

R.L. Bansal And Ors vs Union Of India And Ors on 8 May, 1992

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Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, Kuldeep Singh

PETITIONER:

R.L. BANSAL AND ORS.

Vs.

RESPONDENT:

UNION OF INDIA AND ORS.

DATE OF JUDGMENT 08/05/1992

BENCH:

JEEVAN REDDY, B.P. (J)

BENCH:

JEEVAN REDDY, B.P. (J)

KULDIP SINGH (J)

CITATION:

1993 AIR 978 1992 SCR (3) 133
1992 SCC Supl. (2) 318 JT 1992 (3) 243
1992 SCALE (1) 1179

ACT:

Central Public Works Department Assistant Engineers (Central Engineering Service and Central Electrical Engineering Service) Group 'B' (Confirmation and Seniority) Rules, 1979: Rules 4 and 5 (As amended by 1982 Rules)-Constitutional-Validity of.

Central Engineering Service-C.P.W.D.-Assistant Engineers-Direct recruits and promotees-Confirmation-Determination of seniority-Rule 4 in so far as it predicates determination of seniority based on date of confirmation held violative of Articles 14 and 16(1).

Central Engineering Service, Class II Recruitment Rules, 1954-Part II-Rules 3,4,5,.

Central Engineering Service Class II Recruitment (Amendment) Rules, 1976 and 1978.

Constitution of India, 1950: Article 309:

Proviso-Rules framed under-Held legislative in character-Can be struck down only on the grounds upon which a legislative measure can be struck down.

HEADNOTE:

The Central Engineering Service Class II Recruitment Rules, 1954 provided for four methods of appointment to the category of Assistant Engineers in the Central Public Works Department, viz., (i) by competitive examinations to be conducted by Union Public Service Commission - Rule 3(a); (ii) by direct appointment, i.e. selection from amongst temporary engineers and temporary Section Officers employed on the Civil engineering side of the C.P.W.D. after consultation with the Union Public Service Commission - Rule 3(b); (iii) by promotion, i.e. by selection on merit from amongst permanent Section Officers employed in the Civil Engineering side of the C.P.W.D. - Rule 3(c); (iv) by transfer - Rule 3(d). From time to time appointments to the category of Assistant Engineers were made from

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different sources. Since particular method of confirmation was followed, some of the temporary Assistant Engineers, who we're directly appointed under Rule 3(b), filed a Writ Petition in Delhi High Court challenging the confirmation procedure stating that the other Assistant Engineers recruited by competitive examination under Rule 3(a) as well as those directly appointed under Rule 3(b) and appointed subsequent to them have been confirmed leaving the petitioners unconfirmed. The High Court allowed the petition by directing that the petitioners be considered for confirmation and their inter se seniority fixed accordingly.

Subsequent to the judgment of the High Court, the Central Government prepared a seniority list of Assistant Engineers in 1972 which was based on the date of appointment/promotion and communicated to all concerned inviting objections thereto. However, before the said seniority list could be finalised, the decision of the Delhi High Court was challenged before this Court; it was upheld by this Court. After the judgment of this Court, the 1954 Rules were amended in 1977 and again in 1978. The Central Government then promulgated Central Public Works Department Assistant Engineers (Central Engineering Service and Central Electrical Service) Group 'B' (Confirmation and seniority) Rules, 1979 with retrospective effect from 1954. These rules, which prescribed the mode of determination of seniority of Assistant Engineers, were extensively amended in 1982.

The effect of the amended Rules was that the Assistant Engineers who were appointed by direct recruitment from amongst temporary engineers and Section Officers after

consultation with the Union Public Service Commission were sought to be treated as promotees. Persons appointed under 3(a) were treated as appointed against permanent post of Assistant Engineers and were given prior claim for confirmation. Appointments made prior to 22nd December, 1959 and those made after this date were to be treated differently for the purpose of confirmation. The Assistant Engineers appointed before 22nd December, 1959 were to be confirmed in the order of their seniority. But in the case of appointments made subsequent to 22nd December, 1959, the Assistant Engineers recruited against permanent posts were first to be confirmed en bloc against permanent vacancies in that year and thereafter Assistant Engineers recruited against temporary posts and those promoted from lower posts were to be confirmed against permanent vacancies available in that

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year by continuous interspersing of one promotee and one direct recruit appointee against temporary post till the permanent vacancies of that year exhausted.

Giving effect to the 1979 Rules a fresh seniority list of Assistant Engineers was prepared. The petitioners filed a Writ petition in this Court challenging the validity of 1979 Rules and for quashing the 1979 seniority list and restoration of 1972 list alleging that by virtue of 1972 seniority rules, the promotees have been relegated to far lower positions in seniority as compared to their position in 1972 list.

Allowing the petition, this Court,

HELD: 1. Rules made under the proviso Article 309 of the Constitution being legislative in character cannot be struck down merely because the Court thinks that they are unreasonable. They can be struck down only on the grounds upon which a legislative measure can be struck down. [154 G]

B.S. Vadera v. Union of India, A.I.R. 1969 S.C. 118; B.S. Yadav v. State of Haryana, A.I.R. 1981 S.C. 561, referred to.

2. Rule 4 of the Central Public Works Department Assistant Engineers (Central Engineering Service and Central Electrical Engineering Service) Group 'B' (Confirmation and Seniority) Rules, 1979 (as amended by the Central Engineering Service and Central Electrical Engineering Service) Group 'B' (Confirmation and Seniority) Amendment Rules, 1982, insofar as it predicates the seniority of Assistant Engineers, appointed on or after December 22, 1959, on the date of their confirmation, is violative of the fundamental rights guaranteed to the petitioners and other similarly placed Assistant Engineers by Articles 14 and 16(1) of the Constitution of India and accordingly held to be inoperative and void. [157 -D-E]

3. The cadre, it is admitted, consists of both permanent and temporary members. The Rules do not say that promotees shall not be appointed against permanent posts or

that they shall be appointed only against temporary posts. It is true that generally direct recruitment is made only against permanent vacancies whereas promotions may be made both against permanent as well as temporary vacancies. But in this service,

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It is clear from the Rules themselves that even direct recruitment is made against temporary posts. There is no distinction between the four erstwhile categories mentioned in unamended Rule 3 of the Central Engineering Service, Class II Recruitment Rules, 1954. All the four sources were equal quality-wise. Neither was superior to the other. They could be appointed both against permanent as well as temporary posts. In these circumstances, bringing in new concepts of "Assistant Engineers recruited against permanent posts", and "assistant Engineers promoted from the lower ranks" through the 1979 Rules, as amended by 1982 Rules, and treating the latter category unfavourably on that basis vide Rules 4 and 5 of 1979/1982 Rules, is a clear case of hostile discrimination. [155 B-F]

4. The entire course of amendments and new Rules appears to be designed to undo the effect of the Judgment of the High Court with retrospective effect. Not only the classification has no basis in the Rules-or in the factual situation-It is unreasonable and unjust; it is also unrelated to the object-the object being efficiency of administration. [155H, 156-A]

5. The formula constrained in Rule 5 of 1979 Rules (as amended in 1982) is devised to govern the order of confirmation. This very rule is discriminatory inasmuch as it seeks to treat to equals unequally, to the prejudice of what is now compendiously called, the class of "Promotees". [157-C]

6. The seniority of Assistant Engineers appointed on or after December 22, 1959 shall be determined on the same basis and in the same manner as it is determined in the case of Assistant Engineers appointed prior to the said date. [157-F]

JUDGMENT:

S.B. Patwardhan and Anr.v. State of Maharashtra and Ors., A.I.R. 1977 S.C. 2051, relied on.

Jagmal Singh Yadav v. M. Ramaya, A.I.R. 1977 S.C. 1474, referred to.

& ORIGINAL JURISDICTION : Writ Petition (C) No. 1438 of 1981.

(Under Article 32 of the Constitution of India.) Vijay K. Jain, Baldev Atreya and S. Shekhar for the Petitioners.

V.C. Mahajan, Ms. Sarla Chandra, V.K. Verma and Ashok Bhan for the Respondents.

Ashok Grover (NP) for the intervenor.

The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J. This writ petition is an instance of the classic dispute between promotees and direct recruits. The writ petitioners are Assistant Engineers in the Central Engineering Service-Class III (Gazetted Officers) in the Central Public Works Department (C.P.W.D.). Appointment to the category of Assistant Engineers' Service is governed by the Central Engineering Service, Class-II Recruitment Rules, 1954 (hereinafter referred to as '1954 rules'). These Rules, are divided into six parts. Part I is general. It contains the interpretation clause. Part-II deals with the method of recruitment. Rules 3 to 5, relevant for our purpose occur in this part. The Rules before their amendment in 1977 and 1978 read as follows:

"3. Recruitment to the Service shall be made by any of the following method:-

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

(b) By direct appointment in accordance with Part IV of these Rules of persons selected in India otherwise than by competitive examination.

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

(d) By transfer in accordance with Part VI of these Rules."

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

(b) No appointment shall be made to the Service or to any post borne upon the cadre of the Service by any method not specified in Rule 3.

(c) Subject to the provisions of sub-rule (b), the method or methods of recruitment to be employed for the purpose of filling any particular vacancies in the Service or such vacancies therein as may be required to be filled during any particular period and the number of candidates to be recruited by each method shall be determined by the Government.

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

Rule 3 thus provided for four methods of appointment namely, (a) by competitive examination held in accordance with Part III of the said rules, which means an examination conducted by the U.P.S.C Rule 21 which occurs in Part III provides that the candidates selected under this part shall be appointed as Assistant Engineers on probation for two years and if considered fit for permanent

appointment, they will be confirmed in their appointments;

(b) by direct appointment in accordance with Part IV of these Rules i.e., otherwise than by competitive examination. Rule 23 occurred in Part IV. Recruitment by selection under this rule was to be made " from among temporary engineers and temporary section officers employed on the civil engineering side of the Central Public Works Department after consultation with the Commission." The proviso to Rule 23(1), however, provided that it is not necessary to consult the commission in the case of any person, if the commission were consulted in connected with his temporary appointment to the service. The eligibility criteria are the same as is provided for appointment under method (a) except in the matter of age. The age of the candidate should not be more than 40 years;

(c) by promotion in accordance with Part V. Rule 24 is the only rule occurring in Part V. It reads "recruitment by promotion shall be made by selection on the basis of merit from among permanent section officers employed in the civil engineering side of the Central Public Works Department."

(d) by transfer in accordance with Part VI of the said rules. Part VI again contained a solitary rule - Rule 25. We need not refer to this rule since it is not relevant for our purpose.

Rule 4 provided that no appointment shall be made to the service except in the manner prescribed by Rule 3. Clause (c) of Rule 4, however, empowers the Central Government to determine the number of candidates to be recruited by each method, among other matters.

After the coming into force of 1954 Rules, appointments were being made from different sources from time to time. In the matter of confirmation, however, the authorities followed a particular method which gave rise to discontent and disquiet among certain sections leading to the filing of a writ petition in the Delhi High Court, being Civil Writ Petition No. 238 of 1969. It is necessary to briefly notice the facts of this writ petition and the principle enunciated by the Full Bench of the Delhi High Court while disposing it, as also the decision of this court on appeal reported as Jagmal Singh Yadav v. M. Ramaya A.I.R. (1977) S.C. 1474. Writ Petition No.238 of 1969 was filed by 12 Assistant Engineers who were appointed as Assistant Engineers on various dates between 18th October, 1958 and 8th January, 1963 to officiate temporarily until further orders. The respondent Nos. 1, 2 and 3 to the writ petition were the Union of India, U.P.S.C. and another official respondent. Respondents 4 to 51 were recruited directly under clause (a) of Rule 3 read with Part III i.e., by competitive examination held by U.P.S.C., while respondent 62 to 99 were recruited directly under clause (b) of Rule 3 read with Part IV i.e., in consultation with the U.P.S.C. but otherwise than by holding competitive examination. The case of the petitioners was that prior to their appointment as Assistant Engineers they were working as temporary section officers in C.P.W.D. (in the subordinate engineering services, Class-III Non-gazetted) and that they were appointed as Assistant Engineers in accordance with clause

(b) of Rule 3 read with Part IV of 1954 Rules. Their grievance was that though respondents 4 to 99 were appointed subsequent to them, they have been confirmed in the category of Assistant Engineers leaving the writ petitioner unconfirmed. They submitted that they were entitled to be

confirmed prior to or at any rate along with the said respondents. On behalf of the respondents, it was submitted that the writ petitioners therein were not appointed under clause (b) of Rule 3 read with Part IV but under clause (c) of Rule 3 read with Part V. It was also submitted that the writ petitioners were appointed "to officiate temporarily and until further orders" as Assistant Engineers and, therefore, they cannot claim parity with respondents 4 to

99. The writ petition was heard by a Full Bench of the Delhi High Court which allowed the writ petition in the following terms:

(1) The writ petitioners were, and must be deemed to have been, appointed under clause (b) of Rule 3 read with Part IV and not under clause (c) of Rule 3 read with Part V. At the time of their appointment, they held the same qualifications as the respondents.

(2) That the petitioners in the said writ petition and other persons similarly situated like them. Who had joined the service earlier, should be confirmed first according to the dates of joining the service as Assistant Engineers, after giving weightage, in preference to the respondents therein.

(3) That there was no final determination of quota as contemplated by Rule 4(c) between the four methods/sources of recruitment specified in Rule 3. Fixation of quota was a matter still under consideration of the Central Government but no final decision was taken till the rendering of decision by the High Court.

(4) The writ petitioners did not really question the validity of the appointment of any of the respondents 4 to 99 but only the validity of their confirmation. It is, however, not necessary to set aside their confirmation for giving relief to the writ petitioners in the circumstances of the case. The operative portion and the direction issued by the High Court is better to put in their own words:

"For the foregoing reasons we hold that the petitioners were appointed as temporary Assistant Engineers rule 3(b) read with part IV (rule 23) and were entitled to be considered for confirmation as Assistant Engineer when many of the respondents were confirmed. Since they were not so considered it would normally follow that the confirmation of the said respondents will have to be set aside if the vacancies available at the relevant time were less than the eligible persons including the petitioners and the confirmed respondents. We have already pointed out that Mr. Gopal Krishan stated before us on behalf of the petitioners that they do not question the validity of the appointment of any of the respondents Nos. 4 to 99 but that the petitioners question the validity of the confirmation of those of the respondents who have been confirmed. However we consider that it is not necessary to set aside the said confirmation of the following reasons: Mr. Gopalan Krishanan stated before us that out of the sanctioned No. of post of Assistant Engineer, a large number of posts have remained vacant and they will be more than sufficient to accommodate the

petitioners in case they are confirmed. The correctness of this statement was not disputed by the counsel for the respondent. In other words there are a sufficiently large number of vacant posts for accommodating the petitioners if they are considered and confirmed. It is thus not necessary and we are not inclined to disturb the existing situation by setting aside or questioning the confirmation of these respondents who have been confirmed.

In the result, we allow the writ petition partly and direct the respondents (1) to (3) to consider the petitioner for confirmation as Assistant Engineer, and to adjust the inter se seniority of such of the petitioners as might be confirmed after consideration and the respondents in accordance with law.

In the circumstances of the case we direct the parties to bear their own costs in the writ petition."

No appeal was preferred against the said judgment by the Union of India. However, one of the contesting respondents viz., respondent No.51 in the writ petition approached this Court questioning the correctness of the said decision. This court, in the decision referred to above, agreed with the High Court that the writ petitioners in the said writ petition must be deemed to have been appointed under Rule 3(b) read with part IV of the Rules inasmuch as the Committee which selected them was presided over by a member of the U.P.S.C. This court also agreed with the High Court that there was no final determination by the Union of India on the question of inter se quota as between the four sources/channels of recruitment specified in Rule

3. Accordingly, the appeal was dismissed. While dismissing the appeal, this court made the following observations in the penultimate para of its judgment:

"Before parting with the records we consider it proper to point out that persons entering Government service have the right to know where they stand with regard to their conditions of service and future promotion. Since there is no impediment in the way of the Government to make appropriate rules regarding conditions of service, even retrospectively, subject to constitu-

tionality, keeping in view justice and fair play to all concerned, it is a sorry sight to find that officers in the same Service fight over the years in courts having failed to get redress from the Government. When officers are qualified to hold certain posts after recruitment, according to rules, and they have put in a number of years, without break, in the service to the satisfaction of the authorities, it is impermissible to invoke a recondite rule and call it in aid to deprive a large section of officers of the benefit of otherwise satisfactory service. The matter may be different when posts in the Service are abolished, appointments to the Service are transitory or fortuitous or incumbents are found unsuitable for absorption. The history of this Service is that temporary posts are first created and then after some years they are converted into permanent posts. The Government, therefore, cannot merely be an on-looker where it could

rightly claim to be a legitimate arbiter on its own authority and having proper regard to all just claims. We also cannot held feeling that thinking in the Ministry has not always been uniform, sympathy warning or waxing form time to time for reasons not always manifest."

The petitioners in C.W.P.238/69, it may be noted, were not promotees. They contended - an which contention was upheld by the Delhi High Court and this court - that they are direct recruits having been appointed under Rule 3(b) read with part IV of 1954 Rule. Respondents 4 to 99 to that writ petition were also direct recruits - some of them having been appointed under Rule 3(a) read with part II and the others under Rule 3(b) read with part IV. It was thus not a dispute between promotees and direct recruits - as the Rules then stood - but as between two categories of direct recruits. In fact, a large number of respondents appointed under Rule 3(b) were in the same position as the writ petitioners therein. The Respondents, no doubt, had contended that the writ petitioners therein were promotees appointed under Rule 3(c) read with part V but that contention was rejected.

After the judgment of the Delhi High Court in writ petition No.238 of 1969 (in November, 1971) the Central Government prepared a seniority list of Assistant Engineers in the year 1972, based on the date of appointment/promotion, and communicated to all concerned inviting objections, if any, thereto. Before the said provisional seniority list could be finalised, this court rendered its decision in the appeal on 6th January, 1977. Now what happened after the pronouncement of the said judgment by this court is very significant.

On 17th January, 1977, the Central Government (President) issued GSR 168 amending the 1954 Rule called Central Engineering Service, Class II, Recruitment (Amendment) Rules 1976. By clause (b) of Rule 2 of these Amendment Rules, Rule 24 was substituted altogether. After its substitution, Rule 24 reads as follows:

"24. Recruitment by promotion shall be made

(i) 50% by selection on the basis of merit from among permanent Junior Engineers employed on the Civil Engineering side of the Central Public Works Department; and

(ii) 50% by selection from among Junior Engineers employed on the Civil Engineering side of the Central Public Works Department, after consultation with the Union Public Service Commission on the basis of a limited Departmental Competitive Examination which shall be held in accordance with the rules to be made by the Central Government, after consultation with the Union Public Service Commission."

It may be noted that Rule 24 in part V was relatable to clause (c) of Rule 3, which dealt with promotion. Now by virtue of the above amendment, the category covered by clause (b) of Rule 3 was sought to be brought within the preview of Rule 24, without correspondingly amending Rule 23 or Rule 3(b). In other words, the Assistant Engineers who were appointed by direct recruitment from among temporary engineers and temporary section officers after consultation with Public Service

Commission were sought to be treated as promotees. Evidently, the above amendments were issued in some haste without a proper scrutiny which is evident from the fact that only Rule 24 was amended without correspondingly amending other Rules in the 1954 Rules. When this was realised, it is evident, the Central Government came forward with yet another set of amendment Rules contained in GSR 418 dated 8th March, 1978. Now, by these Amendment Rules (1978 Amendment Rules) Rule 3 was substituted altogether. Instead of four channels/sources/methods of recruitment, they became only two viz., direct recruitment and promotion. As substituted, Rule 3 read as follows:

"3. Recruitment to the service shall be made by way of the following methods:-

(a) by competitive examination in India in accordance with Part III of these Rules.

(b) by promotion in accordance with part IV of these Rules."

To be consistent with the amendment to Rule 3, certain other amendments were also made. They were:

(a) part IV containing Rule 23 was omitted;

(b) part V and Rule 24 therein were renumbered as part IV and Rule 23 respectively;
and

(c) part IV containing Rule 25 was omitted.

Similar amendments were made with respect to Electrical Engineering Service.

The net effect of the 1977 and 1978 amendments was this:

(i) only the Assistant Engineers recruited in accordance with unamended clause (a) of Rule 3 (also clause (a) of Rule 3 after amendment) read with part III were to be treated as direct recruits.

(ii) recruitment by transfer as provided earlier by clause (d) of Rule read with part VI was deleted altogether; and

(iii) Assistant Engineers appointed under clause

(b) read with Rule 23 (part IV) and those appointed under clause (c) read with Rule 24 (part V) were clubbed together and called/treated as promotees with equal quota as between them. It is worth recalling that clause (b) of Rule 3, as it stood before the said Amendment, expressly termed those appointed thereunder as direct recruits.

The matters did not stop there. Purporting to draw inspiration from the observations contained in the penultimate para of the judgment of this court in A.I.R. 1977 S.C. 1474, the Central Government

framed a new set of rules called "Central Public Works Department Assistant Engineers (Central Engineering Service and Central Electrical Service) Group B (confirmation and seniority) Rules, 1979. "Though these rules were issued in January, 1979 they were given retrospective effect from 21st May, 1954 i.e., the date on which the 1954 Rules were brought into force. Since the validity of these rules - as amended in 1982 - is the main issue in this writ petition it would be appropriate to notice these Rules. Rule 2 is the definition clause. Clause (a) defines the expression "appointed day" to mean 21st May, 1954. The expression "Service Rules" defined in Clause (b) refer to the 1954 Rules. Sub-rule (2) of Rule 2 says that the words and expressions not defined in this rule shall carry the same meaning as is assigned to them in the service Rules. Rule 3 provides that every member of service whether appointed by direct recruitment, by promotion or by transfer shall be on probation for a period of two years unless the period of probation has already been approved by the Government under Service Rules. Rules 4 and 5 which dealt with confirmation and seniority respectively constituted the central theme of these rules. It is, however, not necessary to set out these Rules inasmuch as they have been totally substituted in 1982. Suffice it to state that Seniority was to be determined with reference to the date of confirmation and the date of confirmation was determined in a particular manner, to be elaborated hereinafter - and not with reference to the date of appointment or date of promotion, as the case may be. Actually, the purport of the Rules remains the same even after amendment. Even so, it would be sufficient if we refer to Rules 4 & 5 as substituted in 1982. But before we refer to 1982 Amendment Rules, which were framed and issued after the filing of the writ petition, it is necessary to refer to a few more facts as also to the pleadings to the parties Giving effect to the 1979 Rules, a fresh provisional seniority list of Assistant Engineers was prepared and communicated to the persons concerned. The revised provisional seniority list is referred hereinafter as 1979 provisional seniority list. It is on receipt of the said seniority list that the four petitioners herein have come forward with the present writ petition. The petitioners submit that the 1979 Rules are arbitrary, unreasonable and discriminatory and that they have been deliberately so framed as to prejudice the seniority position of the promotees. They submit that the 1972 provisional seniority list was correctly prepared in accordance with the decision of the Delhi High Court and that the 1979 Rules have been so designed as to undo the effect of the Judgment of this Court and Delhi High Court. By virtue of the 1979 seniority Rules, the promotees have been relegated to far lower positions in seniority as compared to their position obtaining in 1972 list. The direct recruits on the other hand have gained enormously vis-a-vis the 1972 list. By way of illustration, the petitioners have cited two instances: One is that of Sri R.M. Agrawal who is a direct recruit(temporary) vis-a-vis Shri A.N. Kapoor, a promotee. In the 1972 list their position was 1033 and 207 respectively whereas in the 1979 seniority list their position is 623 and 624 respectively. In other words, whereas a direct recruit (temporary) has come up from 1033 to 623, the promotee has gone down from 207 to 624. Another instance cited is that of Shri G.S. Mittal, direct recruit (temporary) vis-a-vis Shri S. Doraiswamy, promotee. In the 1972 list, their position was 1094 and 236 respectively which has become 691 and 692 respectively in the 1979 list. Inasmuch as this situation has been brought about by virtue of the 1979 Rules, the petitioners' main attack is directed against the said rules, particularly insofar as they provide that seniority of Assistant Engineers shall be determined with reference to and shall depend upon their date of confirmation. The petitioners say that seniority does not and should not be made to depend upon the date of confirmation. The reliefs sought for in the writ petition are (a) to strike down the 1979 rules (b) to quash the 1979 provisional seniority list and

(c) to restore the 1972 provisional seniority list. It is evident that reliefs (b) and (c) are more or less consequential to relief (a). The main question before us is the validity of the 1979 rules and in particular the rule which predicates seniority on the date of confirmation. If the said rules are found to be good, question of quashing the 1979 provisional seniority list or restoring the 1972 provisional seniority list does not arise. Moreover, the impugned 1979 list is also a provisional list and yet to be finalised after considering the objections received in that behalf. We shall, therefore, have to confine our attention to the validity of the Rules, rather than the correctness of the provisional seniority list prepared on the basis of the Rules.

In the counter-affidavit filed by one Shri Jagdish Prasad, Dy. Director (Administration) in the office of Director General (Works), C.P.W.D., New Delhi, it is submitted that though the 1972 provisional seniority list was prepared on the basis of the judgment of the Delhi High Court, the matter was thoroughly re-examined after the decision of this Court in Jagmal Singh and the 1979 Rules were issued after consulting the Law Department and keeping in view all the relevant facts and circumstances of the case. It is submitted that the judgment of this court aforesaid impliedly concedes the existence of a nexus between confirmation and seniority. The Rules are perfectly just and valid. The 1972 seniority list, it is submitted, was also a provisional one and before it could be finalised, the 1979 Rules were promulgated by the President of India, with retrospective effect from 1954, which Rules prescribed the mode of determining the seniority of Assistant Engineers. Accordingly, a new revised seniority list was prepared. It is submitted in para 20 "that the appointees under Rule 3(b) have been selected for appointment by the same Departmental Promotion Committee which have considered the question of promotion of officers as Assistant Engineers under Rule 3(c). By clubbing them together the persons appointed under Rule 3(b) are not at a disadvantageous position. Direct recruits who have come against permanent posts are a distinct group." It is also submitted that "both the temporary appointments under Rule 3(a) and promotees under Rule 3(b) and (c) have been treated alike in the Rules by giving them 1:1 ratio." Another relevant statement made in the counter-affidavit is that "the cadre consists of both permanent and temporary officers." It is submitted that the persons appointed against the permanent posts have a prior claim for confirmation over those appointed against temporary posts.

It was brought to our notice that after the filing of the writ petition, the 1979 Rules have been extensively amended in the year 1982 with retrospective effect from 21st May, 1954 and another fresh provisional seniority list has been prepared and communicated on basis of the 1979 Rules as amended 1982. For a full and complete disposal of the dispute, we thought it necessary to take notice of the 1982 Amendments and the revised provisional seniority list prepared on that basis. Actually these amendments were brought to our notice only in the written submissions, which were filed after the close of arguments. In this view of the matter, we directed the matter to be posted for further hearing, on which occasion, the counsel for petitioners brought to our notice not only the 1982 Amendments but also the 1976 and 1978 Amendments referred to hereinbefore. We have taken notice of all these Amendments in the interest of justice and with a view to do effective justice between the parties. (The only respondents to the writ petition are the Union of India, Director General of Works and U.P.S.C. No other group or any of its members are impleaded).

The reason for promulgating the 1982 Amendments is stated in the explanatory Memorandum accompanying the Amendments. It reads:

"In the Central Public Works Department, Assistant Engineers (Central Engineering Service) Group `B' (Confirmation and Seniority) Rules, 1979, which had been given retrospective effect from the 21st May, 1954, the definitions of Assistant Engineers appointed by different methods had not been given. This amendment has necessarily to be given retrospective effect from the same date as the original rules. In the Civil Appeal No.1260 of 1973 - Shri Jagmal Singh Yadav v, Ramayyah & Others

- the Supreme Court had also observed that there was no impediment in the way of the Government to make appropriate rules regarding conditions of service, even retrospectively subject to constitutionality and keeping in view justice and fair play to all concerned.

2. The Central Engineering Service Class II Recruitment Rules and the Central Electrical Engineering Service Class II, Recruitment Rules, do not contain the principles for determining the seniority of officers appointed to the grade of Assistant Engineers through different methods except Direct Recruitment. No special orders were also issued by Government in the past laying down any such principles. Therefore, the officers appointed to these services are deemed to be governed by the general principles of seniority issued by the Ministry of Home Affairs in their office memorandum No.30/44/48-Apptt. dated the 22nd June, 1949 and No.9/11/55-RPS dated the 22nd December, 1959 respectively, according as to whether they were appointed to the service prior to the 22nd December, 1959 or on or after that date. The present amendment seeks to incorporate these principles, to the extent possible and practicable, in the Central Public Works Department, Assistant Engineers (Central Engineering Service and Central Electrical Engineering (Central Engineering Service and Central Electrical Engineering Service) Group `B' (Confirmation and Seniority) Rules, 1979, since the principles have to be applied for deter-

mining the seniority of officers appointed to the service in the past also, these have necessarily to be given retrospective effect from the date of the Constitution of the service, viz., the 21st May, 1954. The proposed amendment, according to Government will be equitable, fair and just to all groups of Assistant Engineers in the Central Public Works Department."

The 1982 Amendments have not only substituted Rules 4 & 5 but also added certain definitions in Rule 2(1). Further, for the reasons set out in the Explanatory Memorandum, a cut-off date - if it can be so described for the sake of convenience - is prescribed. It is 22nd December, 1959. Appointments made prior to this date and those made after this date are dealt with on different footing. After the substitution of Rules 4 and 5, Rule 4 deals with seniority while Rule 5 deals with confirmations, whereas before the 1982 Amendments, Rule 4 dealt with confirmation and Rule 5 with seniority. The definitions introduced in Rule 2(1) which are relevant for the present purposes -

read as follows:

"(c) Assistant Engineers recruited against permanent posts" means those Assistant Engineers who have been directly recruited through the Union Public Service Commission against permanent posts of Assistant Engineers in accordance with clause

(a) of rule 3 read with Part III of the Service Rules;

(d) "Assistant Engineers recruited against temporary posts" means those Assistant Engineers who have been directly recruited through the Union Public Service Commission against temporary posts of Assistant Engineers in the Central Public Works Department in accordance with clause (a) of rule 3 read with Part III of the Service Rules;

(e) "Assistant Engineers promoted from the lower ranks" means those Assistant Engineers whether graduates or Diploma holders; promoted or selected from the rank of Section Officers to the grade of Assistant Engineers by a duly constituted Departmental Promotion Committee in accordance with either clause (b) or rule 3 read with Part IV or clause (c) of rule 3 read with Part V of the Service Rules as they existed before they were amended by GSR Nos. 418 and 419 dated the 8th March, 1978."

Rule 4 and 5 as substituted in 1982 read thus:

"4. Seniority

(i) Notwithstanding anything else contained in the Service Rules, the seniority of the members of the service appointed by whichever method, or before the 21st December, 1959 shall be determined with reference to the date of their appointment as Assistant Engineers, irrespective of whatever they have been confirmed in the grade or not and they shall rank en bloc senior to those appointed on or after the 22nd December, 1959.

Note: For the purpose of this sub-rule, the date of appointment of the direct recruits of any batch appointed on or after the 21st May, 1954 shall be deemed to be earliest date on which any person from that batch joined in the service.

(2) Subject to the provisions of sub-rule (4), the seniority of the members of the service appointed by whichever method, on or after the 22nd December, 1959 shall be determined in the order of their confirmation under Rule 5:

Provided that their inter se seniority shall be determined by the order of merit in which they are selected for such appointment:

Provided further that persons appointed as a result of earlier selection shall rank senior to those appointed as a result of subsequent selection.

(3) As from the commencement of the Central Engineering Service, Class II, Recruitment (Amendment) Rules, 1976 and the Central Electrical Engineering Service, Class II, Recruitment (Amendment) Rules, 1976, the relative seniority of promotee Assistant Engineers under clause (i) and (ii) of rule 24 of the Service Rules shall be regulated according to the rotation of vacancies based on the quotas prescribed for such promotions beginning with a promotee under clause (i) of the said rule.

(4) The relative seniority of the members of the service appointed, by whichever method, shall follow the following order. Persons falling in each later category shall rank junior to persons falling in the earlier category:

(i) Assistant Engineers appointed by whichever method on or before the 21st day of December, 1959;

(ii) Assistant Engineers appointed on or after the 22nd day of December, 1959, against the permanent vacancies, in any particular post, in accordance with Part III of the Service Rules, and confirmed in accordance with sub-clause (ii) of clause (b) of rule 5 in that year.

(iii) Assistant Engineers appointed on or after the 22nd day of December, 1959 and confirmed in any particular year after the confirmation of the Assistant Engineers referred to in clause (ii) of this sub-rule, in the manner and in the order specified in sub-clause (iii) of clause (b) of sub-

rule (2) of rule 5, in that year.

Confirmation:

(1) To be eligible to be considered for confirmation an Assistant Engineer appointed, by whichever method, shall have;

(a) completed the period of probation satisfactorily and

(b) passed such tests as may be prescribed from time to time by government by general or special orders.

(2) Notwithstanding anything else contained in the Service Rules, but subject to the provisions of sub-clause (1) above, the confirmation of Assistant Engineers in the service shall be regulated in accordance with the provisions hereinafter contained, namely:-

(a) The Assistant Engineers appointed by whichever method, on or before the 21st day of December, 1959 but not confirmed before that date shall be confirmed in the order of their seniority, subject to their being found fit under sub-rule (1).

(b) Confirmation, in the grade of Assistant Engineers who were appointed on or after the 22nd December, 1959 shall be made in the following manner, namely:-

(i) the number of permanent vacancies available in each year shall be determined in the first instance.

(ii) Assistant Engineers recruited against permanent posts in a particular year, who have completed the period of probation, shall be confirmed en bloc against permanent vacancies available in that year, in order of the inter se seniority of such officers and, where the number of Assistant Engineers so appointed in a particular year exceeds the number of permanent posts available in that year, such Assistant Engineers shall be confirmed against supernumerary posts which shall be created for that purpose.

(iii) After the Assistant Engineers of the category mentioned in sub-clause (ii) have been confirmed in a year, the Assistant Engineers recruited against temporary posts and the Assistant Engineers promoted from lower ranks on temporary basis, who have completed the period of probation, shall be confirmed subject to their being otherwise found fit, against permanent vacancies available in that year by continuous interspersing of one promotee and one direct recruit appointed against temporary post till the permanent vacancies of that year are exhausted.

Provided that if, in a particular year, any of the categories mentioned in sub-clause (iii) namely, the promotees or the direct recruits against temporary posts, gets exhausted in following the procedure set out in this sub-clause, the remaining permanent vacancies shall en bloc go to the group having unconfirmed Assistant Engineers:

Provided further that if, in a particular year, the number of permanent vacancies is less than the number of Assistant Engineers in the categories mentioned in sub-clause (iii), the Assistant Engineers not confirmed in that year shall be con-

sidered for confirmation against permanent vacancies of the subsequent year, by again following the principle of inter-spersion, after the direct recruits against permanent posts of that year have first been adjusted in the manner indicated in sub-clause (ii). The direct recruits or, as the case may be, the promotees shall be selected for such confirmation under this clause in the order of their seniority in their respective seniority lists."

It is necessary to notice the effect of the 1982 amendments. As would be evident from the definitions "Assistant Engineers recruited against permanent posts", are those

appointed under Rule 3(a) of the 1954 Rules against permanent vacancies, while "Assistant Engineers recruited against temporary posts" means those appointed under Rule 3(a) against temporary posts. "Assistant Engineers promoted from the lower ranks", are those appointed/promoted under unamended clauses (b) and (c) of Rule 3. More important, seniority now depends upon the date of confirmation, which is determined in accordance with Rule 5 of 1979/1982 Rules. If we read Rule 5 closely, it becomes clear that of the permanent vacancies available in a year, the direct recruits against permanent vacancies are to be accommodated en bloc in the first instance. And thereafter if any vacancies are left, the direct recruits against temporary posts and promotees (which category now includes Assistant Engineers recruited and promoted under Clauses (b) and (c) - unamended - of Rule 3 of the 1954 Rules) are to be accommodated alternately. This process is to be repeated each year. Then again, while Rule 5 refers to "Assistant Engineers recruited against permanent posts" and "Assistant Engineers recruited against temporary posts", it does not speak of "Assistant Engineers promoted from lower ranks".

It speaks of "Assistant Engineers promoted from lower ranks on temporary basis". What does this mean? Does it mean that all promotee engineers (including those 'direct recruits' appointed under unamended clause (b) of Rule 3) were appointed/promoted only against temporary posts? Was no such person appointed or promoted against a permanent post? Were all permanent posts meant only for direct recruits? Rules do not say so, nor does the counter affidavit assert so. (If this were so, the seniority list prepared in 1972 would not have been prepared in the manner it was prepared.) If on the other hand, these persons were also appointed and promoted against some of the permanent vacancies, then where do they fit in in the sequence prescribed by Rule 5? There is no explanation, nor any apparent reason, why the direct recruits against permanent posts are treated as a superior category to all the promotees en bloc. Not a single promotee - not even an Assistant Engineer recruited under unamended clause (b) of Rule 3 of the 1954 Rules - is ranked on par with them. They are placed on par with Assistant recruited against temporary posts. This is totally at variance with the basis and principle upon which the 1972 seniority list was prepared pursuant to the Judgment of Delhi High Court - which was later affirmed by this Court. There is yet another glaring feature. So far as the appointments/promotions made prior to December 22, 1959 are concerned, they are to be confirmed in the order of their appointment - which means that seniority is determined on the basis of their appointment irrespective of the mode in which he is appointed. But when it comes to the period subsequent to December 22, 1959, the rule is altogether different. The Assistant Engineers appointed/promoted on or after December 22, 1959 are divided into three categories mentioned above. There is no reason or basis for the date 22.12.1959 except that it is the date on which the subsequent Memorandum of the Home Ministry (said to contain the principles regarding determination of seniority) was issued. (We have not been shown a copy of the said Memorandum.) It is not a mere case of different principle being adopted subsequent to 22.12.1959, it is inherent vice of discrimination implicit in it that is hurting the promotees (as defined in amended Rule 3(b) of the 1954 Rules).

The petitioners say that on the basis of the 1982 amendments, a fresh revised provisional seniority list has been prepared and communicated to all concerned, inviting their objections, if any. They say

that in this revised list they have been further sent down to far lower positions than in the 1979 list. The respondents, on the hand, submit that the amendments are perfectly just and equitable and that no legitimate grievance can be made against the Rules or the revised provisional seniority list of 1982.

Now it is true that Rules made under the Proviso to Article 309 of the Constitution being legislative in character cannot be struck down merely because the Court thinks that they are unreasonable, - and that they can be struck down only on the grounds upon which a legislative measure can be struck down. (Vide *B.S. Vadera v. Union of India*, (1969) S.C. 118 and *B.S. Yadav v. State of Haryana*, (1981) S.C. 561, we are yet of the opinion that Rule 4 of 1979 Rules (as amended in 1982) in so far as it predicates seniority on the date of confirmation - which confirmation is directed to be made on a wholly unequal and discriminatory basis - is violative of the equal opportunity clause enshrined in Article 16 of the Constitution. The cadre, it is admitted consists of both permanent and temporary members. The Rules do not say that promotees shall not be appointed against permanent posts or that they shall be appointed only against temporary posts. It is true that generally direct recruitment is made only against permanent vacancies/posts whereas promotions may be made both against permanent as well as temporary vacancies/posts. But in this service, it is clear from the Rules themselves that even the direct recruitment is made against temporary posts. In short, there is no distinction between the four erstwhile categories mentioned in unamended Rule 3. They could be appointed both against permanent as well as temporary posts. If so, there appears to be no justification for treating all the appointees under clauses

(b) and (c) of Rule 3, en bloc, on par with direct recruits against temporary posts (as has been done by Rules 4 and 5 of 1979/1982 Rules) which suggests as if all such appointments were made, at all points of time, only against temporary posts. At the cost of repetition, we may mention that those appointed under unamended clause (b) or Rule 3 were expressly referred to as direct appointees and yet they are now converted into promotees en bloc and downgraded vis- a-vis direct recruits under unamended clause (a) of Rule 3. All this, in our opinion, is discriminatory and violative of Articles 14 and 16(1). There were four channels/sources of appointment. Direct recruitment was one of them - unamended clause (a). Unamended clause (b) provided for another type of direct appointment while unamended clause (c) provided for promotion. True, there was no quota fixed as between them as held by this Court and Delhi High Court but the Rules nowhere stated that appointment under unamended clauses (b) and (c) shall be made only against temporary posts. All the four sources were equal - quality-wise. Neither was superior to the other. In these circumstances, bringing in new concepts of "Assistant Engineers recruited against permanent posts", and "Assistant Engineers promoted from the lower ranks" through the 1979 Rules (as amended by 1982 Rules) and treating the latter category unfavourably on that basis (vide Rules 4 and 5 of 1979/1982 Rules) is a clear case of hostile discrimination. In this context, if we recall the principles enunciated by the Delhi High Court and this court in the earlier writ petition referred to hereinbefore, the intention of the Rule-making authority to undo the effect of the said Judgments, to the grave prejudice of the Assistant Engineers appointed under clauses

(b) and (c) of unamended Rule 3 becomes crystal clear. The entire course of amendments and new Rules appears to be designed to undo the effect of the said Judgment with retrospective effect. Not

only the classification has no basis in the Rules - or in the factual situation - it is unreasonable and unjust; it is also unrelated to the object - the object being efficiency of administration.

In *S.B. Patwardhan and Anr. v. State of Maharashtra and Ors.* A.I.R. 1977 S.C. 2051, this court observed:-

"Instead of adopting an intelligible diffentia, Rule 8(iii) leaves seniority to be determined on the sole touchstone of confirmation which seems to us indefensible. Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the Government.

Rule 8(ii) in the instant case adopts the seniority-cum-merit test for preparing the statewise Select List of seniority. And yet Clause (III) rejects the test of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That, under Articles 14 and 16 of the Constitution, is impermissible and therefore we must strike down Rule 8(iii) as being unconstitutional."

The petitioners also rely upon the following observations from the same judgment:

"Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. And yet clause (iii) of Rule 8 provides that probationers recruited during any year shall in a bunch be treated as senior to promotees confirmed in that year. The plain arithmetic of this formula is that a direct recruit appointed on probation, say in 1966, is to be regarded as senior to a promotee who was appointed as an officiating Deputy Engineer, say in 1956, but was confirmed in 1966 after continuous officiation till then."

True it is that in the present case, a formula contained in Rule 5 of 1979 Rules (as amended in 1982) is devised to govern the order of confirmation, but as demonstrated above, this very rule is discriminatory inasmuch as it seeks to treat equals unequally, to the prejudice of what is now compendiously called, the class of "promotees".

For the above reasons, it must be held that Rule 4 of the Central Public Works Department Assistant Engineers (Central Engineering Service and Central Electrical Engineering Service) Group `B' (Confirmation and Seniority) Rules, 1979 (as amended by the Central Public Works Department, Assistant Engineers (Central Engineering Service and Central Electrical Engineering Service) Group `B' (confirmation and Seniority) Amendment Rules, 1982), insofar as it predicates the seniority of Assistant Engineers (appointed on or after December 22, 1959) on the date of their confirmation, is violative of the fundamental rights guaranteed to the petitioners (and other similarly placed Assistant Engineers) by Articles 14 and 16(1) of the Constitution of India and accordingly held to be inoperative and void.

Having regard to the period for which this dispute has been pending and in the facts and circumstances of this case and for the reasons recorded hereinbefore, we direct that the seniority of Assistant Engineers appointed on or after December 22, 1959 shall be determined on the same basis and in the same manner as it is determined in the case of Assistant Engineers appointed prior to the said date. This direction is made keeping in view the desirability of giving a quietus to this dispute at least now.

The writ petition is, accordingly, allowed in the above terms. No order as to costs.

T.N.A.

Petition allowed.