

Before K. S. Tiwana & J. M. Tandon, JJ.

FOUR SERVICE APPEALS PREFERRED BY

SHRI B. K. BHATIA AND OTHERS.

July 12, 1984.

Constitution of India 1950—Article 229—High Court Establishment (Appointment and conditions of Service) Rules, 1952—Rules 3 and 9—High Court Establishment (Appointment and conditions of Service) Rules, 1973—Rules 2, 16 (i) and (ii), 30 (ii), 32 & 36—Dispute regarding seniority between unconfirmed direct recruits and promotee Assistants—Office Judge appointed under Rule 2 to decide objections against seniority list—Such Judge submitting report to the Chief Justice—Chief Justice on administrative side directing preparation of seniority list as proposed by Office Judge—Such direction of Chief Justice—Whether tantamounts to adoption of seniority list by the Chief Justice—Appeal against such order of Office Judge—Whether maintainable under Rule 36—1952 Rules replaced by 1973 Rules—Later Rules notified in Gazette and circulated in office on different dates—Chief Justice directing their enforcement from an earlier date—Rules—When can be said to have come into force—Article 229—Whether authorises the Chief Justice to give Rules retrospective operation—Fixation of seniority between direct recruits and promotee Assistants—How to be determined—Rules 16 & 30—Whether visualise fixation of seniority according to quota rule—Sine qua non for fixation of seniority—Stated—Principles of confirmation of Assistants—Explained.

Held, that the term 'Office Judge' has been defined under Rule 2 of the High Court Establishment (Appointment and conditions of Service) Rules, 1973 and the said Office Judge could decide the objections/representations filed against the joint seniority list and as such was personally competent to decide the said objections/representations as an Office Judge. The direction issued by the Office Judge to prepare the seniority list according to the guide-lines laid down by the said Judge even if administratively approved by the Chief Justice would not become the order of the Chief Justice and it cannot be said that the said seniority list was adopted by the Chief Justice. The appeals against the order of the Office Judge, therefore, lay before a Bench of two or more Judges under Rule 36 of the Rules.

(Paras 9 & 11).

Held, that members of the establishment of the High Court were earlier governed by High Court Establishment (Appointment and Conditions of Service) Rules, 1952 and Rule 9 thereof provided for appointment as Assistants. Under the 1973 Rules, it was made obligatory that 50 per cent of the posts of Assistants should be

filled by direct recruitment from Graduates from the open market by a competitive examination. The 1973 Rules were notified in the Gazette and were circulated in the office on different dates. There is no law which provides that the Rules could be taken to have come into force from the date they are published in the official gazette. It is thus obvious that the said rules would be taken to have come into force when they were circulated in the office, in the absence of any order of the Chief Justice making them effective from a different date. Where, however, the Chief Justice has directed that the Rules would come into effect from a certain date although that date may be retrospective and said Rules would be deemed to have come into force from that date. Reading of Article 229 of the Constitution of India 1950 leaves no doubt that the rules making power exercised by the Chief Justice of the High Court is analogous to the corresponding power under Article 309 of the Constitution and the rules made by the Chief Justice of the High Court under the former Article can, therefore, be given retrospective effect.

(Paras 15, 16, 17 & 20).

Held, that Rule 30 of 1973 Rules postulates two separate seniority lists for each category of post in the Establishment. The unconfirmed members of the Establishment in each category have to be grouped in one list and those confirmed in the other. The seniority in the first list is to be determined by the length of continuous service in each category whereas the seniority in the second is to be reckoned from the date of confirmation. Under Rule 16 of the 1973 Rules, the quota of the Direct Assistants is fixed at 50 per cent and these rules do not contain a rotation rule, nor can the said rule be implicit in Rule 16. At the time a direct Assistant is appointed, it is necessary to find out whether a post for the direct recruit is available. It will not be possible to appoint a direct Assistant in the absence of a post in the quota of direct recruits. The seniority of unconfirmed direct Assistants under rule 30 (ii) of 1973 Rules can only be determined by the length of continuous service as such. The *Sine qua non* of Rule 30(ii) of aforementioned Rules is that the seniority of unconfirmed Assistants irrespective of the birth mark whether direct or promotee has to be determined according to their length of continuous service as such. It is further clear that if promotees are regularly appointed during a particular period in excess of their quota for want of direct recruits and subsequently got adjusted against their own quota they can claim their whole length of service for seniority under Rule 30(ii) against direct recruits. The direct Assistants irrespective of their seniority vis-a-vis the promotee Assistants in the list formulated under rule 30(ii) are entitled to be confirmed against the permanent posts of their quota with effect from the date the post for each becomes available and the incumbent eligible for confirmation on completing the period of probation prescribed under rule 23 of 1973 Rules.

(Paras 22, 25, 26 & 29).

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K. P. Bhandari Senior Advocate with Ravi Kapoor and C. B. Kakkar, Advocates,—for the Appellants.

J. L. Gupta, Senior Advocate with Rakesh Khanna and Subhash Ahuja, Advocates.

R. S. Cheema, Advocate,—for the Respondents.

JUDGMENT

J. M. Tandon, J.

(1) This order will dispose of four Service Appeals filed by :

1. Brij Kishore Bhatia and 46 others;
2. Vidya Parkash Gupta and 7 others;
3. Ajit Singh; and
4. Virinder Kumar Sharma.

All the appellants are promotee Assistants. Their grievance is against the placement of the direct Assistants in the seniority list formulated in terms of rule 30(ii) read with rule 16(i) and (ii) of the High Court Establishment (Appointment and conditions of Service) Rules, 1973, (hereafter the 1973 Rules).

(2) The members of the Establishment of the High Court before the coming into force of 1973 Rules were governed by the High Court Establishment (Appointment and Conditions of Service) Rules, 1952, (hereafter the 1952 Rules). Under 1952 Rules, the Assistants were contained in Division 'A' and Clerks in Division 'B' of the Ministerial Establishment under rule 3 thereof. Rule 9 of 1952 Rules provided for the appointment to and promotion in 'A' Division. This rule reads:

“Appointment to and promotions in 'A' Division shall be made by selection only. Clerks in 'B' Division shall be eligible for promotion to the posts of Assistants. The principle to be followed in making appointments to or in 'A' Division, whether permanent or officiating will be that the 'bestman' will be selected whether he is or is not already on the office establishment.”

(3) The appointment of Assistants under rule 9 reproduced above could be made either directly or by promotion from Clerks. The appointment to the post of Assistants with few exceptions were made by promotion before the coming into force of the 1973 Rules. Under 1973 Rules, it was made obligatory to fill 50 per cent posts of Assistants by direct recruitment. The relevant part of rule 16 of 1973 Rules which deals with the appointment of Assistants reads :

16. (i) Fifty per cent posts of Assistants shall be filled by direct recruitment from Graduates from the open market by a competitive examination. Graduate Clerks on the establishment of this Court will also be permitted to compete subject to a maximum of three chances.

(ii) The remaining fifty per cent posts shall be filled by promotion from the Clerks on the establishment of this Court on seniority-cum-merit basis.

* * * *

(4) After the coming into force of 1973 Rules, Mrs. Sudesh Malhotra (Ex-Mahajan) was appointed Assistant as a direct recruit on April 6, 1974. She was a Clerk in the High Court Establishment before her appointment as Assistant. She was not appointed Assistant by seniority. It was on compassionate grounds that she was appointed Assistant out of turn and by way of direct recruitment. Thereafter, Paramjit Kaur was appointed Assistant directly on August 1, 1975. Paramjit Kaur has since left the service of the High Court. The next appointment as direct Assistant was that of Inderjit Doda on December 17, 1975. He was also picked up from the office establishment. A competitive examination for recruitment as direct Assistants was held for the first time in 1977, and on the basis of the result 22 appointments were made in May, 1977. On December 22, 1977, S. K. Puri who was working in the office establishment was appointed a direct Assistant.

(5) Rules 16 of 1973 Rules has since been substituted with effect from January 20, 1978. The substituted rule 16 reads:

“Assistants. 16(1) Vacancies in the cadre of Assistants shall ordinarily be filled by promotion from amongst the Clerks on the establishment of this Court on the basis of seniority-cum-merit :

Provided that the Chief Justice may, if he thinks fit to do so, fill any vacancy by direct recruitment from graduates of

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any recognised University on the basis of a "competitive test or otherwise or by transfer from an equivalent post under the Central Government or any State Government.

- (2) 50 per cent of the permanent as well as those temporary posts of Assistants which have been in existence for three years and those which remain in existence for the said period shall be in senior scale of Rs. 800—1,400, to be filled in by selection from amongst the confirmed Assistants on the basis of seniority-cum-merit."

Rule 30 of 1973 Rules deals with the seniority of High Court establishment. It reads:

- "30. (i) Seniority shall be determined separately for each category of posts in the establishment;
- (ii) Up to the date of confirmation, seniority shall be determined by the length of continuous service in the particular category of posts.
- (iii) Within the same category seniority shall be determined from the date of confirmation in the particular category, Seniority between persons confirmed on the same date shall be determined on the basis of their seniority as unconfirmed hands in that category :

Provided that notwithstanding anything contained in these rules the *inter-se* seniority of the existing members of the establishment in any particular category, as already settled by the Chief Justice or by any Judge or Judges prior to the coming into force of these rules shall not be disturbed because of anything contained in the rules;

- (iv) in case of any dispute regarding seniority the same shall be decided by the Chief Justice or by any Judge nominated by the Chief Justice for that purpose."

(6) On May 14, 1982, the Chief Justice desired that the seniority of promotee/directly recruited Assistants and Senior Translators be fixed tentatively. A tentative seniority list was consequently prepared and circulated inviting objections. The Assistants filed

objections/representations against the *inter-se* seniority between the promotee and direct recruits as reflected in the tentative seniority list. The Chief Justice entrusted the objections/representations to Sodhi, J. (Office Judge), for decision,—*vide* order, dated June 4, 1983, who after hearing the concerned parties, decided the matter of *inter-se* seniority of promotee and direct Assistants,—*vide* order dated November 24, 1983. The Office Judge suggested that the office may be directed to prepare a joint seniority list according to the guidelines laid down by him. The file was marked to the Chief Justice, who recorded the order “As proposed” on November 25, 1983. In pursuance of the order of the Chief Justice, the Registry prepared two lists “A” and “B”. List “A” is of officials holding lien on the post of Assistants on February 28, 1974 or were working as Assistants from that date onwards and list “B” of Assistants and Senior Translators holding lien on the posts of Assistants and Senior Translators on February 28, 1974, or were working as such from that date onwards. These lists were submitted to A.C.J. for approval, who,—*vide* order dated December 20, 1983, directed that the same be circulated. The A.C.J.,—*vide* another order invited representations/objections against the seniority lists “A” and “B” by February 10, 1984. The appellants in four appeals, now under consideration, have submitted representations/objections which have been entrusted to this Bench by A.C.J. for decision,—*vide* order dated April 19, 1984.

(7) The grievance of the appellants (promotee-Assistants) is against the placement of the direct Assistants in the impugned seniority list in terms of the order of the Office Judge dated November 24, 1983. The objections/representations (appeals) have been resisted by the direct Assistants.

(8) Mr. J. L. Gupta, learned counsel for the direct Assistants has raised an objection that all the four appeals are not maintainable under rule 32 read with rule 36 of 1973 Rules inasmuch as the order of the Office Judge, dated November 24, 1983, relating to the placement of the direct recruits in the impugned lists was approved by the Chief Justice on November 25, 1983. The argument proceeds that in view of the approval accorded by the Chief Justice on November 25, 1983, the placement of the direct recruits in the seniority list shall be taken to have been adopted by him and his order is not appealable under 1973 Rules. The objection is fallacious and without merit.

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(9) The relevant part of rule 32 of 1973 Rules reads:

“32. All matters of appointment, promotion and seniority of the members of the High Court Establishment shall be decided by the Registrar (Specially empowered) or where the Registrar is not so empowered by the Office Judge, or by the Chief Justice :

Provided that where the order is not made by the Chief Justice, the members of the establishment adversely affected shall be entitled under rule 36(1) to appeal against :—

- (a) * * *
- (b) * * *
- (c) an order fixing the seniority of any member or members of the establishment;
- (d) * * *

The relevant part of rule 36 of 1973 Rules reads:

“36. (1) Where an order is passed by the specially empowered Registrar under rule 32, an appeal shall lie to the Chief Justice who may either hear and dispose it of himself or make over the same for hearing and disposal to a Bench or one or more Judges.

(2) Where the order is passed by the office Judge under Rule 32, an appeal shall lie to a Bench of two or more Judges.

* * * * *

The term “Office Judge” has been defined under rule 2 of 1973 Rules and the definition reads:

“‘Office Judge’ means any Judge who is nominated by the Chief Justice either generally or by a special order to deal with any matter connected with the establishment of the High Court”.

On May 28, 1983, the office of the Registrar submitted the following note:

“The foregoing detailed note of the Assistant Registrar (Estt.) may kindly be perused from pages 209 to 251 *ante*.

Under the orders of the Hon'ble the Chief Justice, dated June 7, 1980, the joint seniority list of Senior Translators and Assistants prepared on the basis of continuous length of service was circulated amongst the two categories of the aforesaid employees for inviting objections, if any, under orders dated 14th May, 1982 of Hon'ble the Chief Justice at page 63 *ante*.

A number of employees from both the categories have submitted representations against the position assigned to them in the joint seniority list.

In this connection, it may be submitted that in the past such like matters were decided by the Hon'ble Judges after hearing both the parties involved in the matter. In view of this, the desirability of entrusting this case to an Hon'ble Judge may be considered, who, after hearing all the concerned officials, may decide the matter.”

(10) The note, dated May 28, was marked to the Registrar who submitted the same to the Chief Justice for orders on May 30, 1983. The Chief Justice entrusted the case to Sodhi, J., for decision,—*vide* order dated June 4, 1983. It is obvious that Sodhi, J., became office Judge as defined in rule 2 of 1973 Rules for deciding the objections/representations filed against the joint seniority list. The Office Judge heard all the parties concerned and,—*vide* order dated November 24, 1983, decided the objections/representations filed against the joint seniority list. Sodhi, J., was competent to decide the objections/representations as an Office Judge himself and his order dated November 24, 1983, did not require the approval of the Chief Justice for becoming operative. The last paragraph of the order dated November 24, 1983, reads:

“The office may be directed to prepare a joint seniority list according to the guide-lines as laid down above.”

(11) It is this suggestion of the Office Judge which was administratively approved by the Chief Justice when the latter recorded

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the note "As proposed" on November 25, 1983. The Chief Justice did not approve the order of the Office Judge, dated November 24, 1983, relating to the placement of direct recruits in the joint seniority list. It cannot be held that the Chief Justice adopted the order of the Office Judge relating to the placement of the direct recruits in the joint seniority list by appending the note "As proposed" on November 25, 1983. It is not disputed that the order of the Office Judge is appealable under rule 32 read with rule 36 of 1973 Rules. The appeals, now under consideration, against the placement of direct Assistants in the joint seniority list in terms of the order of the Office Judge, dated November 24, 1963, therefore, maintainable.

(12) The members of the Establishment of the High Court were governed by 1952 Rules before the 1973 Rules came into force whereunder it was made obligatory that 50 per cent posts of Assistants should be filled by direct recruitment from graduates from the open market by a competitive examination. The 1973 Rules were published in the official gazette on February 1, 1975. The contention of the learned counsel for the appellants is that in the absence of any date regarding the enforcement of 1973 Rules, the same shall be taken to have come into force with effect from the date when they were published in the official gazette and in the alternative on April 24, 1974, when the copies thereof were circulated in all the branches of the High Court. The date of enforcement of 1973 Rules is important for the reason that 50 per cent of the posts falling permanently vacant thereafter shall have to be necessarily filled by direct recruitment and not by promotion. The contention of the learned counsel for the direct Assistants is that 1973 Rules shall be taken to have come into force with effect from March 1, 1974, under the orders of the Hon'ble the Chief Justice dated March 18, 1974.

(13) 1973 Rules were circulated in all the branches of the High Court on April 24, 1974, and were published in the official gazette on February 1, 1975. It is not disputed that 1973 Rules shall be taken to have come into force when they were promulgated or published or brought to the notice of all concerned. A similar point arose in *Harla v. The State of Rajasthan*, (1) and it was held:

(1) 1951 S.C. 467.

“We do not know what laws were operative in Jaipur regarding the coming into force of an enactment in that State. We were not shown any, nor was our attention drawn to any custom which could be said to govern the matter. In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is, or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence.”

(14) The publication of 1975 Rules was made by circulation in all the branches of the High Court on April 24, 1974. There is no law which provides that 1973 Rules could be taken to have come into force from the date they are published in the official gazette. It is thus obvious that 1973 Rules would be taken to have come into force with effect from April 24, 1974, of course in the absence of any order of the Chief Justice making them effective from March 1, 1974.

(15) On March 18, 1974, the office submitted the following note to the Chief Justice:

“Hon’ble the Chief Justice may kindly peruse his Lordship’s order dated February 7, 1974 on pre-page.

As verbally directed, necessary correction regarding the posts of Junior/Senior Translators, Revisors, Superintendent Library and the Selection Grade of Readers and Private Secretaries in the scale of Rs. 700—40—1,100 have been carried out in the draft rules. If approved, these rules may be enforced and made effective from the 1st March, 1974.

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The rules involving financial implications may, if approved, be referred to the Central Government through the Chandigarh Administration for according approval thereto.

All new appointments made after March 1, 1974, have been regulated by the new rules."

(16) The above note, dated March 18, 1974, was approved by the Chief Justice on the same day. In the circulating note, dated April 24, 1974, it was mentioned that 1973 Rules had come into force with effect from March 1, 1974. It was thus brought to the notice of the members of the Establishment of the High Court on April 24, 1974, that 1973 Rules had come into force with effect from March 1, 1974.

(17) Mr. K. P. Bhandari, the learned counsel for the appellants, has argued that 1973 Rules which had been made under Article 229 of the Constitution could not be given retrospective effect by the Chief Justice and the same shall, therefore, be taken to have come into force on promulgation. Reliance has been placed on *The Accountant General and another v. S. Doraiswamy and others*, (2). The contention is without force.

(18) The rules made under Article 309 of the Constitution can be given retrospective effect and it was held in *B. S. Vadera v. Union of India and others*, (3). The rule making power can also be exercised under clause (5) of Article 148 of the Constitution in relation to the conditions of service of persons serving in the Indian Audit and Accounts Department. In *Doraiswamy's case* (supra), their Lordships examined whether the rules made under Article 148(5) could be given retrospective effect. Their Lordships held:

"The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In *B. S. Vadera v. Union of India*, (4), this Court held

(2) A.I.R. 1981 S.C. 783.

(3) A.I.R. 1969 S.C. 118.

(4) (1969) 3 S.C.R. 575. (AIR 1969 SC 118).

that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstances that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a Law on the subject matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that 'any rules so made shall have effect subject to the provisions of any such Act.' Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until Parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148, confers power on the President to frame rules "operating prospectively only. Clearly then, the rules of 1974, cannot have retrospective operation, and therefore, sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on 27th July, 1956, must be held *ultra vires*."

Clause (5) of Article 148 of the Constitution reads:

"Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General."

Clause (2) of Article 229 of the Constitution under which 1973 Rules have been framed reads:

"Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and

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servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pension, require the approval of the Governor of the State."

(19) The point canvassed by the learned counsel for the appellants is that the provisions contained in Article 229(2) is akin to the provision contained in Article 148(5) with the result that retrospective effect cannot be given to the rules made under Article 229(2). We are not impressed by this contention. In *Gurumoorthy v. The Accountant General, Assam and Nagaland, and others*, (5) their Lordships of the Supreme Court examined the power and authority of the Chief Justice of a High Court exercisable under Article 229 of the Constitution. Their Lordships held:

"The unequivocal purpose and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of appointments of officers and servants of a High Court it is, the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the Article. This is essentially to secure and maintain the independence of the High Courts. The anxiety of the Constitution makers to achieve that object is fully shown by putting the administrative expenses of a High Court including all salaries, allowances and pension payable to or in respect of officers and servants of the Court at the same level as the salaries and allowances of the Judges of the High Court nor can the amount of any expenditure so charged be varied even by the legislature. Clause (1) read with clause (2) of Article 229 confers exclusive power not only in the matter of appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court by Rules on the Chief Justice of the Court. This is subject to any legislation by the State Legislature but

only in respect of conditions of service. In the matter of appointments even the legislature cannot abridge or modify the powers conferred on the Chief Justice under Clause (1). The approval of the Governor, as noticed in the matter of Rules, is confined only to such rules as relate to salaries, allowances, leave or pension. All other rules in respect of conditions of service do not require his approval. Even under the Government of India Act the power to make rules relating to the conditions of service of the staff of the High Court vested in the Chief Justice of the Court under section 242(4) read with Section 241 of the Government of India Act, 1935. By way of contrast reference may be made to Article 148 relating to the Comptroller and Auditor General of India. Clause (5) provides:

* * * *

(20) It is clear that their Lordships did not hold the provision contained in clause (2) of Article 229 akin to clause (5) of Article 148. The observations made by their Lordships and reproduced above, hardly leave any doubt that the rule making power exercisable by the Chief Justice of the High Court under Article 229(2) is analogous to the corresponding power under Article 309 of the Constitution. The rules made by the Chief Justice of the High Court under Article 229(2) can, therefore, be given retrospective effect.

(21) On March 18, 1974, the Chief Justice had ordered that 1973 Rules shall come into force with effect from March 1, 1974. There is, therefore, no escape from the conclusion that 1973 Rules shall be taken to have come into force with effect from that date.

(22) Rule 30 of 1973 Rules postulates two separate seniority lists for each category of post in the Establishment. The unconfirmed members of the Establishment in each category have to be grouped in one list and those confirmed in the other. The seniority in the first list is to be determined by the length of continuous service in each category whereas the seniority in the second is to be reckoned from the date of confirmation. In the appeals, now under consideration, we are concerned with the seniority list of unconfirmed Assistants appointed by promotion and direct recruitment. The learned Office Judge has found that there were 125 posts in the Cadre

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of Assistants under 1952 Rule (88 permanent and 37 temporary) and all these posts were necessarily to be held by the promotees. After the coming into force of 1973 Rules with effect from March 1, 1974, Mrs. Sudesh Malhotra was the first direct Assistant appointed on April 6, 1974, when 16 such posts had become available since March 1, 1974, out of which 50 per cent were to be filled by direct recruitment. Mrs. Sudesh Malhotra being the first direct Assistant was assigned 9th position out of 16. Paramjit Kaur was the second direct recruit appointed on August 1, 1975, on which date 33 posts of Assistants had become available since March 1, 1974, out of which 17 posts were to be filled by promotion. One post of direct recruit was already held by Mrs. Sudesh Malhotra. Paramjit Kaur was assigned 19th position out of 33. The third direct appointment as Assistant was that of Inderjit Doda on December 17, 1976, on which date the posts to be filled with effect from March 1, 1974, rose to 55, out of which 28 were to be filled by promotees. Two posts out of a direct quota were held by Mrs. Sudesh Malhotra and Paramjit Kaur. Inderjit Doda was consequently assigned 31st position out of 55. In May, 1977, the number of posts of Assistants to be filled with effect from March 1, 1974, remained at 55 when 22 direct recruits were appointed. They were assigned seniority from 32 to 53. The last appointment of direct recruit was that of S. K. Puri on December 22, 1977, on which date the posts to be filled with effect from March 1, 1974, were 63, out of which 32 could be filled by promotion. Twenty-five direct Assistants had already been appointed. S. K. Puri was assigned 54th position out of 63. The net result is that in pursuance of the order of the learned Office Judge dated November 24, 1983, the direct recruits have been placed at No. 9, 19, 31 to 54 out of 63 posts of Assistants which fell vacant from March 1, 1974, till December 22, 1977.

(23) The learned counsel for the appellants has argued that the methodology adopted by the learned Office Judge is not in consonance with the provision contained in rule 30(ii) of 1973 Rules. The contention of the learned counsel for the direct Assistants is that the direct recruits have been assigned correct positions out of 63 posts of Assistants which fell vacant since March 1, 1974. The contention of the learned counsel for the appellants must prevail.

(24) The seniority of unconfirmed Assistants in terms of rule 30(ii) of 1973 Rules is to be determined by the length of continuous service as Assistant. The methodology adopted by the learned

Office Judge,—*vide* his order dated November 24, 1983, has obviously resulted in the promotee Assistants having longer tenure of service as Assistant than the direct Assistants ranking for junior in seniority to the latter. The seniority thus determined militates against the provision contained in rule 30(ii) of 1973 Rules.

(25) Under rule 16 of 1973 Rules the quota of the direct Assistants is fixed at 50 per cent. These Rules do not contain rotation rule. The rule of rotation is not implicit in rule 16. It has been held by their Lordships of the Supreme Court in *N. K. Chauhan and others v. State of Gujarat and others*, (6), that the quota rule does not unequivocally invoke the application of Rota Rule. The learned counsel for the direct recruits also did not press for the application of the rule of rotation for the benefit of direct recruits obviously because there is no such rule in 1973 Rules.

(26) At the time a direct Assistant is appointed, it is necessary to find out whether a post for the direct recruit is available. It will not be possible to appoint a direct Assistant in the absence of a post in the quota of direct recruits. The learned Office Judge has found that at the time direct Assistants were appointed posts within their quota were available. The scope of the methodology adopted by the learned Office Judge is limited to the extent of finding out whether a post in the direct quota is available when a direct recruit is appointed. The seniority of an unconfirmed direct Assistant under rule 30(ii) of 1973 Rules can only be determined by the length of continuous service as such. The *sine qua non* of rule 30(ii) of 1973 Rules is that the seniority of unconfirmed Assistants irrespective of the birth mark whether direct or promotee has to be determined according to their length of continuous service as such. With great respect for the learned Office Judge, the view taken in order dated November 24, 1983, directing the placement of the direct recruits in the seniority list formulated in terms of rule 30(ii) of 1973 Rules, at Nos. 9, 19, 31 to 54 out of 63 posts having fallen vacant since March 1, 1974, cannot be sustained.

(27) The learned counsel for the appellants has argued that the promotees regularly appointed during a particular period in excess of their quota for want of direct recruits can claim their whole length of service for seniority (under rule 30(ii) of 1973 Rules) against direct recruits appointed subsequently. Reliance has been placed

(6) A.I.R. 1977 S.C. 251.

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of *T. N. Saxena and others v. State of U.P. and others*, (7). The contention of the learned counsel for the appellants is correct.

(28) In *T. N. Saxena's case* (supra), their Lordships considered the issue of seniority between the promotees and direct recruits and examined the earlier decision in *N. K. Chauhan and others v. State of Gujarat and others*, (8). It was held that in *N. K. Chauhan's case* (supra), three important principles were laid down :

- (1) Normal rule is that seniority should be measured by the length of continuous officiating service unless a contrary intention appears from the rules.
- (2) Promotees regularly appointed during a particular period in excess of their quota for want of direct recruits can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.
- (3) Promotees who had exceeded their quota would have to be pushed down to accommodate direct recruits coming after their appointment.

(29) It is clear that the promotees regularly appointed during a particular period in excess of their quota for want of direct recruits and subsequently got adjusted against their own quota can claim their whole length of service for seniority under rule 30(ii) against direct recruits. The direct Assistants, irrespective of their seniority *vis-a-vis* the promotee Assistants in the list formulated under rule 30(ii) of 1973 Rules, are entitled to be confirmed against the permanent posts of their quota with effect from the date the post for each becomes available and the incumbent eligible for confirmation on completing the period of probation prescribed under rule 23 of 1973 Rules.

(30) The last contention of the learned counsel for the appellants is that Mrs. Sudesh Malhotra who was already working as Clerk in the High Court was appointed as Assistant on April 6, 1974, and it was in October, 1976, that A.C.J. ordered that she be treated as a direct recruit. The argument proceeds that under these circumstances she can be treated a direct Assistant since October, 1976, and

(7) A.I.R. 1982 S.C. 1244.

(8) A.I.R. 1977 S.C. 251.

not April 6, 1974. The contention is without merit. Mrs. Sudesh Malhotra was not appointed Assistant by way of promotion on April 6, 1974. She was given out of turn promotion without considering the claims of her seniors in clerical cadre. The order of A.C.J. passed in October, 1976, is clear that Mrs. Sudesh Malhotra was to be treated to have been initially appointed as Assistant from the quota of direct recruits. Mrs. Sudesh Malhotra has, therefore, been rightly treated a direct Assistant since the date of her appointment.

(31) The principles that emerge from the above discussion are:

1. The quota of the direct Assistants in terms of rule 16 of 1973 Rules shall be calculated out of the posts fallen vacant permanently with effect from March 1, 1974.
2. *The inter se seniority* of the promotees and direct Assistants under rule 30(ii) of 1973 Rules shall be determined on the basis of their length of continuous service as such.
3. The promotee Assistants regularly appointed during a particular period in excess of their quota for want of direct recruits and subsequently got adjusted against their own quota shall be given the benefit of their whole length of service as Assistant for determination of their seniority *vis-a-vis* the direct Assistants under rule 30(ii) of 1973 Rules.
4. The direct Assistants irrespective of their seniority *vis-a-vis* the promotee Assistants under rule 30(ii) of 1973 Rules shall be entitled to be confirmed against the permanent posts of their quota with effect from the date the post for each becomes available and the incumbent eligible for confirmation on completing the period of probation prescribed under rule 23 of 1973 Rules.

(32) In the result, all the four Service Appeals are accepted and the impugned order of the Office Judge dated November 24, 1983, regarding placement of the direct Assistants in the seniority list formulated under rule 30(ii) of 1973 Rules set aside. The Registrar shall prepare the seniority list under rule 30(ii) of 1973 Rules afresh in the light of the observations made above.

K. S. Tiwana, J.—I agree.

H.S.B.