

A HON'BLE HIGH COURT OF JUDICATURE AT ALLAHABAD –  
THROUGH REGISTRAR GENERAL

v.

THE STATE OF UTTAR PRADESH & ORS.

B (Civil Appeal No.3356 of 2018)

MARCH 28, 2018

**[ADARSH KUMAR GOEL AND R. F. NARIMAN, JJ.]**

C *U.P. Higher Judicial Service Rules, 1975 – Determination of seniority of promotees and direct recruits – Earlier, in absence of determination of vacancies for the period from 2002 till 2007, neither promotees were appointed in spite of availability of vacancies and eligibility nor direct recruitments were made – After the amendment of the Rules in 2007, recruitment process was initiated, and vacancies were worked out and advertisements were issued – Both*  
D *promotees and direct recruits were appointed – After the appointments, the dispute of seniority cropped up – The direct recruits claimed that they were entitled to be given seniority as per Rota system laid down under the Rules and they had been wrongly placed junior to the promotees – The promotees claimed that their seniority should commence from the date of accrual of vacancy,*  
E *date of their eligibility, without their passing of the suitability test which was retrospectively prescribed for the first time after the amendment of the 2007 Rules – Held: The High Court was correct in taking the view that suitability test was required in terms of judgment rendered in All India Judges Association case and under*  
F *the amended Rules applicable retrospectively – Promotees could not be given promotion without suitability test nor could they claim seniority without the same – They were rightly given seniority from their appointments – Insofar as Quota-Rota rule is concerned, it is a mandatory requirement of the Rules – The said requirement has*  
G *however to be seen in the peculiar fact situation – On facts, the issue of determination of vacancies was embroiled in continuous litigation – The Quota-Rota rule could not be applied in the absence of determination of vacancies – The rule provided for seniority of the promotees to be fixed from the date of availability of vacancy but such seniority could also not be given in the present fact situation*  
H *– If Rota rule is applied, it will work serious prejudice to the*

*promotes – Thus, the Rules will have to be given pragmatic interpretation – If it becomes impractical to act upon rule fixing quota from two sources, it is no use insisting that the authority must give effect to such a rule – Every effort has to be made to respect a rule but if it is not feasible to enforce it, the rule has to be given a practical interpretation – Thus, interference by the High Court with the seniority given to the promotees above the direct recruits without following the rotation principle cannot be sustained.*

**Disposing of the matters, the Court**

**HELD: 1.** The first issue raised is whether the promotees recruited in the year 2008/2009 are entitled to seniority prior to their selection on the ground that no suitability test was required prior to 9<sup>th</sup> January, 2007 and retrospective effect to such requirement was illegal. The view taken by the High Court is correct that suitability test was required in terms of judgment of this Court in *All India Judges’* case and under the amended Rules applicable retrospectively. Thus, the promotees could not be given promotion without suitability test nor could they claim seniority without the same. They have been rightly given seniority from their appointments. [Para 29] [1111-B-D]

**2.** With regard to the Quota-Rota rule, there is no doubt that this is a mandatory requirement of the Rules. The said requirement has however to be seen in the peculiar fact situation. The issue of determination of vacancies was embroiled in continuous litigation. The Quota-Rota rule could not be applied in the absence of determination of vacancies. The suitability test though validly laid down could not be held till 2008. No promotion could be given in absence of suitability test. The rule provided for seniority of the promotees to be fixed from the date of availability of vacancy but such seniority could also not be given in the present fact situation. If rota rule is applied, it will work serious prejudice to the promotees. Thus, the Rules will have to be given pragmatic interpretation. If it becomes impractical to act upon rule fixing quota from two sources, it is no use insisting that the authority must give effect to such a rule. Every effort has to be made to respect a rule but if it is not feasible to enforce it, the rule has to be given a practical interpretation. Thus, interference by the High Court with the seniority given to the

- A **promotees above the direct recruits without following the rotation principle cannot be sustained. [Para 30] [1111-D-H]**

*All India Judges Association v. Union of India* (2002) 4 SCC 247 : [2002] 2 SCR 712 – followed.

- B *V.K. Srivastava v. Govt. of U.P.* (2008) 9 SCC 77 : [2008] 13 SCR 24; *R.K. Sabharwal v. State of Punjab* (1995) 2 SCC 745 : [1995] 2 SCR 35; *Direct Recruit Class-II Engineering Officers' Association v. State of Maharashtra* (1990) 2 SCC 715: [1990] 2 SCR 900 – relied on.

- C *P. K. Dixit v. State of U.P.* (1987) 4 SCC 621 : [1988] 1 SCR 398; *O.P. Garg v. State of U.P.* (1991) Supp. (2) SCC 51 : [1991] 2 SCR 424; *Sri Kant Tripathi v. State of U.P.* (2001) 10 SCC 237 : [2001] 2 Suppl. SCR 635; *Ashok Pal Singh v. U.P. Judicial Services Association* (2010) 12 SCC 635 : [2010] 12 SCR 25; *Het Singh Yadav v. State of U.P.* Civil Appeal No. 5270 of 2012 decided on 15.9.2016 – referred to.

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**Case Law Reference**

- |   |  |             |         |
|---|--|-------------|---------|
|   | [2002] 2 SCR 712   | followed    | Para 1  |
|   | [1988] 1 SCR 398   | referred to | Para 2  |
|   | [1991] 2 SCR 424   | referred to | Para 2  |
| E | [2001] 2 Suppl. SCR 635                                      | referred to | Para 2  |
|   | [2010] 12 SCR 25   | referred to | Para 2  |
|   | [2008] 13 SCR 24   | relied on   | Para 2  |
|   | [1995] 2 SCR 35  | relied on   | Para 10 |
|   | [1990] 2 SCR 900   | relied on   | Para 30 |
| F | CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3356 of 2018 |             |         |

From the Judgment and Order dated 30.06.2017 of the High Court of Judicature at Allahabad Lucknow Bench, Lucknow in Service Bench No. 1880 of 2017.

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WITH

C. A. No. 3355 of 2018  
SLP (C) Nos. 27284 and 27876 of 2017  
SLP (C) No. 8334 of 2018  
T. P. (C) No. 81 of 2018

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R. Venkataramani, P.S. Patwalia, Siddharth Luthra, Rakesh Dwivedi, S. R. Singh, R. Basant, Sr. Advs., Ms. Mayuri Raghuvanshi, Yashraj Singh Bundela, M. R. Shamshad, Praveen Vignesh, Vyom Raghuvashi, Sangya Megi, Sakshi Kakkar, Shakti Singh, Karan S., Ms. Mainka Verma, Ms. Preetika Dwivedi, Apoorva Garg, Mangal Prasad, Ankur Yadav, Ms. Shweta Yadav, Yash Pal Dhingra, Rana Ranjit Singh, Abhay Kumar S., Ravish Singh, Vivek K. Singh, Kaushal Narayan Mishra, A. K. Behra, Jasbir Singh Malik, Ms. Usha Nandini. V, Praveen Kumar Aggarwal, Sanjay Rastogi, Ms. Mayuri Raghuvanshi, Mohit Paul, Anugrah Niraj Ekka, Vikas Arora, Garvesh Kabra, Aviral Saxena, Sanjay Kumar Tyagi, Venkita Subramoniam T. R, Rakesh U. Upadhyay, Ms. Aarti Upadhyay, Amar Deep Sharma, Advs. for the appearing parties.

The Judgment of the Court was delivered by

**ADARSH KUMAR GOEL, J.** 1. Leave granted in Special Leave Petition (Civil) No.26993 of 2017 and SLP (Civil) D. No.39750 of 2017. The question for consideration is the validity of determination of seniority of promotee and direct recruit Higher Judicial Service (HJS) officers in the State of Uttar Pradesh. Dispute mainly relates to the principle to be applied for determining seniority for direct recruits and promotees of the years 2007 and 2009 in the context of Rules 22 and 26 of the Uttar Pradesh Higher Judicial Service Rules, 1975 (the Rules) and the judgment of this Court in *All India Judges Association versus Union of India*<sup>1</sup>.

2. Before giving brief facts we may note that the Rules and the issue of seniority of the HJS officers were subject matter of consideration, *inter alia*, in *P.K. Dixit versus State of U.P.*<sup>2</sup>, *O.P. Garg versus State of U.P.*<sup>3</sup>, *Sri Kant Tripathi versus State of U.P.*<sup>4</sup>, *Ashok Pal Singh versus U.P. Judicial Services Association*<sup>5</sup>, *V.K. Srivastava versus Govt. of U.P.*<sup>6</sup> and *Het Singh Yadav versus State of U.P.*<sup>7</sup>

3. In *P. K. Dixit* (supra), there was challenge to the seniority list on the ground that vacancies had not been properly calculated as per the

<sup>1</sup> (2002) 4 SCC 247

<sup>2</sup> (1987) 4 SCC 621

<sup>3</sup> (1991) Supp. (2) SCC 51

<sup>4</sup> (2001) 10 SCC 237

<sup>5</sup> (2010) 12 SCC 635

<sup>6</sup> (2008) 9 SCC 77

<sup>7</sup> Civil Appeal No.5270 of 2012 decided on 15.9.2016

A Rules. This Court directed that matter should be examined afresh with reference to appointments on posts available before the Rules came into force.

B 4. In *O.P. Garg* (supra), challenge to seniority list of 1988 was considered. This Court held that benefit of continuous length of service for a promote officer has to be with reference to availability of a vacancy and not independent thereof. Second and third proviso to Rule 8(2) and part of Rules 22 and 26 were declared ultra vires.

C 5. In *Sri Kant Tripathi* (supra) question was about correctness of calculation for working out ratio between direct recruits and promotees. The issue had arisen with reference to recruitments for the years 1988 to 1994. This Court directed that for 1988 recruitment, the High Court should determine number of vacancies available in the relevant year of recruitment and then allocate the vacancies to different sources of recruitment. It was also directed that vacancies should be filled up in the year when vacancies become available. If a post is available in the quota of promotees, selection is made but promotion is not given, promotion must take effect from the date the promotee could have been appointed.

E 6. In *Ashok Pal Singh* (supra) one of the issues was whether procedure of carrying forward of vacancies adopted by the High Court was erroneous. This Court held that no direct recruit at a subsequent recruitment can claim that his seniority should be reckoned from the date earlier to the date of his joining. The seniority of the promotee had to commence from the date he should have been appointed against an available vacancy for which he had already been selected.

F 7. In *V.K. Srivastava* (supra), challenge was to the amendment of the Rules as notified on 9<sup>th</sup> January, 2007 on the ground that giving of retrospective effect prejudiced the vested right of the candidate eligible for vacancies prior to the amendment. This Court dismissed the writ petition with the observation that the Rules had been duly complied with for the year 2008 selection.

G 8. In *Het Singh Yadav* (supra) question for consideration was the validity of seniority list of promotees with regard to vacancies existing prior to 15<sup>th</sup> March, 1996. The High Court quashed the seniority list dated 24<sup>th</sup> August, 2007. Correctness of the view taken before the High Court was subject matter of consideration before this Court. This Court

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noted that after the judgment of the High Court dated 16<sup>th</sup> December, 2010, seniority list had been finalized on 14<sup>th</sup> April, 2016 consistent with the directions in **Ashok Pal Singh** (supra) against which matter was pending consideration before the High Court. This Court set aside the judgment of the High Court leaving the merits of the matter to be gone into by the High Court in the matter pending before it.

9. In **All India Judges case** (supra), it was directed that recruitment to HJS at the relevant time had to be as follows :

- “(a) 50 per cent by promotion from amongst Civil Judges (Senior Division) on the principle of merit-cum-seniority and passing a suitability test;
- (b) 25 per cent by promotion strictly on the basis of merit through a limited competitive departmental examination on Civil Judges (Senior Division) having not less than five years qualifying service, and;
- (c) 25 per cent of the posts shall be filled directly from amongst the eligible advocates on the basis of written and viva voce test conducted by the respective High Courts.”

10. It was observed that to avoid litigation, seniority rules should provide for roster system as laid down in **R.K. Sabharwal versus State of Punjab**<sup>8</sup>. Direction of this Court is as follows :

“29. Experience has shown that there has been a constant discontentment amongst the members of the Higher Judicial Service in regard to their seniority in service. For over three decades a large number of cases have been instituted in order to decide the relative seniority from the officers recruited from the two different sources, namely, promotees and direct recruits. As a result of the decision today, there will, in a way, be three ways of recruitment to the Higher Judicial Service. The quota for promotion which we have prescribed is 50 per cent by following the principle “merit-cum seniority”, 25 per cent strictly on merit by limited departmental competitive examination and 25 per cent by direct recruitment. Experience has also shown that the least amount of litigation in the country, where quota system in recruitment exists, insofar as seniority is concerned, is where

<sup>8</sup> (1995) 2 SCC 745

A *a roster system is followed. For example, there is, as per the rules of the Central Government, a 40-point roster which has been prescribed which deals with the quotas for Scheduled Castes and Scheduled Tribes. Hardly, if ever, there has been a litigation amongst the members of the service*

B *after their recruitment as per the quotas, the seniority is fixed by the roster points and irrespective of the fact as to when a person is recruited. When roster system is followed, there is no question of any dispute arising. The 40-point roster has been considered and approved by this Court in R.K. Sabharwal v. State of Punjab (supra) One of the methods of*

C *avoiding any litigation and bringing about certainty in this regard is by specifying quotas in relation to posts and not in relation to the vacancies. This is the basic principle on the basis of which the 40-point roster works. **We direct the High Courts to suitably amend and promulgate seniority rules on the basis of the roster principle as approved by this Court in R.K. Sabharwal case (supra) as early as possible. We hope that as a result thereof there would be no further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be protected but the roster has to be evolved for the future.***

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(emphasis added)

F 11. The Rules as originally framed envisaged three sources of recruitment – direct recruitment from the bar, promotion from members of Uttar Pradesh Nyayik Sewa (UPNS) and officers out of cadre of judicial magistrates. There was also a provision for quota for the different sources. Number of appointments to be made is required to be identified. Seniority is to be determined as per Rule 26.

G 12. As a result of observations in the above judgments, there was amendment in the Rules. It may not be necessary to refer all the amendments but reference to some of the amendments may be necessary.

H 13. Accordingly, Rule 6 was amended to give effect to the judgment of this Court in *All India Judges’* case (supra) vide U.P.

Higher Judicial Service (Sixth Amendment) Rules, 2006 notified on January 09, 2007. By the said amendment, the criteria for recruitment by promotion was changed. Requirement of passing a suitability test was incorporated. There was also modification about the percentage of quota. The suitability test in pursuance of the said amended rules was held for the first time in the year 2008. The introduction of the roster was introduced by U.P. Higher Judicial Service (Seventh Amendment) Rules, 2009 which was notified on 8<sup>th</sup> August, 2009.

14. Reference may now be made to the relevant Rules.

**Rule 5**

<b>U.P. Higher Judicial Service Rules, 1975</b> (Prior to the Sixth Amendment in 2006)	<b>Uttar Pradesh Higher Judicial Service (Sixth Amendment) Rules, 2006</b>  (come into force w.e.f 21 <sup>st</sup> March, 2002)
<p><b>Rule 5. Sources of recruitment.</b>—The recruitment to the Service shall be made—</p> <p>(a) by direct recruitment of pleaders and advocates of not less than seven years' standing on the first day of January next following year in which the notice inviting applications is published;</p> <p>(b) by promotion of confirmed members of the Uttar Pradesh Nyayik Sewa (hereinafter referred to as the Nyayik Sewa), who have put in not less than seven years service to be computed on the first day of January next following the year in which the notice inviting application is published:</p> <p>Provided that so far long as suitable officers are available from out of the dying cadre of the Judicial Magistrates confirmed officers who have put in not less than seven years service to be computed as aforesaid shall be eligible for appointment as Additional Sessions Judges in the Service.</p> <p>Explanation.—When a person has been both a pleader and an advocate his total standing in both the capacities shall be taken into account in computing the period of seven years under clause (a)."</p>	<p><b>Rule 5 was substituted as under:—</b>  <b>Sources of recruitment</b>—The recruitment to the service shall be made—</p> <p>(a) By promotion from amongst the Civil Judges (Senior Division) on the basis of Principle of merit-cum-seniority and passing a suitability test.</p> <p>(b) By promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;</p> <p>(c) By direct recruitment from amongst the Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published.</p>



A **Rule 6**

	U.P. Higher Judicial Service Rules, 1975 (Prior to the Sixth Amendment in 2006)	Uttar Pradesh Higher Judicial Service (Sixth Amendment) Rules, 2006  (come into force w.e.f 21 <sup>st</sup> March, 2002)	Uttar Pradesh Higher Judicial Service (Ninth Amendment) Rules, 2014
B	<b>Rule 6. Quota.</b> - Subject to the provisions of Rule 8, the quota for various sources of recruitment shall be-	<b>Rule 6 was substituted as under:-</b> <b>6. Quota</b> -Subject to the provisions of rule 8, the quota for various sources of recruitment shall be-	<b>Rule 6 was substituted as under:-</b> <b>Quota-6.</b> Subject to the provisions of rule 8, the quota for various sources of recruitment shall be-
C	Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one:	(i) Uttar Pradesh Nyayik Sewa: (a) from amongst the Civil Judges (Senior Division) on the basis of merit-cum-seniority and passing a suitability test. - 50%	(i) Uttar Pradesh Nyayik Sewa: (a) from amongst the Civil Judges (Senior Division) on the basis of merit-cum-seniority and passing a suitability test. - 65%
D	(i) <b>Direct recruits from the Bar 15%</b> of the vacancies	(b) on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service. - 10%	(b) on the basis of merit through limited competitive examination of civil Judges (Senior Division) having not less than five years service. -10%
E	(ii) <b>Uttar Pradesh Nyayik Sewa 70%</b>		
	(iii) <b>Uttar Pradesh Judicial Officers service (Judicial Magistrate) 15%</b>	Provided that in case of there being any shortfall in the vacancies to be filled up on the basis of in cadre competitive examination, the shortfall of 25% reserved for such promotion will be made good by corresponding increase in the quota reserved for promotion of Civil Judge (Senior Division) referred to in Clause (i)(a).	Provided that in case of there being any shortfall in the vacancies to be filled up on the basis of in cadre competitive examination, the shortfall of 10% reserved for such promotion will be made good by corresponding increase in the quota
F	Provided further that when the strength in the cadre of the Judicial Magistrates gradually gets depleted or is completely exhausted and suitable candidates are not available in requisite numbers or no candidate remains available at all, the shortfall in the number of vacancies required to be filled from amongst Judicial Magistrates and in the long run all the vacancies, shall be filled		
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by promotion from amongst the members of the Nyayik Sewa and their quota shall, in due course, become 85 per cent.	(ii) direct recruitment from Bar - 25%  Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one."	reserved for promotion of Civil Judge (Senior Division) referred to in clause (i)(a).  (ii) Direct recruitment from Bar-25%  Provided that where the number of vacancies to be filled in by any of the sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one:
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**Rule 8**

U.P. Higher Judicial Service Rules, 1975 (Prior to the Sixth Amendment in 2006)	Uttar Pradesh Higher Judicial Service (Sixth Amendment) Rules, 2006 (come into force w.e.f 21 <sup>st</sup> March, 2002)
<p><b>Rule 8.</b> Number of appointments to be made.---(1) The Court shall, from time to time, but not later than three years from the last recruitment, fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years.</p> <p>Note--The limitation of three years mentioned in this sub-rule shall not apply to the first recruitment held after the enforcement of these rules.</p> <p>(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa;</p>	<p><b>In Rule 8 the existing sub rule (2) was substituted as under:-</b></p> <p>"8.(2) If at any selection the number of selected direct recruits available for</p> <p>"8.(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa;</p> <p>Provided that the number of vacancies filled in as aforesaid under this sub rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of</p>

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<p>Provided that the number of vacancies filled in as aforesaid under this sub rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly; so, however, that the percentage of direct recruits in the Service does not in any case exceed 15 per cent of strength of the service.</p> <p>Provided further that all the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date, if any when they are converted into permanent posts, shall be filled by promotion from amongst the members of the Nyayik Sewa; and only the remaining vacancies shall be shared between the three sources under these rules;</p> <p>Provided also that the number of vacancies equal to 15 per cent of the vacancies referred to in the last preceding proviso shall be worked out for being allocated in future to the Judicial Magistrates in addition to their quota of 15 per cent prescribed in Rule 6, and thereupon, future recruitment (after the promotion from amongst the members of the Nyayik Sewa against vacancies referred to in the last preceding proviso) shall be so arranged that for so long as the additional 15 per cent vacancies worked out as above have not been filled up from out of the Judicial Magistrates, the allocation of vacancies shall as follows---</p> <p>(i) 15 per cent by direct recruitment.  (ii) 30 per cent from out of the Judicial Magistrate;  (iii) 55 per cent from out of the members of the Nyayik Sewa.</p>	<p>direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly so, however, that the percentage of direct recruits in the service does not in any case exceed 25% of strength of the service.</p>
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**Rule 18**

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**U.P. Higher Judicial Service Rules, 1975**  
(Prior to the Sixth Amendment in 2006)

**Rule 18.** (1) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such examination, as it may considered necessary for judging the suitability of the candidates. The committee may call for interview such of the applicants who in its opinion have qualified for interview after scrutiny and examination.

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(2) In assessing the merits of a candidate the Selection Committee shall have due regard to his professional ability, character, personality and health.

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(3) The Selection Committee shall make a preliminary selection and submit the record of all candidates to the Chief Justice and recommend the names of the candidates in order of merit who, in its opinion, are suitable for appointment to the service.

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(4) The Court shall examine the recommendations of the Selection Committee and having regard to the number of direct recruits to be taken, prepare a list of selected candidates in order of merit and forward the same to the Governor.

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**Rule 20**

U.P. Higher Judicial Service Rules, 1975 (Prior to the Sixth Amendment in 2006)	Uttar Pradesh Higher Judicial Service (Sixth Amendment) Rules, 2006 (come into force w.e.f. 21 <sup>st</sup> March, 2002)	Uttar Pradesh Higher Judicial Service (Ninth Amendment) Rules, 2014
<b>Rule 20. Promotion of Members of Nyayik Sewa-</b> (1) Recruitment by promotion of the members of the Nyayik Sewa shall be made by selection on the principle of seniority-cum-merit.  (2) The field of eligibility for recruitment by promotion shall be	<b>In Rule 20- for the existing sub-rules (1) and (2), the following sub-rules were substituted:-</b>  (1) Recruitment by promotion of the members of the Nyayik Sewa shall be made by selection on the principle of	<b>The existing sub-rule (3) of rule 20 was substituted as under:-</b>  20.(3) The Selection Committee shall, after examining the record of the officers included in the list prepared under sub-rule (2) of this rule make a preliminary selection of the officers

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A	confined to four times the number of vacancies to be filled by promotion. The Selection Committee shall prepare a list in order of seniority of the officers eligible under Rule 5(b) of these rules	merit-cum-seniority and on passing such a suitability test, as prescribed in Appendix "G(1)"	who in its opinion are fit to be appointed on the basis of merit-cum-seniority. In assessing the merit of a candidate, the Selection Committee have due regard to his service record, ability, character and seniority. The list shall contain the names of officers twice the number of vacancies required to be filled by promotion of the members of the Nyayik Sewa.
B	(3) The Selection Committee shall, after examining the record of the officers included in the list prepared under sub-rule (2) of this Rule make a preliminary selection of the officers who in its opinion are fit to be appointed on the basis of seniority-cum-merit. In assessing the merits of a candidate, the Selection Committee have due regard to his service record, ability, character and seniority. The list shall contain the name of officers twice the number of vacancies required to be filled by promotion of the members of the Nyayik Sewa.	(2) The field of eligibility for recruitment by promotion shall be confined to four times the number of vacancies to be filled by promotion. The selection Committee shall prepare a list in order of seniority of the officers eligible under Rule 5(a) of these rules.	
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E	(4) The Selection Committee shall forward the list of the candidates chosen at the preliminary selection to the Chief Justice along with the names of the officers who, if any, in the opinion of the Committee have been passed over for promotion to the service.		
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G	(5) The Court shall examine the recommendations of the Selection and make a final selection for promotion and prepare a list in order of seniority of the candidates who are considered fit for promotion and forward the same to the Governor. The list shall remain operative only till the next recruitment.		
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**Rule 21**

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<p><b>U.P. Higher Judicial Service Rules, 1975</b> (Prior to the Sixth Amendment in 2006)</p>	<p><b>Uttar Pradesh Higher Judicial Service (Sixth Amendment) Rules, 2006</b> (come into force w.e.f 21<sup>st</sup> March, 2002)</p>
<p><b>Rule 21. Temporary provisions for the cadre of the Judicial Magistrate.-</b> (1) For so long as suitable officers are available from out of the dying cadre of the Uttar Pradesh Judicial Officers Service, confirmed officers who have put in not less than seven years' service shall be eligible for appointment as Additional Sessions Judges in the service, as provided in Rules 4, 5, 6 and 8. Such officers may also be appointed as Additional Sessions Judge in officiating and temporary capacity upto the extent of 15 per cent of the vacancies in the cadre occurring during any one period of Selection.</p> <p>(2) The field of eligibility for appointment from out of the Judicial Magistrate shall be confined to four times the number of vacancies to be filled from this source. The Selection Committee shall prepare a list in order of seniority of the eligible officers.</p> <p>(3) Criterion for selection shall be seniority-cum-merit. In assessing the merits of a candidate the Selection Committee shall have due regard to his service record ability, character and seniority. The preliminary selection shall be made by the Selection Committee referred to in Rule 6 and the list of the selected candidates shall be forwarded to the Chief Justice along with the names of the officers who, if any, in the opinion of the Committee are unfit for appointment to the Service.</p>	<p>The existing Rule 21 was substituted as under:-</p> <p>(1) Recruitment by promotion of the members of Nyayik Sewa as referred to in Rule 5(b) shall be made by selection strictly on the basis of merit through a limited competitive examination as prescribed in Appendix 'H'.</p> <p>(2) Application for recruitment to the service from such sources shall be invited by the Court through District Judges.</p> <p>(3) the District Judge shall forward to the Court all applications received by him alongwith his own estimate of each candidate's character and fitness for appointment to the service.</p> <p>(4) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and shall hold a limited competitive examination, as prescribed in Appendix 'H'.</p> <p>(5) The Selection Committee shall prepare a select list on the basis of the merit of the successful candidates.</p>

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A	(4) The Court shall examine the recommendations of the Selection Committee and make a final selection and prepare a list of candidates considered fit for appointment in order of seniority and forward the names of the officers. The list shall remain operative only till the next recruitment.	(6) The committee shall make a preliminary selection and submit the record of all candidates to the Chief Justice and recommend the names of the candidates in order of merit who, in its opinion are suitable for appointment to the service.
B	(5)..... (6).....	(7) The Court shall examine the recommendations of the Selection Committee and make a final selection for appointment in HJS cadre and prepare a list in order of merit and forward the same to the Governor. The list shall remain operative only till the next recruitment
C	(7) The Court shall examine the recommendations of the Selection Committee and make a final selection for appointment in HJS cadre and prepare a list in order of merit and forward the same to the Governor. The list shall remain operative only till the next recruitment.	
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### Rule 22

E	<b>U.P. Higher Judicial Service Rules, 1975</b> (Prior to the Sixth Amendment in 2006)	<b>Uttar Pradesh Higher Judicial Service (Seventh Amendment) Rules, 2009</b>	<b>Uttar Pradesh Higher Judicial Service (Ninth Amendment) Rules, 2014</b>
F	<b>Rule 22. Appointment-</b> (1) Subject to the provisions of sub-rules (2) and (3), the Governor shall on receipt from the Court of the lists mentioned in Rule 18, 20 and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates from the lists in the order in which they stand in the respective lists.	<b>Rule 22 . Appointment.-</b> (1) Subject to the provisions of sub-rule (2) the Governor shall, on receipt from the Court of the list mentioned in Rules 18, 20 and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates from the list in the order in which they stand in the respective lists in accordance with the roster.	<b>In Rule 22, the existing sub-rule (2) was substituted as under:-</b> <b>22.(2)</b> Appointments to the service shall be made on the basis of roster system, the first post shall be filled from the list of promotees, the second post shall be filled up by direct recruit, the third and fourth posts shall be filled up from the list of promotees and fifth post shall be filled up by the candidate
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<p>(2) Appointments to the service shall be made on the rotational system, the first vacancy shall be filled from the list of officers of the Nyayik Sewa. The second vacancy shall be filled from the list of direct recruits (and so on), the remaining vacancies, shall therefore be filled by promotion from the list of the officers of the Nyayik Sewa.</p>	<p>(2) Appointments to service shall be made on the basis of roster system, the first and second post shall be filled from the list of promotes, the third post shall be filled up by direct recruit and the fourth post shall be filled up by the candidate selected strictly on merit through LDCE (and so on) according to the roster as prescribed in Appendix 'I', which will cease to become operative on the date the respective three streams achieve their full allotted vacancies. Thereafter on account of arising any vacancy in quota of respective stream the same could be filled-up from the same stream of which vacancy arises;</p>	<p>selected strictly on merit through LDCE (and so on) according to the roster as prescribed in Appendix 'I', which will cease to become operative on the date the respective three streams achieve their full allotted vacancies. Thereafter on account of arising any vacancy in quota of respective stream the same could be filled-up from the same stream of which vacancy arises;</p>
<p>Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrates, appointments to the Service shall be made in such a way that the second fifth and eighth (and so on), vacancy shall be filled from the list of judicial Magistrates.</p>	<p>Provided that while following the roster at no point of time the percentage of posts filled from direct recruit and LDCE shall exceed 25% each of the vacancies available at the time of selection. In case the percentage is exceeding the allotted quota, in such eventuality the promotee shall occupy the vacancy which would have gone to the direct recruit or LDCE, had not the same been an excess of 25% of either of the two.</p>	<p>Provided that while following the roster at no point of time the respective percentage of posts filled from direct recruit and LDCE shall exceed 25% and 10% of the strength of service. In case the percentage is exceeding the allotted quota, in such eventuality the promotee shall occupy the vacancy which would have gone to direct recruit or LDCE, had not the same been in excess of 25% and 10% respectively of either of the two.</p>
<p>(3) In the eventuality of delay in making appointment under sub-rule (1) and further if exigency of service so requires, the Governor may, in consultation with the Court, make short term appointment as a stop gap arrangement from amongst the members of Nyayik Sewa in the vacancy in these services within the quota fixed by the Court till the appointment are made under subrules (1) and (2): Provided that the period of service spent by a member of Nyayik Sewa on short term appointment to the service as a stop-gap arrangement shall not be computed from seniority under Rule 26.</p>		

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A	(4) The appointments shall be made on rotational system, the first vacancy shall be filled from the list of officers of the Nyayik Sewa, the second vacancy shall be filled from the list of Judicial Magistrates (and so on).	(3) In the eventuality of delay in making appointment under sub-rule (1) and further if exigency of service so requires the Governor may, in constitution with the Court, make short term appointment as a stop-gap arrangement from amongst the promotees, in the vacancy in these services fill the appointment are made under sub-rules (1) and (2):	
B		Provided that the period of service spent by the promotees on a short term appointment to the service as stop-gap arrangement shall not be computed under Rule 26.	
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### **Rule 26**

E	<b>U.P. Higher Judicial Service Rules, 1975</b> (Prior to the Sixth Amendment in 2006)
F	<b>Rule 26.</b> Seniority.--(1) Seniority of the officers appointed in the Service shall be determined in accordance with the order of ppointment in the Service under sub-rules (1) and (2) of Rule 22 of these rules.
G	(2)Seniority of members of the service who have been confirmed in the service prior to the commencement of these rules shall be as has been determined by the order of the Government as amended from time to time.

15. We may now note the necessary facts. It is clear from resume of judgments of this Court that there is long history of seniority dispute of the members of HJS. In the process, there was complex and long drawn effort in determination and redetermination of vacancies. Though, in pursuance of judgment of this Court in *All India Judges' case* (supra),

amendment in the Rules was carried out and notified on 9<sup>th</sup> January, 2007 and principle of suitability test and roaster system were introduced, in absence of determination of vacancies for the period from 2002 till 2007, neither the promotees could be given appointments in spite of availability of vacancies and eligibility nor direct recruitments could be made. Thus, recruitment for the relevant period was initiated belatedly in the year 2007. In the absence of suitability test, which was conducted only in the year 2008, the promotees could not be given promotion. In the circumstances, the direct recruits selected after 2007 could not be given seniority prior to their joining. Seniority for direct recruits by following the rota system would have operated unfairly for the promotees.

16. In this background, vacancies as on 31<sup>st</sup> December, 2006 and expected vacancies upto 31<sup>st</sup> December, 2008 were determined for the direct recruits and promotees on 15<sup>th</sup> February, 2007.

17. After the rules were amended in the year 2007, vacancies were worked out and advertisement was issued on 31<sup>st</sup> March, 2007. Suitability test for purposes of promotion was held on 10<sup>th</sup> February, 2008. Final list of selected direct recruits was approved by the Full Court on 12<sup>th</sup> July, 2008.

18. Vide order dated 11<sup>th</sup> August, 2008, appointments to the UPHJS by way of promotion were made. Direct recruited officers to the UPHJS were appointed between 11<sup>th</sup> September, 2008 and 24<sup>th</sup> November, 2008. Though, process for appointment was conducted simultaneously, the select lists were also forwarded to the Court simultaneously, due to observance of certain formalities, letters of appointment for direct recruits were given later to the promotion being affected.

19. For the recruitment year 2009, calculation of vacancies was finalized on 24<sup>th</sup> March, 2009. The same was approved by the Full Court on 10<sup>th</sup> April, 2009. Suitability test for promotees was held on 29<sup>th</sup> November, 2009. Select list was approved by the Full Court on 9<sup>th</sup> January, 2010. Appointments were notified on 7<sup>th</sup> September, 2010. Direct recruits for the year 2009 were appointed between 24<sup>th</sup> December, 2010 to 20<sup>th</sup> April, 2011. After the appointments, the dispute of seniority cropped up. The direct recruits claimed that they were entitled to be given seniority as per rota system laid down under the Rules and that they had been wrongly placed junior to the promotees. The promotees claimed that their seniority should commence from the date of accrual

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- A of vacancy, date of their eligibility and officiation and not from the date of actual appointment.

20. The High Court appointed a Committee to go into the matter. The Committee took up determination of vacancy and fixation of seniority for the HJS officers appointed upto 1998-2000 which was finalized on 1<sup>st</sup> August, 2011. Thereafter, determination of vacancies and fixation of seniority of 2007 and 2009 recruitments was considered by the committee vide its report dated 23<sup>rd</sup> September, 2015 and 6<sup>th</sup> April, 2016. The same was approved by the Full Court on 14<sup>th</sup> June, 2016.

21. The report of the Committee dated 23<sup>rd</sup> September, 2015 was in continuation of its earlier reports finalizing seniority lists dated 6<sup>th</sup> May, 1995 and 13<sup>th</sup> July, 2011, with reference to officers recruited prior to 2007. The Committee determined vacancies vide its report dated 7<sup>th</sup> February, 2012 on the basis of which tentative seniority lists dated 25<sup>th</sup> July, 2013 and 18<sup>th</sup> December, 2014 were published. Objections to the said tentative seniority lists were considered in the said report.

22. The question considered by the Committee was whether long officiation by officers of UPNS should be given due credit so that they may not suffer on account of delay in holding suitability test. Suitability test was not held due to non amendment of the Rules upto 9<sup>th</sup> January, 2007 inspite of judgment of this Court dated 21<sup>st</sup> March, 2002. Thus, from 21<sup>st</sup> March, 2002 to 2008 since a different regime of Rules was stipulated under the judgment of this Court in *All India Judges case* (supra) and the Rules were amended by the High Court only on 9<sup>th</sup> January, 2007, in spite of availability of vacancies in promotion quota, the promotee officers who were eligible and were officiating against the said vacancies, could not be recruited. They were recruited only after the suitability test was held for the first time in the year 2008. The Committee thus held that they were entitled to en bloc seniority without rota system. The direct recruits could not be given seniority for the period prior to their appointment. Same was the position with regard to 2009 recruitments. The view of the Committee was that rota system will create imbalance and injustice.

23. The direct recruits as well as the promotees were aggrieved by the determination of their seniority and challenged the same by filing Writ Petitions. In Writ Petition (SB) No.1880 of 2017 filed by the direct recruits, respondents 134 to 173, along with others before the High Court,

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prayer was for quashing the final seniority Report dated 23<sup>rd</sup> September, 2015 (of Committee of High Court Judges), supplementary report dated 6<sup>th</sup> April, 2016 (also of a Committee of High Court Judges) and for a direction to redetermine seniority of the writ petitioners who were the direct recruits on the basis of rotational system proportionate to their quota, apart from other incidental prayers. It was submitted that since Rule 22(2) provides for rotational basis for seniority, their date of appointment was not conclusive for the purpose of seniority. Accordingly, the writ petitioners sought determination of seniority by applying roster system. The High Court and the affected officers defended the report of the Committee as approved by the Full Court.

24. In Writ Petition (SB) No.16569 of 2016 filed by the promotees, challenge was to the validity of the Amendment Rules, 2006 in so far as the Rules were retrospective. Challenge was also to the reports of the Committees and decision of the Full Court in so far as objections to seniority list were rejected. The petitioners in the said writ petition were promoted against vacancies of the years 2002 onwards but the said vacancies were actually determined later. According to the said writ petitioners, they were entitled to seniority from the date of their eligibility, without their passing of the suitability test which was retrospectively prescribed for the first time on 9<sup>th</sup> January, 2007.

25. The High Court examined two questions : -

- (i) Whether promotees were entitled to seniority prior to their appointment on the ground that requirement of suitability test was introduced for the first time in the year 2007 and they had a vested right to be promoted against the earlier vacancies without the suitability test.
- (ii) Whether direct recruits were entitled to the benefit of rotation in determination of seniority. The High Court held that the promotees could not be given seniority prior to their selection. The retrospectivity of the Rules prescribed suitability test was valid particularly in view of judgment of this Court in *V.K. Srivastava* (supra).

26. It was held that no determination of vacancies had taken place on account of pendency of litigation which was finalized on 25<sup>th</sup> August, 2004. No direct recruitment was made after 1998-2000 upto 2005. Only after 25<sup>th</sup> August, 2004 determination of vacancies took place. Promotions

A and direct recruitments were made in respect of the said selection in the year 2005. Promotions and direct recruitments which are subject matter of the present case were made in 2008/2009. Thus, Writ Petition (SB) No.16569 of 2016 was dismissed and objection of the promotees to their seniority was rejected.

B 27. As regards claim of the direct recruits based on Quota-Rota rule and post based roster system, it was observed that the same was mandatory. It was accordingly, held that seniority was required to be re-determined by applying the Quota-Rota.

28. The conclusions of the High Court are as follows :

C *“In view of the above, we sum up our conclusions as under :*

*(1) The challenge to the vires of the 6th amendment Rules, 2006 already having been repelled by the Supreme Court in V.K. Srivastava’s case, is not open to reconsideration by us.*

D *(2) There is no factual and legal basis for the petitioners claim to promotion from date of occurrence of vacancies and seniority accordingly in Writ Petition No. 16569(SB) of 2016.*

E *(3) The determination of vacancies by the Committee does not require any interference but determination of seniority is not sustainable.*

F *(4) Considering the facts of the present case there is no error in the appointment of direct recruits in December, 2011 and January, 2012 w.e.f. 04.01.2007 when the last of the selectees of the same selection had joined following the dictum in Dr. A.K. Sirkar and in view of Balwant Singh Narwal’s case (supra).*

G *(5) There has been a complete non-adherence to the Quota-Rota Rule and the determination of seniority in accordance thereof in terms of Rule 22 and 26 of the Rule, 1975. The judgment rendered in All India Judges’ Cases has not been followed as was mandatorily required.*

H *(6) The determination of seniority is patently erroneous and contrary to Rule 26 of the Rules, 1975 which envisages such determination in accordance with the order of appointment*

*in the service under Sub-Rules (1) and (2) of the Rule 22 which necessarily means the order of rotational/cyclical placement of appointees from different sources of recruitment without disturbing their inter-se placement within the same stream/quota and not en bloc placement on the basis of date of appointment as has been done.”*

29. We have heard learned counsel for the parties. The first issue raised is whether the promotees recruited in the year 2008/2009 are entitled to seniority prior to their selection on the ground that no suitability test was required prior to 9<sup>th</sup> January, 2007 and retrospective effect to such requirement was illegal. We are in agreement with the view taken by the High Court that suitability test was required in terms of judgment of this Court in *All India Judges’* case (supra) and under the amended Rules applicable retrospectively which was duly upheld by this Court in *V.K. Srivastava* (supra). Thus, the promotees could not be given promotion without suitability test nor could they claim seniority without the same. They have been rightly given seniority from their appointments.

30. With regard to the Quota-Rota rule, there is no doubt that this is a mandatory requirement of the Rules. The said requirement has however to be seen in the peculiar fact situation. The issue of determination of vacancies was embroiled in continuous litigation. The Quota-Rota rule could not be applied in the absence of determination of vacancies. The suitability test though validly laid down could not be held till 2008 for reasons already noted. No promotion could be given in absence of suitability test. The rule provided for seniority of the promotees to be fixed from the date of availability of vacancy but such seniority could also not be given in the present fact situation. If rota rule is applied, it will work serious prejudice to the promotees. Thus, the Rules will have to be given pragmatic interpretation. As laid down by this Court in *Direct Recruit Class-II Engineering Officers’ Association versus State of Maharashtra*<sup>9</sup>, if it becomes impractical to act upon rule fixing quota from two sources, it is no use insisting that the authority must give effect to such a rule. Every effort has to be made to respect a rule but if it is not feasible to enforce it, the rule has to be given a practical interpretation. Thus, interference by the High Court with the seniority given to the promotees above the direct recruits without following the rotation principle cannot be sustained.

<sup>9</sup> (1990) 2 SCC 715, para 23

- A            31. Accordingly, we allow the appeal arising out of Special Leave  
Petition (Civil) No.26993 of 2017 and dismiss the Writ Petition (SB)  
No.1880 of 2017 on the file of the High Court filed by the direct recruits.  
We uphold the judgment of the High Court with regard to dismissal of  
Writ Petition (SB) No.16569 of 2016 filed by the promotees and dismiss  
B            the appeal arising out of Special Leave Petition (civil) D.No.39750 of  
2017.

              In view of the above, all other matters will stand disposed of  
accordingly.

Ankit Gyan

Matters disposed of.