% by promotion of Junior Engineers and 20% by promotion of diploma holders.**

The last direct recruitment in the wing was done in 1984. In 1987 in order to remove stagnation, Government reorganised the service vide its
B **orders dated 29.6.87 and 29.10.87. Thereafter vide several orders, officers at various level were promoted to the next higher post on *ad-hoc* basis for six months. Later Government issued orders continuing these *ad-hoc* appointments till regularisation without consultation with Public Service Commission.**

C **On 23.11.87 Government referred the matter of direct recruitment in respect of 10% quota, to the State Public Service Commission. The advertisement was issued on 3.12.87. The direct recruits applied, but were interviewed only in 1992-93, and they were appointed on various dates in 1994 and thereafter, only after the intervention of High Court.**

D **Government issued seniority list. Direst recruits filed various writ petitions challenging the *ad-hoc* promotion of Assistant Engineers made by Government without consulting the Public Service Commission beyond six months and seeking to quash the existing seniority list contending that the seniority list cannot show the *ad-hoc* promotees as seniors to direct re-**
E **cruits. On the other hand promotee officers filed writ petitions alleging that the seniority list was favourable to direct recruits.**

During pendency of the writ petitions, Cabinet on 19.12.97 decided that in view of Court litigation there used to be delay in finalising seniority lists and the reference of the promotees' cases to the P.S.C./D.P.C. would
F **take fairly long time to be completed. This view was supported by Law Departments and it was decided that the only remedy was to regularise their promotion in relaxation of rules from the date they were promoted on *ad-hoc* basis against substantive vacancies without prejudice to seniority to be fixed in accordance with rota and quota. The Government on 2.1.98, pursuant to the Cabinet decision, regularised the *ad-hoc* service of all the**
G **promotee officers of electrical wing retrospectively as a "one time exception". The order dated 2.1.98 was also challenged by the direct recruits alongwith other seniority lists. General Administration Department placed the relaxation proposal before PSC/DPC in order to obtain clearance. PSC instead of considering the proposal requested for various documents. But**
H **rejecting the request of the PSC the Cabinet straightaway directed relaxa-**

tion as a `one time exception'. A

High Court, allowing the writ petitions of direct recruits, held that the orders for *ad-hoc* continuance beyond six months and till regularisation, without consultation were ineffective, since as per J & K Service Commission Regulation 4(d)(ii), officiating promotion or transfer to any service or post should not be beyond six months, unless the Commission B was consulted; and that quota rota rule existed. The order of blanket regularisation of promotee Assistant Engineers dated 2.1.98 was in violation of Regulation 4(d)(ii); and that the order dated 2.1.98 could not have the effect of regularising the entire *ad-hoc* service. The direct recruits could count their seniority from the date of their substantive appointment C within their quota, and the claims of promotees whose stop gap promotion exceeded six months should be referred to the Commission for determining their suitability.

In appeal to this Court the promotee Assistant Engineers contended that the order dated 2.1.98 even if it be without the concurrence of the D Commission, could be treated as one passed by the Government by impliedly relaxing the Service Commission Regulation as the provisions of Section 133 of J & K Constitution were not mandatory, and considering the long years of service of the promotees, it was permissible for the State to relax the service rules; and that there was no rota and there was break down of E quota rule. The direct recruits contended that there is no rule for commencing probation retrospectively in the case of a person promoted by transfer temporarily; and that though there is no express rota rule, the same is to be implied and read into the quota rule, and there has been previous practice of applying a rota; and that the entire service of the promotee continued beyond 6 months without consulting the Commission F be treated as *non-est*, and only service rendered in accordance with rules can be regularised retrospectively; and that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. G

Disposing of the appeals, the Court

HELD : 1.1. The wholesale regularisation by order dated 2.1.1998 (for the Electrical Wing) by way of implied relaxation of the recruitment rule to the gazetted category is invalid. It is also bad as it has been done H

A **without following the quota rule and without consulting the Service Commission. Further, power under Rule 5 of the J & K CCA Rules, 1956 to relax rules cannot be treated as wide enough to include a power to relax rule of recruitment. [828-F]**

B *G.S. Lamba* **v.** *Union of India,* **[1985] 2 SCC 604;** *Narender Chadda* **v.** *Union of India,* **[1986] 2 SCC 157;** *V. Sreenivasa Reddy* **v.** *Govt. of A.P.,* **[1995] Suppl. 1 SCC 572 and** *Ashok Kumar Uppal* **v.** *State of J & K,* **[1998] 4 SCC 179, distinguished.**

C *Keshav Chandra Joshi* **v.** *Union of India,* **[1992] Suppl. 1 SCC 272;** *Syed Khalid Rizvi* **v.** *Union of India,* **[1993] Suppl. 3 SCC 575 at 603;** *State of Orissa* **v.** *Sukanti Mohapatra,* **[1993] 2 SCC 486;** *Dr. M.A. Haque* **v.** *Union of India,* **[1993] 2 SCC 213;** *Jammu and Kashmir Public Service Commission* **v.** *Dr. Narinder Mohan,* **[1994] 4 SCC 630;** *Anundhati Ajit Pargaonkar* **v.** *State of Maharashtra,* **[1994] Suppl. 3 SCC 380 and** *Dr. Surinder Singh Jamwal and Anr.* **v.** *State of J & K,* **[1996] 9 SCC 619, relied on.**

D

J.C. Yadav **v.** *State of Haryana,* **[1990] 2 SCC 189 and** *Direct Recruit Class II Engineering Officers' Association* **v.** *State of Maharashtra,* **[1990] 2 SCC 619, referred to.**

E **1.2. On facts, the reason given in the Cabinet note for granting relaxation are insufficient. In fact, the letter of the Commission was prepared to give its opinion in regard to Regularisation of such promotee but the Government backed out when the Commission called for the records relevant for considering suitability for regular promotion. There can be no hardship for a person seeking appointment or promotion to go** F **by the procedure prescribed therefor. The relevant recruitment rule for promotion cannot itself be treated as one producing hardship. If such relaxation is permitted in favour of promotees then the same yardstick may have to be applied for direct recruits. If it is to be held that direct recruitment can also be permitted without consulting the Service** G **Commission (in case it is required to be consulted), there will be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and fancy of Government. Such a blanket power of relaxation of recruitment rules cannot be implied in favour of the Government. [828-H; 829-A-C]**

H *Narender Chadda* **v.** *Union of India,* **[1986] 2 SCC 157, distinguished.**

Jammu & Kashmir Public Service Commission v. *Narender Mohan*, [1994] 2 SCC 630; *Dr. Surinder Singh Jamwal and Anr.* v. *State of J & K*, [1996] 9 SCC 1, referred to.

1.3. In the present case the Government was merely carried away by sympathy to the promotees. By not making direct recruitment after 1998, by restricting direct recruits to 10% rather than permitting 20% and by deliberately promoting the Junior Engineers to the other 10% quota of the direct recruits, the State Government had definitely acted in a biased manner. There is any amount of justification for the grievance of the direct recruits that the state had passed an omnibus order on 2.1.1998 regularising all *ad-hoc* promotees (Electrical Wing) without consulting the Commission, by way of deemed relaxation, in a wholly arbitrary manner, counting the entire *ad-hoc* service of promotion. [829-D]

2.1. There is no rota coupled with quota but there is only a quota rule. On the question of break down of quota rule except the lethargy of the State Government and its inaction and its not asking the Service Commission to make direct recruitment, no other cause is visible. The Cabinet not only stated that because reference to PSC would take a long time, the *ad-hoc* services of promotees were to be regularised. The delay on part of the Government appears to be motivated for the purpose of blocking the quota of the direct recruits and giving a part of it to promotees. When a very belated decision was taken to make direct recruitment, the same was restricted to 10% rather than to the statutory quota of 20%. This attitude on the part of the State was not reasonable. Further under Rule 5(4) of the Recruitment Rules, 1978 it is provided that in case suitable candidates are *not available* for promotion, the posts shall be filled up by direct recruitment and *vice-versa*. Thus, there must be evidence that suitable candidates were "*not available*" for direct recruitment. Such non-availability cannot be inferred when, as a fact, not even a reference is made to the Commission to find out if upon advertisement, anybody will respond. Cabinet note dated 19.12.1997 only states that cases of the *ad-hoc* promotees if referred to PSC, will take a long time for getting the necessary recommendation. But nowhere it is said that direct recruits were not available or such recruitment had became impracticable. Thus there is no breaking down of the quota rule. [832-F; 830-G-H; 831-A-B]

Direct Recruit Class II Engineering Officers' Association v. *State of*

A *Maharashtra,* [1990] 2 SCC 715, distinguished.

N.K. Chauhan v. *State of Gujarat,* [1977] 1 SCC 308; *Syed Khalid Rizvi* v. *Union of India,* [1993] Suppl. 3 SCC 575 and *M.S.L. Patil* v. *State of Maharashtra,* [1996] 11 SCC 361, relied on.

B 2.2. In view of the admission by all parties that there is no express rota rule, the decision of the High Court that rota principle applied cannot be upheld. There is no question of quota being necessarily 'inter-locked' with rota. [832-B]

C *N.K. Chauhan* v. *State of Gujarat,* [1977] 1 SCC 308 and *B.S. Yadav* v. *State of Haryana,* [1981] 1 SCR 1024, relied on.

2.3. A practice must be consistent with Rules, and that a practice not consistent with rules is not acceptable. A past practice which was *dehors* a rule could be of no help. [832-D-E]

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L. Chandra Kishore Singh v. *State of Manipur,* JT (1999) 7 SC 576 and *Stephen Joseph* v. *Union of India,* [1997] 4 SCC 753, relied on.

3. The *ad-hoc*/stop gap service of the promotees cannot be treated as non-est merely because P.S.C. was not consulted in respect of continuance E of the *ad-hoc*/stop gap service beyond six months. Such service is capable of being regularised under Rule 23 of the J & K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no 'rota' rule applicable. The 'quota' rule has F not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjustment made in later vacancies within their quota, after due regularisation. Such service outside promotee quota cannot count for seniority. Service of promotees which is retrospective with effect from the date of vacancies within quota counts for seniority. However, any part of such *ad-hoc*/or stop gap or even regular service G rendered while occupying the direct recruitment quota cannot be counted. Seniority of promotees or transferees is to be fixed as per quota and from date of commencement of probation/or regular appointment as stated above. Seniority of direct recruit is from the date of substantive appointment. Seniority has to be worked out between direct recruits or promotees H for each year. [847-F-H; 848-A-B]

State of West Bengal v. *Aghore Nath Dey,* [1993] 3 SCC 371; *Direct Recruit Class II Engineering Officers' Association* v. *State of Maharashtra,* [1990] 2 SCC 715; *Syed Khalid Rizvi* v. *Union of India,* [1993] Suppl. 3 SCC 575; *I.K. Sukhija* v. *Union of India,* [1997] 6 SCC; *Desoola Ramarao* v. *State of A.P.,* [1988] Suppl. SCC; *State of A.P.* v. *K.S. Muralidhar,* [1992] 2 SCC 241; *M. Janardhan* v. *State of A.P.,* [1994] Suppl. 3 SCC 298, relied on.

V. Sreenivasa Reddy v. *Govt. of A.P.,* [1995] Suppl. 1 SCC 572; *K. Siva Reddy* v. *State of A.P.,* [1988] 3 SCR 18; *Ramender Singh* v. *Jagdish Prasad,* [1984] Suppl. SCC 142; *A.P.M. Mayan Kutty* v. *Secretary,* [1977] 2 SCC 360; *State of T.N.* v. *E. Partpoornam,* [1992] Suppl. 1 SCC 420; *P.D. Aggarwal* v. *State of U.P.,* [1987] 3 SCC 622; *Masood Akhtar Khan* v. *State of M.P.,* [1990] 4 SCC 24; *Vijay Kumar Jain* v. *State of M.P.* , [1992] Suppl. 2 SCC 95; *State of Orissa* v. *Sukanti Mohapatra,* [1993] 2 SCC 486; *Dr. Arundhati Ajit Pargaonkar* v. *State of Maharashtra,* [1994] Suppl. 3 SCC 380; *E. Ramakrishan* v. *State of Kerala,* [1996] 10 SCC 565; *C.K. Antony* v. *B. Muraleedharan,* [1998] 6 SCC 630; *D.N. Agrawal* v. *State of M.P.,* [1990] 2 SCC 553; *B.N. Nagarajan* v. *State of Karnataka,* [1979] 3 SCR 937 and *State of Bihar* v. *Akhouri Sachindra Nath,* AIR (1991) SC 1244, distinguished.

Baleshwar Das v. *State of U.P.,* [1981] 1 SCR 449; *B.S. Yadav* v. *State of Haryana,* [1981] 1 SCR 1024; *A. Janardhan* v. *Union of India,* [1983] 2 SCR 936; *G.P. Doval* v. *Chief Secretary Government of U.P.,* [1984] 4 SCC 329; *Narender Chadda* v. *Union of India,* [1986] 2 SCC 157; *A.N. Pathak* v. *Secretary to The Government,* [1987] Suppl. SCC 763; *Delhi Water Supply & Sewage Disposal Committee* v. *R.K. Kashyap,* [1989] Supp. 1 SCC 194; *Keshav Chandra Joshi* v. *Union of India,* [1992] Suppl. 1 SCC 272; *Rajbir Singh* v. *Union of India,* AIR (1991) SC 518; *A.N. Sehgal* v. *Raje Ram Sheoram,* [1992] Suppl. 1 SCC 304; *S.L. Chopra* v. *State of Haryana,* [1992] Suppl. 1 SCC 391 and *Keshav Dev* v. State of U.P., [1999] 1 SCC, referred to.

4. The contention of the direct recruits that direct recruitment appointment should be ante-dated from the date of occurrence of vacancy in direct recruitment quota, even if on that date the said person was not directly recruited, cannot be accepted. The reason that in Service Jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service. [848-D; F]

N.K. Chauhan v. *State of Gujarat,* **[1997] 1 SCC 308 (at P.321);** *A. Janaradhana* v. *Union of India,* **[1983] 2 SCR 936 and** *A.N. Pathak* v. *Secretary to The Government,* **[1987] Suppl. SCC 763, relied on.**

(The court directed the state of Jammu & Kashmir to appoint a high level Committee within a month from the date of the judgment to go into the question as to whether in any department in Government service, direct recruitment of existing vacancies has not been made and if there was unreasonable delay; and to consider making recruitment expeditiously depending on the needs in the service and other relevant factors, and to ensure that no promotees are put in the direct recruitment quota, temporarily or on stop gap or *ad-hoc* basis unless simultaneously proceedings are initiated for direct recruitment through the service Commission. The Committee will recommend in what manner the direct recruitment could keep pace with promotions as contemplated by rules. The Committee will find out in which department the *ad-hoc*/stop-gap promotees are languishing without their cases being referred to the Service Commission/DPC for regularisation within their quota. The State will ensure that no relaxation of basic recruitment rules is made for direct recruitment through P.S.C., or for purpose of regular promotions/recruitment by transfer. The recommendations of the Committee may be considered by Government and implemented in accordance with the rule and in accordance with law without unreasonable delay.) [850-C-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3034 of 2000 Etc. Etc.

From the Judgment and Order dated 14.12.98 of the Jammu & Kashmir High Court in S.W.P. No. 47 of 1998.

M.H. Baigh, Raju Ramachandran, G.K. Banerjee, Ms. Hina, Ms. Nandini Gore, Dhruv Mehta, Ms. Shobha, S.K. Mehta, (M.A. Gani) General for J & K, A.M. Magray, Ashok Mathur, N Safaya, Santosh Gupta, Sarwa Mitter, Ms. Beena Madhavan, P.H. Parekh, G.M. Kawaoosa, N. Ganapathy, Ms. Rani Chhabra, Ms. Richa Goyal, Sibo Sankar Mishra and P.N. Puri for the appearing parties.

The Judgment of the Court was delivered by

M. JAGANNADHA RAO, J. Leave granted in all the special leave petitions.

These Civil Appeals arise out of several writ petitions filed in the High Court of Jammu & Kashmir in which common judgment was delivered on 14.12.1998. The judgment of the High Court deals with power of Government to appoint officers on promotion temporarily for periods of more than six month without consulting the Public Service Commission, grant of seniority to such promotees in respect of service within their quota and also outside quota. Validity of the order passed by the State Government on 2.1. 1998 regularising, at one stroke, several *ad hoc* promotions made between 25.5.1973 to 31.12.1996 was in issue, so far as the Electrical Wing was concerned. We are concerned only with the regularisation of *ad hoc* Assistant Engineers and Assistant Executive Engineers (see Point 2 in the High Court Judgment). The High Court held that *ad hoc*/stop-gap service of promotees could not be regularised. A contention was also raised before us by the direct recruits that stop gap or *ad hoc* service of promotees could never be regularised and only service rendered in a post where a person if appointed "according to rules" can be regularised and that there was rota coupled with quota. All the appeals before us have been filed by the promoted Assistant Engineers.

How the appeal have arisen :

SWP 522/90 was filed in the High Court by the direct recruit Assistant Engineers of the Mechanical department to fix a seniority and to declare that they were entitled to the post of Assistant Executive Engineers w.e.f. the date of their appointment as Assistant Engineers and to treat direct recruits as senior to respondents 3 to 121 therein (promotees) and to quash the promotion of respondents 3 to 32 therein as Assistant Executive Engineers (Mechanical). Similarly SWP. 227/97 and 47/98 were filed by direct recruit Assistant Engineers (Electrical) seeking the quashing of Government Order dated 12.12.1997 containing the seniorty list and also to quash the Government Order dated 2.1.1998 whereby services of several *ad hoc* promotee Assistant Engineers of the Electrical wing were regularised. They sought a further direction for issuing a fresh seniority list and for promotion as per quota and a direction not to fill up the post of Assistant Executive Engineers from among promotees' quota till seniority as per quota was fixed. CWP 1869/97 and 824-B/94 were filed by the direct recruits Civil Engineers (Hydraulic) for fixing seniority as per the recommendations of the Committee constituted by the Government by its order dated 31.2.1997 and for a direction *not to* promote promotee Assistant Engineers as Assistant Executive Engineers till

a final seniority list was prepared.

SWP 705/94 and 777/94 were filed by the promotee Assistant Engineers (Mechanical) to quash the seniority list of Assistant Engineers dated 28.4.1994 and for issuance of fresh seniority list according to date of appointment, irrespective of quota. Similar relief was claimed by the promotee Assistant Engineers in SWP. 377/94. SWP 198/93 was filed by the promotee Assistant Engineer (Mechanical) claiming seniority over direct recruits.

The High Court in its impugned common judgment dated 14.12.1998 dismissed the petitions filed by the promotees namely SWPs 198/93, 705/94, 777/94 and it allowed the writ petitions filed by the direct recruits Assistant Engineers namely SWPs 522/90, 824-B/94, 227/97, 1869/97 and 47/98.

The Facts :

The following facts are relevant :

There are three wings of Engineers working in the various Departments of the Government of Jammu and Kashmir - Mechanical, Electrical and Civil Engineering. These posts in these three wings at various levels are of Junior Engineers, Assistant Engineers and Executive Engineers. The recruitment to the posts of Assistant Engineers, as per the J.K. Engineering (Gazetted) Service Recruitment Rules 1978 (hereinafter called the 'Recruitment Rules, 1978') provided that 20% posts were to be filled by direct recruitment, 60% by promotion of Junior Engineers who had degrees or equivalent qualification with 3 years service and 20% by Diploma holders or those holding post carrying scale of Rs. 340-700/450-700 etc. with 10 years service.

In 1987, with a view to remove stagnation, the Government issued two orders one on 29.6.87 and another on 29.10.87, the latter in supercession of the former and re-organised the service as follows : (a) the existing post of Assistant Engineer was upgraded and re-designated as Assistant Executive Engineer, to be kept in charge of a sub-Division. The Assistant Engineer was to work as a Technical officer to the Assistant Executive Engineer in the sub-division and also to the Executive Engineer in each division. All the Diploma holders (Section Officers) were to be re-designated as Junior Engineers. In November 1987, 1116 posts of Assistant Engineers were created (as held by the High Court) in all the three wings, The Government also issued SRO 209 of 1992 on 4.9.92, amending the Schedule to the

Recruitment Rules, 1978. The ratio was 20% by direct recruitment, 60% by promotion by graduate Junior Engineers with 3 years service and 20% by Diploma holder Junior Engineers with 10 years service etc. A

Thereafter, Government issued a large number of orders and officers at various levels were promoted to the next higher post on an *ad hoc* basis for six months. Later Government issued orders continuing these *ad hoc*/stop gap appointments till regularisation. This was done without consultation of the Public Service Commission as required by Regulation 4(d)(ii) of the Service Commission Regulations, 1957. These orders included some in which several Junior Engineers were promoted as *ad hoc* Assistant Engineers in the three wings of the Engineering Department (and also related to *ad hoc* promotions as Assistant Executive Engineers). This was done without following the rules for promotion of the Junior Engineers as Assistant Engineers which required consultation with the J & K Public Service Commission under section 133 of the J.K. Constitution (corresponding to Article 320 of the Constitution of India) or other rules. (The promotion as Assistant Executive Engineer required consultation with DPC). It was case of the direct recruits, that these *ad hoc* promotions were made not only against the 80% (60% + 20%) quota of the promotees but also in respect of 10% out of the 20% quota of direct recruits, in total breach of the quota rule. Direct recruitment was indefinitely delayed to benefit promotee officers and even when it was initiated, it was restricted to 10%. B C D E

It appears that the last direct recruitment in these wings was way back in 1984. It was only on 23.11.87 that the State Government referred to the State Public Service Commission the matter relating to direct recruitment. But instead of referring the matter of filing up the quota upto 20%, the reference was confined only for 10%. The advertisement was issued by the Commission on 3.12.87. The respondents before us (who were direct recruit writ petitioners in the writ petitions before the High Court) applied for direct recruitment. But, for a period of 4 years, the commission did not take any steps to make recommendations. The candidates were interviewed during 1992-93 and a list of selected candidates was sent to Government for the 10% quota of direct recruits. It was only after the High Court gave directions on 22.2.94 in certain writ petitions and on other dates in other petitions, that the direct recruits were appointed on various dates in 1994 as Assistant Engineers. Some direct recruits were appointed much later. F G H

A The direct recruits filed the various SWPs 522/90, 227/97, 47/98, 1869/97, 824-B/94 challenging the *ad hoc* promotion of the Assistant Engineers made by Government without consulting the service Commission beyond six months and contended that continuance of *ad hoc* stop gap promotion beyond six months (as per the order issued during 1987 to 1996) was not-est and void and could not be subject of regularisation. The seniority list cannot show these *ad hoc* promotees as seniors to direct recruits. There is rota as well as quota. They sought the quashing of existing seniority lists and they asked for issuing fresh seniority lists. On the other hand, the promotee officers filed SWP 98/93, 705/94 and 777/94 and in the two latter petitions, the seniority list dated 28.4.94 was questioned to the extent it was favourable to the direct recruits.

The High Level Committee :

Government appointed a High Level Committee on 21.5.97 to go into the various issues arising between the direct recruits and promotees. On the three issues. referred, the Committee gave a Report soon thereafter in 1997. It said that merely because the State Government could not make direct recruitment due to inaction, the quota rule could not be said to have broken down. Thereafter, it opined as follows : (1) as and when the direct recruitment was made, the direct recruits would be entitled to placement of their seniority to the vacancies reserved for them as per the ratio. Similarly, where the promotees came to be promoted in accordance with the rules "in excess of their quota", they could not be given seniority but should be given seniority only from the respective dates on which vacancies in their quota were available; (ii) seniority had to be determined only "from the respective dates on which their respective quota became available *in a particular year*" (iii) *ad hoc*/stop gap appointment would not entitled an individual to the benefit of seniority from the date of such *ad hoc*/stop gap appointment", such service not being according to rules. The period of officiation could not be taken into account for seniority. The Continuous length of *ad hoc* service could not be so counted.

The order dated 2.1.98 by Government regularising promotees services without consulting P.S.C. :

Ignoring the above report of the above Committee, and without any recommendation of the Public Services Commission for retrospective regu-

larisation, the Government issued, during the pendency of the writ petitions, an order on 2.1.98 so far as the Electrical Wing was concerned, stating that *ad hoc* service of officers in various categories (starting for Junior Engineers to Superintending Engineers) right from 25.5.73 to 18.4.96 would stand regularised at various levels of the service including Assistant Engineers and Assistant Executive Engineers levels, as a "one time exception". This order dated 2.1.98 covered several Assistant Engineers in Electrical Wing wherein *ad hoc* promotions were made. The regularisation was ordered subject to.

(a) The seniority of the officers concerned which will be fixed according to the Rules;

(b) The outcome of writ petition, if any, pending in courts.

The writ petitions :

The above order dated 2.1.98 was questioned by direct recruits in the High Court along with other seniority lists. It was contended for the direct recruits before the High Court that there was quota and rota, that the entire *ad hoc* service was to be treated as non-est, whether it was rendered within the promotion quota or outside the said quotas and stop gap/*ad hoc* service of promotees could not be regularised at all. But the promotees contended that there was no rota, that the quota rule had broken down and the entire *ad hoc* service as Assistant Engineers could be counted or regularised by the Government.

The findings of the High Court :

The High Court framed three points for consideration. It held on the *first point* that promotion to the post in the Gazetted cadre required consultation with the Commission on the question of promotion/transfer from one service to another and also on the suitability of the candidates for appointment, promotion and transfer; that under the J.K. Service Commission, Regulation 4(d)(ii), officiating promotion or transfer to any service or post, should not be for more than six months, unless the Commission was consulted and *that the orders for such ad hoc continuance beyond six months and till regularisation, without consultation, were ineffective.* It held that the quota rule and not broken down. The posts were advertised in 1987, but it was only in 1993, 1994 and in 1998 that the direct recruits were appointed in the three wings, and that in the Civil Mechanical and Electrical Wings 7, 16 and 20

A posts were under excess occupation by the promotees and these posts were not filled by direct recruitment because the Government directed advertisement of only 10% and not 20% for direct recruits. It was held that in SWP 824-B/94 filed by direct recruits, Government filed a reply stating that there was 'quota rota' rule and therefore the said Rule applied. The seniority list B dated 28.4.94 in the Mechanical Wing - which was sought to be quashed in SWP 705/94 by the promotees showed that the quota rule had not broken down. The State had not placed before the Court any material to show why it could not make direct recruitment. The excess promotees had to be pushed down and had to be fitted in subsequent vacancies in their quota in later years. C On the *second point*, the High Court held that *ad hoc*promotions could be made for three months and not more than 9 months under rule 14(1) of the J & K Civil Service (Classification Control and Appeal) Rules, 1956 (read with Regulation 4(d)(ii) of the J & K Public Service Commission (Limitation of Functions) Regulation 1997). *Ad hoc* service beyond 6 months could not have been continued. But, in view of Regulation 4(d)(ii), "*if the exercise of* D *selection of candidates has not been done by the Commission for regularisation*" the promotees were not entitled to seniority. Under Rule 8 of the Recruitment Regulations, 1978 probation was to be for 2 years. Hence, *ad hoc* promotee could not be a 'member' of the service. To claim seniority the promotion could not be *de hors* the Rules. Conditions of service could be E relaxed but rules of recruitment could not be relaxed. The order of blanket regularisation of the promoted Assistant Engineers dated 2.1.98 for the Electrical Wing passed by the Government was in violation of Regulation 4(d)(ii) was bad. Such orders passed under executive powers were outside the Rules and were invalid. On the *third point*, the High Court held that seniority F under Rule 11 of the 1978 Rules was to be determined in accordance with Rule 24 of the 1956 Rules on the basis of 'date of first appointment' i.e. date of "substantive appointment or date of permanent appointment or date of first appointment on probation against a clear vacancy". In as much as regularisation of *ad hoc* promotions by the Government on 2.1.98 was illegal, the promotees were not members of the service. The order dated 2.1.98 could G not have the effect of regularising the entire *ad hoc* service. The direct recruits could however count their seniority from the date of their substantive appointment within their quota. However, the claims of the promotees whose stop gap promotion exceeded six months without consultation of the Commission *should be referred to the Commission* "for determining their suitabil- H ity". The seniority was to be fixed for direct recruits and promotees in terms

of the quota-rota rule, within their respective quota in the particular year. A

Stay orders in their Courts :

In this Court notice in SLPs was issued on 7.4.1999 and the order of the High Court was stayed. But then a further order was passed on 12.5.99 in IAs. 3 & 4 in SLPs 5329-5330/99 that the stay order dated 7.4.99 did not imply any right to effect promotion during the pendency of the SLPs. It was directed that status quo be maintained. B

During the course of hearing of the case, at one stage counsel made some efforts to narrow done the disputes between the two groups by discussion but ultimately all the points arising between the parties were argued elaborately and thoroughly. C

The written submissions by both parties covered as many as sixty rulings of this Court. Having regard to the vehement argument before us and also in order to explain the various decisions, - which may appear to be apparently conflicting - we have thought it necessary to refer to most of the relevant rulings. This has no doubt added to the volume of this judgment but it could not be helped. D

On the basis of the various submission, the following points arise for consideration : E

The Points :

(1) Can the promotees, for recruitment to the gazetted service, avoid the Service Commission? Can the Government order that the entire *ad hoc*/ stop gap service of Assistant Engineers and Assistant Executive Engineers is to be counted for seniority and can the order of regularisation dated 2.1.98 passed by Government (in respect of the Electrical Wing) be treated as amounting to an implied *relaxation* of the rules of recruitment requiring consultation with the Service Commission? Whether relaxation of recruitment rule is permissible? F G

(2) Whether the quota rule had broken down? Whether excess promotees are to be pushed down? Whether there is a quota-rota rule?

(3) Whether the *ad hoc*/stop gap promotion of Assistant Engineers (and H

A Assistant Executive Engineers) could be made beyond six months and till regularisation, by Government without consulting the Public Service Commission? Whether Government could have regularised the *ad hoc* service by executive order dated 2.1.98? Whether, the point raised in para IX of written submissions by the direct recruits that retrospective regularisation cannot be
B made in respect of the *ad hoc* stop gap service and could be made only if the initial appointment as Assistant Engineers or Assistant Executive Engineers was "in accordance with rules", is correct?

(4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was
C available, even though the direct recruit was not appointed by that date and was appointed long thereafter?

(5) To what relief?

Point 1 :

D

This point deals with the question whether the promotees can avoid going through the Service Commission for recruitment to the gazetted cadre? This raises the question of the validity of the order dated 2.1.98 of retrospective regularisation of entire *ad hoc* service of promotees as Assistant Engi-
E neers and Assistant Executive Engineers passed by the Government, (in relation to the Electrical Wing) without the approval of the Public Service Commission and whether relaxation can be implied. Question arises whether it is permissible to relax recruitment rules?

Implied relaxation of recruitment rule relating to promotion - plea as to

F

Learned senior counsel appearing for the promotee Assistant Engineers contended that the order dated 2.1.98 regularising the *ad hoc*/stop gap service passed by Government, even if it be without the concurrence of the Commission, could be treated as one passed by the Government by impliedly
G "relaxing" the Service Commission Regulation requiring consultation with the Commission. Provisions or Article 320 requiring consultation with the Commission (here Section 1-33 of the J & K Constitution), were not mandatory. When promotees had put in long years of services, it was permissible for the State to relax the recruitment rule and regularise the service outside the PSC Regulations. It was to be deemed there was relaxation. This contention was
H contested by the learned senior counsel for the respondents.

The Rules :

For the purpose of the above argument, the promotees relied on the following rules :

Rule 13 of the 1978 Recruitment Rules states that in respect of residuary matters, (i.e. 'matters not specifically covered by the said Rules), the members of the service shall be governed by the rules, regulations and orders applicable to the State/Civil Services in general. Therefore, Rules 5 of the J & K Civil Service (CCA) Rules, 1956 is attracted. It permits relaxation of the Rules. It reads :

> "*Rule 5* : Any of *these rules* or rules made under them, may or reasons to be recorded in writing, be relaxed by the government in individual cases, if Government is satisfied that a strict application of the rule would cause hardship to the individual concerned or confer undue benefit on him".

Further, Rule 5(4) of the Recruitment Rules, 1978 states that : In case suitable candidates are not available for promotion, the posts shall be filled up by direct recruitment and *vice versa*'. In view of the words '*vice versa*', the promotees contend that if suitable direct recruits are "*not available*", the direct recruit quota can be filled up by promotees. Direct recruitment was not made for several years and hence it was clear that suitable direct recruits were "*not available*" as required by proviso to Rule 5(4) of the Recruitment Rules, 1978.

The quota between direct recruits and promotees is governed by Rule 5(2) of the 1978 Rules which states that appointment to a service shall be made by (a) direct recruitment (b) by promotion/selection and (c) partly by direct recruitment and partly by promotees, in the manner and ratio as indicated against each post in the Schedule. The quota of 20% for direct recruits Assistant Engineers and 60% for graduate Junior Engineers and 20% for non-graduate in the lower category is provided in the Schedule. Further, Rule 11(1) of the above said Rules of 1978 states that seniority will be regulated under the provisions of the J & K Civil Service (Classification, Control and Appeal), Rules 1956. The proviso to Rule 11(3) states that the seniority in *a particular year* is to be determined as per ratio. It says :

A "Provided further that the seniority of Assistant Engineers by direct recruitment and by promotion shall, in *a particular year* be determined, in the ratio fixed for direct recruitment and promotion.

B The relaxation Rule, namely, Rule 5 of the 1956 J & K CCA Rules, 1956 referred to earlier, enables the power of relaxation to be exercised on the ground of '*hardship*' in "*individual cases*". Reasons have to be recorded in writing.

C *Reasons for so called relaxation of recruitment rules - Cabinet decision of 19.12.97* :

As to the reasons for relaxation of recruitment rule of promotion requiring consultation with the Commission, counsel for promotees referred us to the Cabinet decision preceding the issuance of the blanket regularisation Order dated 2.1.98. It is dated 19.12.97. We have to examine the reasons stated in the Cabinet decision and find out if adequate reasons have been given. It was stated there that in view of Court litigation, there used to be delay in finalising seniority lists and that this had resulted in officers retiring at lower levels and getting financial/promotional benefit only after retirement. The finalisation of seniority lists and the reference of the promotees' cases to the P.S.C./D.P.C. *would take fairly long time to be completed.* It was felt that it would definitely be preferable if the *confusion*, was cleared *once and for all.* At the level of *Assistant Engineers*, 574 were on *ad hoc* promotion and at the level of *Assistant Executive Engineers* there were 401, requiring regularisation. This view was supported by the Law Department and it said that undue delay had adversely affected the promotees and the only remedy was to regularise their promotion in *relaxation* of rules *from the date they were promoted on ad hoc basis* against substantive vacancies without prejudice to seniority to be fixed in accordance with the "rota and quota" rules. It opined that all those who had held the post uninterruptedly for 6 months (originally Law Department said 2 years) or more and had rendered "satisfactory service" could be regularised in *relaxation* of rules. But the General Administration Department was however of the view that this relaxation proposal should be placed before the PSC/DPC and clearance obtained. The matter was therefore referred to PSC which instead of considering the proposal, requested by its

letter dated 25.11.97 for various documents (1) 'final seniority lists; (2) eligibility list on prescribed form, (3) APRs of all Engineers for the relevant period, (4) integrity certificate and (5) information regarding Court orders and (6) Copy of Rules, for the purpose of considering regularisation under the Rules. But rejecting the said letter of the PSC, the Cabinet straightaway directed relaxation as a `one time exception', stating that :

> "due to the reasons that the finalisation of seniority list, collecting APRs of all engineers for the relevant period, obtaining date of eligibility/date of vacancy, one is expected to take a *very long time and may even be impossible* in very old cases. When this Department places these engineers in charge of higher posts, there must have been clear vacancies.
>
> Hence, information required by the PSC cannot be prepared and the matter would stand further delayed, defeating the very purpose of this proposal. Accordingly, it is proposed that *regularisation* of *all ad hoc*/stop gap/incharge promotions, may be approved as a "*one time exception*".

On the above reasoning, by a single stroke of pen, by the above order dated 2.1.98 such stop gap/*ad hoc* promotions made in respect of the Electrical Wing, from time to time were regularised including those at the level of Assistant Engineers and Assistant Executive Engineers. It was no doubt stated that this would be subject to.

> "(a) The seniority of the officers concerned which will be fixed according to the Rules;
>
> (b) the outcome of writ petitions, if any, pending in the courts".

It may be noted that the order of Government dated 2.1.98 does not however use the word "relaxation" though the Cabinet proceedings use the said word. The above order was issued after the writ petitions were filed by the direct recruits. This order too was questioned by them by amending the relief in their writ petitions.

Relaxation Rules - scope of : If recruitment rules can be relaxed : A previous view :

Some relaxation rules permit relaxation of conditions of service and some permit relaxation of rules. Some permit relaxation in any particular case

A and some permit relaxation in favour of a person or class of persons. In *J.C. Yadav* v. *State of Haryana,* [1990] 2 SCC 189, a three Judge Bench while dealing with Rule 22 of the relevant rules which permitted relaxation, in case of hardship, in "*any particular case*", held that the above words did not mean a particular person but meant "pertaining to an event, situation or B circumstances". The power could therefore be exercised even in favour of a group.

Two earlier decisions :

C Promotees relied upon the ruling in *Q.S. Lamba* v. *Union of India,* [1985] 2 SCC 604 but the said decision cannot, in our view, apply. There the promotees were appointed *regularly* but were allowed to occupy the posts of direct recruits, for long periods. It was held that it must be deemed that the relevant recruitment rule was relaxed in their favour and their service in such direct recruit posts could be counted. This case in our view D is distinguishable because there the promotees were regular promotees though appointed outside the promotee quota. The position before us is different because here the promotees are *ad hoc* promotees and further the issue relates to all posts, within the outside promotion quota. *Narender Chadda* v. *Union of India,* [1986] 2 SCC 157 no doubt supports the case of promotees. E There the promotees occupied not only their own quota but also the direct recruitment quota to some extent. After 15 to 20 years, the temporary service of those who had put in 4 years service in the feeder category was regularised. It was held that all the promotees were entitled to regular promotion and the seniority of all promotees (including some of those F selected by DPC) was to be reckoned from date of continuous officiation. This was done on the theory of implied relaxation of recruitment rule to all posts within and outside the promotion quota. But this case, in our view, is to be treated as an exception because the promotees there were not regularised for is 15 to 20 years (see p. 171) and it was held that the non-regularisation over such a long period violated Articles 14 and 16 G of the Constitution of India. It is no doubt true that the Constitution Bench in the *Direct Recruit Class II Engineering Officers Assistant* v. *State of Maharashtra,* [1990] 2 SCC 715 referred to *Narender Chadda's* case at p. 726 and it observed : "There is considerable force in this view also" but as we shall presently show, the recent trend of cases in this Court is H entirely different.

Recent trend of cases : Recruitment rules cannot be relaxed :

The decisions of this Court have recently been requiring strict conformity with the recruitment rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment. In *Keshav Chandra Joshi* v. *Union of India,* [1992] Suppl 1 SCC 272 the Rule permitted relaxation of conditions of service and it was held by the three Judge Bench that the rule did not permit relaxation of recruitment rules. The words 'may consult the PSC' were, it was observed, to be read as 'shall consult PSC' and the rule was treated mandatory. In *Syed Khalid Rizvi* v. *Union of India,* [1993] Suppl. 3 SCC 575 at 603, decided by a three Judge Bench, a similar strict principle was laid down. The relevant Rule - Rule 3 of the Residuary Rules (see p. 603) (para 33) in that case did permit relaxation of "*rules*" Even so, this Court refused to imply relaxation of recruitment rule and observed :

> "the condition precedent, therefore, is that there should be appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused, ... It is already held" that conditions of *recruitment* and conditions of *service* are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed".

Similarly, in *State of Orissa* v. *Sukanti Mohapatra,* [1993] 2 SCC 486, it was held that though the power of relaxation stated in the rule was in regard to 'any of the provisions of the rules', this did not permit relaxation of the rule of direct recruitment without consulting the Commission and the entire *ad hoc* service of direct recruit could not be treated as regular service. Similarly, in *Dr. M.A. Haque* v. *Union of India,* [1993] 2 SCC 213 it was held that for direct recruitment, the rules relating to recruitment through the Public Service Commission could not be relaxed. In *Jammu and Kashmir Public Service Commission* v. *Dr. Narinder Mohan,* [1994] 2 SCC 630 it was held that the provisions of the J & K Medical Recruitment Rules could not be relaxed for direct recruitment. Backdoor direct recruitments, could not be permitted. See also *Dr. Anundhati Ajit Pargaonkar* v. *State of Maharashtra,* [1994] Suppl. 3 SCC 380. In *Dr. Surinder Singh Jamwal and Anr.* v. *State of J & K,* [1996] 9 SCC 619, this Court directed the direct recruits to go before the Public Service Commission.

Decisions cited for promotees distinguishable :

A Two decisions which have been referred to by counsel for promotees have to be referred to but these can be distinguished. In *V. Sreenivasan Reddy* v. *Govt. of A.P.,* [1995] Suppl 1 SCC 572 there was an order of relaxation in favour of the promotees who were not regularised under Rule 23 of the A.P. State and Substantive Service Rules. In that case this Court felt that the B Government's order relaxing the requirement of consultation with the Commission need not be interfered with because the promotees were placed by the Government below the direct recruits. This case is therefore clearly distinguishable. (We shall be referring to this case again under Point 3). Again in *Ashok Kumar Uppal* v. *State of J & K,* [1998] 4 SCC 179 while holding that the power of relaxation could not be arbitrarily exercised, this Court C upheld the relaxation of the relevant standard prescribed for typing, in respect of five direct recruits. This was because the State Recruitment Board in that case had made a recommendation for relaxation of the requisite standard in their favour and this was accepted by the Govt. The relaxation was upheld because Government had retrospective amended the promotion rule so that D promotees could just go into promotion quota by sheer seniority rather than by selection as was the rule earlier. The five direct recruits were very close to the other selected direct recruits and were more meritorious than the promotees.

E *Summary* :

The result of the discussion, therefore, is that the wholesale regularisation by order dated 2.1.1998 (for the Electrical Wing), by way of implied relaxation of the recruitment rule to the gazetted category is invalid. It is also bad as it has been done without following the quota rule and without F consulting the Service Commission. Further, power under Rule 5 of the J & K CCA Rules, 1956 to relax rules cannot, in our opinion, be treated as wide enough to include a power to relax rules of recruitment.

On facts, relaxation bad :

G On facts, the reasons given in the Cabinet note for granting relaxation are hopelessly insufficient. In fact, the letter of the Commission date 25.11.97, shows that the Commission was prepared to give its opinion in regard to regularisation of each promotee but the Government backed out when the Commission called for the records relevant for considering suitabil- H ity for regular promotion, in our view, there can be no hardship for a person

seeking appointment or promotion to go by the procedure prescribed therefor. The relevant recruitment rule for promotion cannot itself be treated as one producing hardship. *Narender Chadda'* case must be treated as an exception and not as a rule. In fact, if such relaxation is permitted in favour of promotees then the same yardstick may have to be applied for direct recruits. In fact the J.K. Government has already started to do so and this has not been accepted by this Court in *Narender Mohan's* case and *Dr. Surinder Singh Jamwal's* case referred to above. If it is to be held that direct recruitment can also be permitted without consulting the Service Commission (in cases it is required to be consulted) there will, in our opinion, be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and fancy of Government. Such a blanket power of relaxation of recruitment rules cannot be implied in favour of the Government.

In the present case, the Government was merely carried away by sympathy to the promotees. By not making direct recruitment after 1984, by restricting direct recruits to 10% rather than permitting 20% and by deliberately promoting the Junior Engineers to the other 10% quota of the direct recruits, the State Government had definitely acted in a biased manner. There is any amount of justification for the grievance of the direct recruits that the State had passed an omnibus order on 2.1.98 regularising all *ad hoc* promotees (Electrical Wing) without consulting the Commission, by way of deemed relaxation, in a wholly arbitrary manner, counting the entire *ad hoc* service of promotion. Their illegal occupation of direct recruitment quota was not even noticed. Their eligibility or suitability was not considered. It is probable that even those who had bad ACRs were regularly promoted. The requirement of following quota for each year was not respected. The regularisations order dated 2.1.98 was therefore bad and was therefore rightly quashed by the High Court. (This declaration is confined to Assistant Engineers and Assistant Executive Engineers (Electrical Wing) - as stated under Point No. 2 of the High Court Court's judgment). We confirm the view of the High Court on this point. The result is that the promotees have to go through the Service Commission for getting into the gazetted category of Assistant Engineers. The Assistant Engineers have to go through DPC for promotion as Assistant Executive Engineers. Point 1 is decided accordingly.

Point 2 :

This point concerns the question as to whether the quota rules has

A broken down and whether there is a quota-rota rule. The High Court held it did not.

Reliance is placed by the promotees on the decision of the Constitution Bench in *Direct Recruit Class II Engineering Officers' Association* v. *State of Maharashtra,* [1990] 2 SCC 715. It laid down in proposition D & E as follows :

B

> (D) If it becomes *impossible* to *adhered* to the existing quota rule, it should be substituted by an appropriate rule to meat the needs of the situation. In case, however, the quota rule is not followed
C continuously for a number of years because it is *impossible* to do so, the inference is irresistible that the quota rule had *broken down.*
>
> (E) When the quota rules has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment,
D the appointees should *not be pushed* down below the appointees from the other source inducted in the service at a later date.

The above decision deals with a situation where the quota rule has broken down and regular promotees whose service are regularised are posted
E in the direct recruitment quota. In that event, it is permissible to count that service for purpose of seniority of the promotee. But, that is the position when the quota rule breaks down.

Quota rule has not broken down :

F On the question of breakdown of quota rule, except the lethargy of the State Government and its inaction and its not asking the Service Commission to make direct recruitment, no other cause is visible. The Cabinet note only stated that because reference to PSC would take a long time, the ad hoc services of promotees were to be regularised. The delay on part of the
G Government appears to us to be motivated for the purpose of blocking the quota of the direct recruits and giving a part of it to promotees. We have noticed that when a very belated decision was taken to make direct recruitment, the same was restricted to 10% rather than to the statutory quota of 20%. This attitude on the part of the State was not reasonable.

H Further under Rule 5(4) of the Recruitment Rules, 1978 it is provided

that in case suitable candidates are *not available* for promotion, the posts shall be filled up by direct recruitment and *vice-versa*. Thus, there must be evidence that suitable candidates were *"not available"* for direct recruitment. Such non-availability cannot be inferred when, as a fact, not even a reference is made to the commission to find out if upon advertisement, anybody will respond. Thus there is no breaking down of the quota rule.

That in such situations there can be no break down of the quota rule is clear from decided cases. In *N.K. Chauhan* v. *State of Gujarat*, [1977] 1 SCC 308, the rule said that 'as far as practicable', the quota must be followed. Krishna Iyer J. said that there must be evidence to show that effort was made to fill up the direct recruitment quota. It must be positively proved that it was not feasible, nor practicable to get direct recruits. The reason should not be 'procrastinary'. In *Syed Khalid Rizvi* v. *Union of India*, [1993] Suppl. 3 SCC 575, it was held that mere non-preparation of select list does not amount to collapse of the quota rule. In *M.S.L. Patil* v. *State of Maharashtra*, [1996] 11 SCC 361 it was held that mere omission to prepare lists did not amount to break down of quota rule.

One other significant fact is that the Cabinet note dated 19.12.1997 only States that cases of the *ad hoc* promotees' if referred to PSC, will take a *long time* for getting the necessary recommendation. But no where it is said that direct recruitment was not possible nor that direct recruits were not available or such recruitment had became impracticable. For the aforesaid reasons, we hold that the quota rule has not broken down.

Rota : no express rota rule :

We shall next refer to the contention for the direct recruits that *"rota-quota"* rule is to be applied. Before us, it is not disputed by the learned counsel for the direct recruits that in the Recruitment Rules, 1978, there is only a quota rule and that no rota rule has been expressly prescribed.

Question is whether 'rota' can be implied?

The direct recruits contend that rota is to be implied or read into the 'quota' rule. It is also argued that there has been a previous *practice* of applying a rota and that this fact stands conceded in the counter-affidavit filed by the Government in SWP. 824-B/94. Reliance is also placed on Cabinet note of December, 1997 where the view of the Law Department that quota-

A rota rule is to be applied, is referred to.

In our opinion, in view of the admission before us by all parties that there is no express rota rule, the decision of the High Court that 'rota' principle applied cannot be upheld. As held in *N.K. Chauhan* v. *State of Gujarat*, [1977] 1 SCC 308, by Krishna Iyer, J. there is no question of a B quota being necessarily 'inter-locked' with rota. It is not necessarily inscribed within every quota rule. Again in *B.S. Yadav* v. *State of Haryana*, [1991] 1 SCR 1024. Chandrachud, CJ held that a 'quota' does not imply a rota. The first part of the contention of the direct recruits is without any substance.

C

Rota cannot be brought in because only of past practice :

So far as second part of the contention that there has been previous practice, we may refer to *L. Chandrakishore Singh* v. *State of Manipur*, (1999) 7 SC 576 (p. 592). There it was held that a practice must be consistent with D Rules and that a practice not consistent with rules is not acceptable. In that case, the practice of not considering for promotion probationers and considering only confirmed candidates was, held not consistent with the Rules and could not be permitted. Similarly, in *D. Stephen Joseph* v. *Union of India*, [1997 4 SCC 753 it was held that a past practice which was *de hors* a rule E could be of no help. The question in that case was as to whether the requirement of particular years of service with graduation for promotion meant service after graduation or service during which a degree qualification was acquired. A practice of counting three years after obtaining qualification was not accepted. In that view of the matter, the second part of this contention F also goes.

Hence, it must be held that there is no rota couple with quota but that there is only a quota rule. Point 2 is decided accordingly.

Points 3:

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This point is crucial. The point here is whether the Government could have continued the *ad hoc*/stop gap service of promotees beyond six months and till regularisation without consulting the Commission and whether Government could have regularised without such consultation. Point also is whether as contended in para IX of the written submissions of the H direct recruits, the retrospective regularisation of the service of the

promotees is not permissible unless the original promotion is "in accordance with rules"? A

Ad hoc/stop-gap service beyond six months require P.S.C. consent. Government cannot regularise the period without consultation.

In our view, the High Court was right to the extent it held that the rules did not permit continuance of the *ad hoc*/stop gap promotion beyond six months and the Government could not have continued the ad hoc/stop gap promotion till regularisation without consulting the Commission. This is clear from Regulation 4(d)(ii) already referred to. The High Court was also right in holding that the Government could not have also passed any orders such as the one dated 2.1.98 of regularisation of the entire *ad hoc* service without consulting the Commission. B C

Regularisation of ad hoc/stop-gap service under Rule 23 : The contention of direct recruits and the High Court's view :

D

Here, two important findings given by the High Court have to be referred to. The High Court at one stage observed as follows: if the exercise of selection of candidates has not been done by the Commission for regularisation of *ad hoc* promotees' for substantive promotions, in that event, without consultation of the Commission, the regularisation of *ad hoc* promotions is in violation of Regularisation 4(d)(ii) framed under the constitutional provision contained in section 133 or the Constitution of Jammu and Kshmir". This would mean that the High Court in a way accepted that services of such promotees could be regularised if the Service Commission was consulted. E

F

But the High Court again stated at a later stage that the *ad hoc*/stop gap service rendered by promotees could not be regularised and for that proposition it relied upon several rulings of this Court. But those decisions, as we shall show a little later were cases where it was held that a *direct recruit* could not count his *ad hoc* service rendered prior to the date of selection. Those rulings cannot be applied, as shown below, to the cases of promotees for holding that *ad hoc* stop gap service of the promotees could not be regularised. If the High Court meant that such service could not be regularised under Rule 23 at least to the extent when vacancies arose in the promotee quota, subject to eligibility and suitability of the promotees based on ACRs etc. - we are of the opinion, for reasons to be given below, that the said G H

A view of the High Court is wrong and runs counter to overwhelming authority of this Court that such service of promotees could be regularised in the posts relatable to the promotee quota provided the PSC/DPC was consulted and subject to eligibility etc.

B Perhaps based on the above view of the High Court, the direct recruits have raised a point in their written submissions in para ix as follows :

> "Even where rules permit antedating of probation, the service rendered in stop-gap arrangement cannot be counted towards seniority. Discretion to antedate- appointment can be exercised only
C where initial appointment is according to rules. Even a rule that permits regularisation of service Retrospectively, does not entitle counting of stop gap service towards seniority."

Rules relating to retrospective regularisation permit regularisation of ad hoc/stop gap service of promotees :

D

For the purpose of deciding the point, it is necessary to refer to other rules relevant on the question of regularisation. Rule 2(e) of the Recruitment Rules, 1978 defines "Member of Service" as a person appointed to a post in the service *under* the said rules. Under rule 5 of the said Rules which deals
E with "Qualification and method of recruitment", it is stated in sub-clause (1) that one must possess the qualifications stated in the schedule for appointment or promotion. Clause (2) refers to 'appointment' to a service to be made by (a) direct recruitment. (b) by promotion/selection and (c) partly by direct recruitment and partly by promotion. Rule 8 of the 1978 recruitment Rules
F deals with 'probation' and states that persons 'appointed' against substantive vacancies, whether directly or by promotion, to any class, or category in the service shall be on probation for two years and their confirmation shall be regulated by the provisions of the J & K (Civil Services (CCA) Rules, 1956. Rule 11(1) of the same Rules refers to seniority to be regulated by J & K Civil Services (CCA) Rules, 1956. The second proviso to Rule 11(3) of the 1978
G Rules requires that "seniority of Assistant Engineers appointed by direct recruitment and by promotion shall, *in a particular year*, be determined, in the ratio fixed for direct recruitment and promotion". It is to be noticed that these Recruitment Rules, 1978 for Engineers do not speak separately of recruitment by transfer. They only speak of direct recruitment and promotion.
H Even the schedule when it deals with 60% quota for graduate Junior

Engi-neers and 20% quota for non-graduate, the word used is 'promotion'. A

But under the J & K Civil Service (CCA) Rules, 1956, Rule 2(e) defines 'member of service' as a person *holding* or *appointed* to a whole time pensionable post. Rule 2(f) defines 'period of probation' of a member of service as the period prescribed in the rules. Rule 2(g) defines 'probationer' as a person appointed to a service who has not been declared to have B satisfactorily completed his probation. Rule 2(h) defines 'promotion' as the "appointment" of a member of a service or class or service in any category or grade, to a higher category or grade of such service or class. Rule 2(i) defines a person "recruited direct' as one recruited otherwise than by promotion or by transfer. Rule 2(j) defines Recruitment by transfer as one C where at the time of his 'appointment' thereto, he is either a member/ probationer in another service. Rule 9 refers to 'first appointment' as (a) one by promotion or by transfer and (b) by direct recruitment or (c) partly by (a) or partly by (b). Rule 14(1) deals with 'temporary appointment' not exceeding three months at a time and under Rule 14(3), the temporary D appointee is to be replaced by a member of the service or a candidate qualified and considered fit to hold the post under the 1956 Rules. Rule 14(4) says that a temporary appointment will not be regularised as a probationer nor will he have any preferential claim for future appointment. Rule 15, which follows rule 14 permits commencement of probation from an anterior date and it reads as follows : E

> "*Rule 15:* If such person is subsequently appointed to such service, class or category in accordance with these rules, he shall commence his probation therein from the date of such subsequent appointment or *from such earlier* date as may be determined by the Minister-in-charge." F

Thus a person temporarily appointed under Rule 14 can be appointed to the service according to rules from an anterior date. Rule 20 states that no person shall be eligible for confirmation as a member of a service or class, until he has been on probation in such service or class continuously or in G the aggregate for a period of two years. Rule 22 deals with declaration of completion of probation. Rule 23 is again important and deals with 'appointment of Members' with retrospective effect. It reads as follows :

> "*Rule 23 :* (1) A probationer shall, if a substantive vacancy in the permanent cadre of the category for which he was selected exists, H

A be *appointed* to the service at the earliest possible opportunity in the order of seniority, and if such vacancy existed from a date previous to the issue of the order of appointment, he may be so appointed with *retrospective effect* from such date or, as the case may be, from such subsequent date from which he was continuously on duty as a member of the service."

B

Under Rule 23, whenever probation is commenced in respect of an officer, it is permissible to appoint him to the service with retrospective effect from such date from which the person was "continuously on duty as a member of the service". Read with Rule 2(e) which define `member of C service' it means the time from which he was "continuously *holding* the pensionable post". Rule 23 does not make any distinction between different modes of recruitment. It is well settled that in the case of a direct recruit, the probation commence only from a date after his selection and he can hold a permanent vacancy only after such selection. According to service jurispru- D dence (see in fact, discussion under Point 4), a direct recruit cannot claim appointment from a date much before his selection. So far as a promotee and also one who is recruited by transfer, are concerned, before such persons are appointed as members of the service under Rule 23, first their probation must commence. Then such person becomes a probationer for purposes of rule 23. Once he is on probation, and if a substantive vacancy in the permanent cadre E existed in which the promotee or a recruitee by transfer can be accommodated, and if such a vacancy has arisen from a date previous to the issue of the order of appointment (i.e. appointment by promotion or transfer) then under Rule 23 had may be appointed to the service (i.e. regularly) with retrospective effect from such anterior date (or, as the case may be, from such F subsequent date) from which (he has been continuing on duty on a non-pensionable post [see 2(e)] defining `member of service'). This period can certainly be one that a person holds in a stop gap or *ad hoc* manner. The order of `promoting a person in the service' regularly from an anterior date and the order of probation from an anterior date can be simultaneously G passed. That is how under Rule 23, a person holding a temporary, stop-gap or *ad hoc* appointment beyond three months can become a probationer and get appointed regularly to the service with retrospective effect.

Then comes the Rule of '*Seniority*'. Seniority is to be determined by the 'date of first appointment' to such service, class or category or grade. It H reads as follows :

"*Rule 24 - Seniority :* (1) The seniority of a person who is subject to these rules has reference to the service, class, category and grade with reference to which the question has arisen. Such seniority shall be determined by the *date of first appointment* to such service, class, category or grade, as the case may be." A

Note 1 : ..... B

Interpretation : The words "date of first appointment" occurring in the above rule will mean the date of first substantive appointment, meaning thereby *the date of permanent appointment or the date of first appointment on probation on a clear* vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and/or tests. C

Provided that the *inter-se* seniority of two or more persons appointed to the same service, class, category or grade *simultaneously*, will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined; D

(a) in the case of those promoted by their relative seniority in the lower service, class, category or grade; E

(b) if the case of those recruited direct (except those who do not join their duties when vacancies are offered to them) according to the positions attained by and assigned to them in order of merit at the time of competitive examinations or on the basis of merit and ability and physical fitness etc., in case no such examination is held for the purpose of making selections; F

(c) as between those promoted and recruited direct, by the *order in which appointment* have to be allocated for promotion and direct recruitment as prescribed by the rules. G

Note.....

It has to be noticed that the interpretation clause below Rule 24 is very wide and under that provision, seniority of a promotee depends on the date of the commencement of probation on a clear vacancy. Probation can be H

A commenced in the case of a person promoted or recruited by transfer from the date of existence of a clear vacancy in the promotee/transfer quota and depending upon his eligibility, suitability based on ACRs.

Rule 25 deals with temporary and regular promotions. It reads as follows :

B

"(1) All promotions shall be made by the appointing authority.

(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and shall be subject to the passing of any tests that Government may C prescribe in this behalf, seniority being considered only where the merit and ability are approximately equal.

(3) .....

D (4) where it is necessary in the public interest owing to an emergency which has arisen and could not have been foreseen, to fill immediately a vacancy by promotion from a lower category, and where promotion in accordance with these rules would involve undue delay or expenditure or cause administrative inconvenience, the appointing authority E may promote a person otherwise than in accordance with these rules *temporarily until* a person is *promoted in accordance with these rules*, but such temporary promotion shall in no case exceed three months on each occasion.

(5) A person promoted under sub-rule (4) shall not be entitled by F reason only of such promotion to any preferential claim to future promotion."

A point has been raised by the direct recruits that there is no Rule (corresponding to Rule 15) for commencing probation retrospectively in the G case of a person promoted or recruited by transfer temporarily under rule 25.

It is true that while Rule 15 permits probation to be commenced from an anterior date in the case of one 'appointed' temporarily there is no such clause in Rule 25 dealing with 'promotions'. That does not, in our opinion, mean that in respect of a person temporarily appointed by transfer, probation H cannot be commenced from an anterior date. In our view, this power is

implicit in Rule 23 itself when it speaks of a probationer being appointed as a member of a service with retrospective effect. Once a promotee or recruitee by transfer is appointed on probation, it is permissible to appoint him under Rule 23 as a member of the service from an anterior date when a substantive vacancy existed in his quota. It is then obvious that such power to make a retrospective appointment of a member implies a power to commence probation of such person from an anterior date when a clear vacancy existed in his quota. We cannot imagine that the Rule-making authority did not visualise delays in regularisation of *ad hoc* or stop-gap or temporary service rendered by promotees or those recruited by transfer and kept in mind delay only in cases of appointments under Rule 14.

Thus, the stop-gap/*ad hoc* or temporary service of a person appointed by transfer as an Assistant Engineer or by promotion as an Assistant Executive Engineer can be regularised through PSC/DPC from an anterior date in a clear vacancy in his quota, if he is eligible and found suitable for such transfer or promotion, as the case may be, and his seniority will count from that date.

Should the services proposed to be reguarised have been rendered according to rules?

We then come to the crucial point (point IX in written submissions) raised by the direct recruits that if the appointment of a promotee as Assistant Engineer is not according to rules but is a stop gap or *ad hoc* appointment and if it lasts more than 6 months, it requires consultation with the Commission under Regulation 4(d)(ii) of the P.S.C. Regulations and if there is no consultation such service is '*not according to rule*' and cannot be regularised, i.e. even by consulting the Service Commission at a later stage, and in spite of such service being rendered within promotion quota, subject to eligibility and suitability.

Plea is not correct on the face of it :

We are unable to hold that the entire service of a promotee continued beyond 6 months without consulting the Commission must be treated as non-est and should stand wiped out altogether and that only service rendered in accordance with rules can be retrospectively regularised.

A On the face of it, there is a contradiction in the plea for if service to start with is in accordance with Rules, it will not come under Rule 25 at all. It will be regular to start with and there is no need for regularisation. The need arises for regularisation only if the service of the promotees is not according to rules to start with.

B *Regulation 4(d)(ii) does not refer to any penal consequences:*

Regulation 4(d)(ii) of the J.K. Public Service Commission (Limitation of Functions) Regulations, 1957 merely states that it shall not be necessary for the commission to be consulted on the suitability of candidates for

C "officiating promotions or transfer to any service or post when at the time of making the promotion or transfer there is reason to suppose that the officiating promotion or transfer will be for not more than *six months*"

D This Regulation therefore fixes the period of service of such officiating promotee or transferee which need not go before the Commission. It does not however say that if the Commission is not consulted before six months, or where the Commission when consulted within six months does not pass an order of extension before the period of six months, the said service is to be treated as non-est. Further, in our view, E as already stated, such service can be regularised under Rule 23 of the J.K. (CCA) Rules, 1956, by commencing the probation retrospectively and by appointment to the service from a date when a substantive vacancy was available within the quota. It is only in respect of the period of service rendered outside the quota that retrospective regular promotion/recruitment F by transfer cannot be made in respect of that part of the service. That would mean that only such service which is rendered by the promotee/ transferee-recruitee within his quota, can be regularised. Similarly if he is found not eligible, nor fit, nor suitable - though posted in a post within quota-that service cannot be counted. It is not the employees' fault if the State does not take steps to refer the question of continuance beyond six G months to the P.S.C. for years. It is one thing to say that the *ad hoc* service of a promotee does not count for seniority till regularised after consulting the Service Commission and another thing to say that it cannot, under any circumstances be regularised. In as much as the consequence of non-consultation with the Commission is not stated in the Regulation 4(d)(ii) H of the P.S.C. Regulations 1957, and no penal consequences are mentioned,

such service within quota subject to eligibility and suitability cannot be ignored when power is exercised under Rule 23. A

Overwhelming authority of this Court to say that ad hoc/stop gap service of promotees can be regularised :

This principle is supported by ample authority. Procedural inaction towards promotees, it has been held, can be "*rectified*". This is explained in the three Judge Bench case in *State of West Bengal* v. *Aghore Nath Dey*, [1993] 3 SCC 371. In that judgment propositions A and B laid down in *Direct Recruit* Case [1990] 2 SCC 715 were explained by Verma, J. (as he then was). It was pointed out that proposition A where it was held that the ad hoc service would not count was one where the same was stop gap (i.e. and remained as such). In proposition B it was said that *ad hoc* service could count in certain situations such as where there was only a `procedural' irregularity in making appointments according to Rules. In such a situation, the irregularity can be subsequently `rectified'. In such a case such *ad hoc/* stop-gap or temporary service cold be counted. Again in *Syed Khalid Rizvi's* case, it was held by Ramaswamy, J. speaking for the three Judge Bench that proposition A and B in *Direct Recruit* case had to be read with para 13 therein. Similarly, in *I.K. Sukhija* v. *Union of India*, [1997] 6 SCC 406, Nanavati, J. explained propositions A and B by reference to *Aghore Nath Dey's* case [1993] 3 SCC 371, referred to above. B C D E

The Andhra Pradesh cases are based on similar rule: such service can be regularised with retrospective effect :

Apart from the general principle of law as stated above, there are ruling of this Court on almost identical rules which go against the contention raised by the direct recruits. Rules identical to Rules 15 and 23 of the J.& K. (CCA) Rules, 1956 have come up for consideration in this Court in cases arising from Andhra Pradesh. These decisions are obviously binding on us. A case directly in point is the one in *Desoola Rama Rao* v. *State of A.P.*, [1988] Suppl. SCC 221. The relevant rule in that case [Rule 23(a)] is similar to Rule 15 and Rule 23 of the J&K (CCA) Rules of 1956. Rule 23(a) of the AP State and Subordinate Services Rules read as followings: F G

> "*Rule 23(a)* If a person having been appointed temporarily under sub-rule (a) or sub-rule (c) of Rule 10 to a post borne on the cadre H

A of any service, class or category or having been appointed to any service, class or category otherwise than in accordance with the rules governing appointment thereto is subsequently appointed to any service, class or category in accordance with the *rules*, he shall commence his probation from the date of such subsequent appointment or *from such earlier date* as the appointing authority may determine."

We shall examine the facts closely. The respondents 3 and 4 there were temporarily promoted as Assistant Engineer on 14.10.1959 and 19.5.60 respectively. The appellant was directly recruited on 18.7.66 as Assistant Engineer. Under rule 23(a) the services of the respondents 3 and 4 were retrospectively regularised by commencing probation from 19.5.61 in both cases by order of the Chief Engineer dated 3.7.67. This Court held that the respondent-promotee officers would be senior to the appellant even though the appellant was appointed substantive as a direct recruit on 18.7.66 and the respondents were on that date working only in a temporary capacity from 14.8.59 and 19.5.60 but once their services were regularised by order dated 3.7.67 (passed no doubt after 18.7.66) it could take effect from anterior dates. It will be noticed that even in the above case, the regularisation was not of the entire temporary service of the promotees from 14.8.59 and 19.5.60 but only from 19.5.61 in both cases. In other words when the posting Assistant Engineers were filled, based on their qualifying service and availability of vacancies in their quota, part of the temporary service before 19.5.61 was lost and was not counted.

Again, in respect of the same Rule 23(a) of the Andhra Pradesh Rules, this Court observed in *State of A.P.* v.*K.S. Muralidhar*, [1992] 2 SCC 241 that there can be no objection under the said rule for retrospective regularisation.

Similar is the position in *M. Janardhan* v. *State of A.P.*, [1994] Suppl. 3 SCC 298. There adverting to Rule 37(e) of the A.P. Rules which also permitted regular promotion from an 'anterior date', (like Rule 23 here) it was held that the said retrospective promotions were rightly upheld by the Tribunal.

Cases from other States Support promotee's regularisation with retrospective effect :

Apart from cases arising from Andhra Pradesh the position appears to be the same as per the cases arising from other States, so far as promotee's

ad hoc service is concerned. In *Baleshwar Das* v. *State of U.P.*, [1981] 1 SCR 449, it was observed (at p.464) that officiating promotees are to be given dates by the Service Commission for counting seniority. In *B.S. Yadav* v. *State of Haryana*, [1981] 1 SCR 1024; it was said that the promotees have to be confirmed in their quota if found fit and qualified and when vacancies arose in their quotas. In *A. Janardhana* v. *Union of India*, [1983] 2 SCR 636 (at p.961) it was observed that the seniority of the promotees was to count from the date of occurrence of vacancy in their quota. In *G.P. Doval* v. *Chief Secretary, Government of U.P.*, [1984] 4 SCC 329, it was held that subsequent appointment by the Public Service Commission to the temporary appointments will relate back to the initial dates or appointment for purpose of seniority on basis of rule of continuous officiation and the seniority could not be reckoned only from the date of approval or selection by the Commission. In *Narender Chadda* v. *Union of India*, [1985] 2 SCC 157, it was held that promotees were first to be regularised from dates of occurrence of vacancies/ eligibility. The initial appointment though not according to rules, the said service could not be ignored. In *A.N. Pathak* v. *Secretary to the Government*, [1987] Suppl. SCC 763, it was held that the promotees had to be inserted at places reserved for them as per quota. In *Delhi Water Supply & Sewage Disposal Committee* v. *R.K. Kashyap*, [1989] Suppl. 1 SCC 194, it was held that once regularisation was made by the PSC/DPC, the said service could not be ignored.

As to when post of ad hoc/stop gap service of promotees cannot be regularised: if outside quota or not eligible or suitable :

In some cases, a distinction is made between two parts of the *ad hoc/* stop gap service or promotees, one which can be regularised and the other which cannot be regularised. In *Keshav Chandra Joshi* v. *Union of India*, [1992] Suppl. 1 SCC 272, it was held that previous promotee would get regularisation from date of occurrence of vacancy in promotion quota. *Before that, it would be fortuitous.* Of course, excess promotees could not claim seniority if the quota rule had not broken down because they occupy the seats of direct recruits. In *Rajbir Singh* v. *Union of India*, AIR (1991) SC 518, the *ad hoc* promotion was in 1975 and the subsequent regularisation was in 1986 and it was held that the period *ad hoc* service could be counted. In *A.N. Sehgal* v. *Raje Ram Sheoran*, [1992] Suppl. 1 SCC 304, it was held that the promotees whose services were regularised could count their earlier service from the date of availability of a post within their quota but the *earlier period*

A *between the starting point of ad hoc promotion and the date of occurrence of the vacancy could not be counted.* In *S.L. Chopra* v. *State of Haryana*, [1992] Suppl. (1) SCC 391, it was held that promotees service would count from date of availability of post within quota and service before that dates would be fortuitous. In *Syed Khalid Rizvi* v. *Union of India*, [1993] Suppl. 3 SCC 575, it was held that the service of promotee would count from date of allotment to select list *but the period prior thereto would not count.* In *Keshav Dev* v. *State of U.P.*, [1999] 1 SCC 280, Srinivasan J. held, on a review of case law that seniority of promotees would count from the dates fixed within the quota by DPC. (In this case, a good number of judgments which were relied upon before us by direct recruits were distinguished).

Thus, there is overwhelming authority of this Court to hold that *ad hoc*, stop gap service could be regularised from an anterior date after consulting the Service Commission from the date of vacancy in promotee quota, after considering fitness, eligibility, suitability and ACRs. Therefore, the *ad hoc*/stop gap service rendered by promotees beyond six months and without the consent of the Public Service Commission as per Regulation 4(d)(ii) cannot be treated as *non-est.* It can be regularised later after consulting the Commission in respect of posts in the promotion quota and subject to eligibility and suitability based on ACRs. etc. Only the period rendered outside quota or the period rendered within quota when the promotee was not eligible or found fit has to be excluded.

Unfortunately, the High Court as well as the direct recruits have applied wrong rulings to the case of promotees and ignored the overwhelming authority, referred to above, in favour of promotees. We shall now refer to these aspects in detail.

Cases relied upon by direct recruits - not applicable :

The direct recruits have strongly relied upon the decision in *V. Sreenivasa Reddy* v. *Govt. of A.P.*, [1995] Suppl. 1 SCC 572. But this decision cannot be of any help to them. In that case Rule 10 and Rule 23 of the Andhra Pradesh State and Subordinate service Rules were referred to. It was pointed that the promotee's temporary service under Rule 10 (i.e. service rendered. in a post to which the officer was not appointed according to Rules), could not be counted on facts, because there was no order of retrospective regularisation. In fact, this Court accepted that if regularised

under Rule 23 of the A.P. Rules, the temporary appointees could have been regularised from an anterior date. (This Court then referred to certain rulings which said that direct recruits could not count *ad hoc* service rendered by them before their regular selection). On facts, this Court held that the Government had relaxed the rule regarding P.S.C. consultation but had placed the promotees below the direct recruits and this need not be interfered with. This case far from supporting the direct recruits, supports the promotees.

Similarly, *K. Siva Reddy* v. *State of A.P.*, [1988] 3 SCR 18 = [1988] Suppl. SCC 225 cannot also be of any help. It was there held that the retrospective regularisation cannot be resorted to under Rule 23(a) of the Andhra Pradesh Rules if the Service is rendered by the promotee is in a post within direct recruit quota. The promotees were to be confined to their quota. This case is distinguishable.

Again, *Ramedhra Singh* v. *Jagdish Prasad*, [1984] Suppl. SCC 142 is distinguishable in as much as it was there held that under executive power, retrospective regularisation cannot be made. There it can be made after consulting the Commission is well settled by various decisions. This ruling too does not advance the case of the direct recruits.

Principle that only service "according to Rules" can be regularised applies to direct recruits and not to promotees:

Next, the direct recruits and the High Court have relied upon several rulings which say that direct recruits cannot seek benefit of *ad hoc* service rendered before their regular appointments.

These rulings cannot be applied to the case of promotees. In fact the principle laid down in these cases is consistent with principles in service jurisprudence so far as the *ad hoc* service rendered by direct recruits before the date of their regular selection is concerned. Their service counts only from date of regular appointment according to rules and any *ad hoc* /stop gap service rendered before regular selection cannot count for seniority.

The direct recruits relied upon *A.P.M. Mayan Kutty* v. *Secretary*, [1977] 2 SCC 360. In that case, the petitioner was appointed in the 1950 temporarily under Rule 10(a)(i) of the Rules (which is similar to the *ad hoc* appointment under Rule 14 and Rule 25 in J. & K. Rules and rule 10(a)(i)

A of the AP Rules) but was directly recruited only in 1954. It was held that the pre 1954 service could not be counted. Likewise in *State of T.N.* v. *E. Paripoornam*, [1992] Suppl. 1 SCC 420, the petitioner in the High Court was appointed temporarily under Rule 10(a)(i) but was recruited much later under the rules through PSC. The PSC gave him a rank. It was held that B his seniority would be as per the rank and not from date of temporary appointment. *A.P.M. Mayan Kutty's* case was followed. *P.D. Aggarwal* v. *State of U.P.*, [1987] 3 SCC 622 was one where it was held (see para 26-28) that the *ad hoc* service of the officer who was later directly recruited in consultation with the PSC, could not count as it was not regularised service. Their seniority would count only from the date they become C members of the services, even if they were qualified earlier on date of temporary appointment (see p.646). *Masood Akhtar Kan* v. *State of M.P.*, [1990] 4 SCC 24 is also a case of the direct recruit and it was held that his previous service before regular selection by PSC could not count. *Vijay Kumar Jain* v. *State of M.P.*, [1992] Supp. 2 SCC 95 is similar. In *State* D *of Orissa* v. *Sukanti Mohapatra*, [1993] 2 SCC 486, the exercise of power of relaxation by the Government to count the *ad hoc* service of direct recruit prior to PSC recruitment was held bad and the order, to that extent, was quashed. *Dr. Arundhati Ajit Pargaonkar* v. *State of Maharashtra*, [1994] Suppl. 3 SCC 380 is also a case where *ad hoc* service of employee before E direct recruitment by PSC was held not liable to be counted. In *E. Ramakrishnan* v. *State of Kerala*, [1996] 10 SCC 565 the pre-recruitment service of 13 years was held not to be counted. All these cases cited relate to *ad hoc* service of direct recruits before selection and are therefore distinguishable and could not have been relied upon to deprive the promotees of their *ad hoc* service.

F *Promotees cannot seek regularisation of ad hoc service in certain situations:*

We shall next refer to another set of cases relied upon by the direct recruits where, on facts, the promotees were not given benefit of *ad hoc*/stop gap service. Here the service rendered by the promotee was either outside G quota or the candidates were not eligible by the date the order of regularisation was passed or were not having the required experience. In *C.K. Antony* v. *B. Muraleedharan*, [1998] 6 SCC 630, arising from the Kerala State has some special features. There was a rule similar to Rule 23 of the J & K Rules and Rule 23(a) of the Andhra Pradesh Rules. The said rule permitted retrospective regularisation of the promotees from anterior dates H but this rule stated that the said regularisation should be "without prejudice

to seniority". It was no doubt interpreted that the rule meant that the seniority of direct recruits could not be affected. The question as to when it could be said that the seniority of a direct recruit would be prejudiced, was not elaborated. Whether the case of direct recruits would be prejudiced even if the promotees were given seniority from an anterior date upon a post within their quota, was not decided. Further, on facts, the earlier *ad hoc* promotion of the promotees was not against cadre posts but was on the excess quota. Obviously, it could not count for seniority in view of *Direct Recruit's* case. Any regularisation of such service in a direct recruitment post would definitely prejudice the seniority of direct recruits. In view of the above peculiar features, the case is clearly distinguishable. Similarly, the decision in *D.N. Agarwal* v. *State of MP*, [1990] 2 SCC 553, cannot help. There it was held that the benefit of retrospective regularisation for promotees could not be granted but this was because the promotees lacked the requisite years of experience and were not eligible. *B.N. Nagarajan* v. *State of Karnataka*, [1979] 3 SCR 937 the promotees service from1.11.1956 was regularised and it was held that the order of regularisation by government w.e.f. 1.11.1956 by an executive order was not tenable because the probation Rules came in 1958 and in fact, the promotions were partly within quota of direct recruits. The case in *State of Bihar* v. *Akhouri Sachindra Nath*, AIR (1991) SC 1244, is again distinguishable because there the promotees were not even officiating in the post on 22.2.61 and were not even born in the cadre. These cases are all distinguishable.

Unfortunately these rulings have been wrongly relied upon by the direct recruits or by the High Court, to hold that promotees are not entitled to benefit of the *ad hoc*/stop gap service.

Summary :

Summarising the position, we therefore hold that the *ad hoc*/stop gap service of the promotees cannot be treated as *non-est* merely because P.S.C. was not consulted in respect of continuance of the *ad hoc*/stop gap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no 'rota' rule applicable. The 'quota' rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies

A within their quota, after due regularisation. Such service outside promotee quota cannot count for seniority. Service of promotees which is regularised with retrospective effect from date of vacancies within quota counts for seniority. However, any part of such *ad hoc*/stop gap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of promotees or transferees is to be fixed as per quota and from B date of commencement of probation/regular appointment as stated above. Seniority of direct recruit is from the date of substantive appointment. Seniority has to be worked out between direct recruits or promotees for each year. We decide point 3 accordingly.

C *Point 4 :*

direct recruits cannot claim appointment from date of vacancy in quota before their selection :

We have next to refer to one other contention raised by the respond- D ents-direct recruits. They claimed that the direct recruitment appointment can be antedated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct E recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under direct recruitment quota.

This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in Service Jurisprudence, a direct recruit F can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service. This principle is well settled. In *N.K. Chauhan* v. *State of Gujarat*, [1977] 1 SCC 308 (at p.321) Krishna Iyer, J. stated :

G > "later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service."

Again, in *A. Janardhana* v. *Union of India*, [1983] 2 SCR 936, it was held that a later direct recruit cannot claim seniority from a date before his birth H in the service or when he was in school or college. Similarly it was pointed

out in *A.N. Pathak* v. *Secretary to the Government*, [1987] Suppl. SCC 763 (at p.767) that slots cannot be kept reserved for the direct recruits for retrospective appointments.

What we have stated in points 1 to 4 in respect of *ad hoc* Assistant Engineers applies to *ad hoc* Assistant Executive Engineers, to the extent of the principles laid down, are applicable. We say this in view of point 2 that was framed by the High Court covering both the cadres. We hold on Points 1 to 4 as stated above.

Point 5:

The relief :

In view of our decision on Points 1 to 4, the appeals will be governed by our findings on points 1 to 4. We further direct as follows. The Public Service Commission and the Government will complete the exercise of regular appointment of the promotees - Assistant Engineers and Assistant Executive Engineers within four months from today. Till such time the stay of promotions granted by this Court will operate. After passing orders under Rules 15 or 23, as the case may be, and in conformity with quota and year-wise adjustment of quota, a fresh provisional seniority list will be prepared in the category of Assistant Engineers. Objections will be invited and the final seniority lists will be issued within two months of last date fixed for filing objections. The stay of promotions granted by us will stand vacated once the provisional seniority list of Assistant Engineers is prepared. Promotions can be made, subject to review. After receiving objections, the provisional list shall be finalised as stated above and a final seniority list will be issued. Pending issue of final seniority list of Assistant Engineers there will be no reversions of Assistant Engineers already promoted as of today. Once the list is finalised, there will be a review of all promotions to the category of Assistant Engineers in respect of all promotions made to that category. Thereafter, a provisional seniority list will be issued in the category of Assistant Executive Engineers within one month of the final list of the Assistant Engineers and objections will be called for. The stay granted by us of further promotions of Assistant Executive Engineers shall then stand vacated. There will be no reversions of Assistant Executive Engineers already promoted till final seniority list of Assistant Executive Engineers is published. Their final list will be published within two months after the last date for filing objection to the provisional list.

certain general directions to the State of J&K for the future :

Apart from the above specific directions, we think this is an occasion to issue certain general directions to the State of Jammu & Kashmir. As pointed out earlier, the State of Jammu and Kashmir has been flouting basic rules of recruitment by granting relaxation of the rules of direct recruitment as also the rules requiring consultation with PSC/DPC for promotions/ recruitment by transfer. In order to ensure that this is not done in future, the following directions shall also issue.

(A) The State of Jammu and Kashmir shall appoint a high level Committee within a month from today to go into the question as to whether in any department in Government service, direct recruitment of existing vacancies has not been made and if there was unreasonable delay, the State will consider making direct recruitment expeditiously depending on the needs in the service and other relevant factors. But it will ensure that no promotees are put in the direct recruitment quota, temporarily or on stop gap or *ad hoc* basis unless simultaneously proceedings are initiated for direct recruitment through the Service Commission. The Committee will recommend in what manner the direct recruitment could keep pace with promotions as contemplated by rules.

(B) Similar, the Committee will find out in which department the *ad hoc*/stop-gap promotees are languishing without their cases being referred to the Service Commission/DPC for regularisation within their quota.

(C) The State of Jammu and Kashmir Will ensure that no relaxation of basic recruitment rules is made for direct recruitment through P.S.C., or for purposes of regular promotions/recruitment by transfer. The recommendations of the Committee referred to above may be considered by Government and implemented in accordance with the rule and in accordance with law without unreasonable delay.

The appeals are disposed of as stated above. There will be no order as to costs.

K.K.T. Appeals disposed of.