

State Of U.P. And Anr vs M. J. Siddiqui And Ors on 31 March, 1980

Equivalent citations: 1980 AIR 1098, 1980 SCR (3) 254, AIR 1980 SUPREME COURT 1098, 1980 LAB. I. C. 644, 1980 SCC (L&S) 321, 1980 (3) SCC 174, (1980) 1 SERVLR 868

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Bench: Syed Murtaza Fazalali, N.L. Untwalia, A.D. Koshal

PETITIONER:
STATE OF U.P. AND ANR.

Vs.

RESPONDENT:
M. J. SIDDIQUI AND ORS.

DATE OF JUDGMENT 31/03/1980

BENCH:
FAZALALI, SYED MURTAZA
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FAZALALI, SYED MURTAZA
UNTWALIA, N.L.
KOSHAL, A.D.

CITATION:
1980 AIR 1098 1980 SCR (3) 254
1980 SCC (3) 174

ACT:

Seniority, inter-se of direct recruits and promotees prior to the merger of PMS I and PMS II as per order 18-12-68-Validity of the seniority list dt. 31-12-71 pursuant to the order fixing the principles Dt 18-12-71 -Pradeshik Medical Services, 1964-Whether the order is inconsistent with Rule 18 of the U.P. Medical Services Rules 1945.

In the State of U.P. there were two Medical Services consisting of doctors serving in the State. The senior service was called the Provincial Medical Service (P.M.S.) This service was a gazetted service carrying a higher scale of pay than the other service which was known as P.S.M.S. (Provincial Subordinate Medical Service). So far as the P.M.S. was concerned, the incumbents of the posts in the service were appointed by the Governor, whereas in the case of the P.S.M.S., the employees were appointed by the

Director, Health Services. On June 14, 1945, the Government of U.P. framed rules known as the "United Province Medical Services (Men's Branch) Rules, 1945" which were applicable to P.M.S. Only. Rule 3(b), (f), and (h) defined "Direct Recruitment", "Member of the Service" and "Subordinate Medical Service", respectively. Rule 5 provided for two modes of recruitment. Rule 12 provided that selection of candidate for direct recruitment shall be made in consultation with the Public Service Commission. Rule 13 prescribed the mode of interview. Rule 15 laid down modes of recruitment by promotions. Rule 17 specified the "appointing authority" and the manner in which the vacancies should be filled in. Under Rule 18, seniority in the service shall be determined by the date of order of appointment in a substantive vacancy. Rule 19 required that all persons whether recruited directly or by promotion be placed on probation, while Rule 20 laid down the circumstances under which a person appointed to a post in the Service on probation may be confirmed.

On 14-3-1946, two Medical Services were constituted, namely (i) Provincial Medical Service Grade I (popularly known as P.M.S. I) and (ii) Provincial Medical Service Grade II (known as P.M.S. II). It was decided that existing members of PMS II were to be absorbed in PMS I and further recruitment of medical graduates should be made to PMS II in order to replace the PSMS. By an order dated July 24, 1951, the Government laid down that 50 per cent of the vacancies in PMS I were to be filled in by direct recruitment and 51 per cent by promotion. The principle for determination of inter se seniority between direct recruits and the promotees in PMS I was not laid down at the time when the Government order was made. In spite of the quota fixed by the order dated 24-7-1951, no promotion from PMS II to PMS I could be made between the years 1952 to 1963, except on an ad hoc basis. On July 14, 1962 by virtue of an advertisement, the Public Service commission invited applications for recruitments to 56 gazetted posts out of which 9 posts were permanent and the rest were temporary but were likely to continue. In pur-

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suance of this advertisement, the appellants applied for direct recruitment to PMS I and they were ultimately appointed on a temporary basis some time in June 1963, but before the merger of the two services (PMS I and PMS II) which came into existence on November 1, 1964. This merger was brought about through an order of Government dt. 2-11-64. By this order the Pradeshik Medical Service (Men/Women) was constituted which had two grades; namely-ordinary grade which included all the existing posts of PMS I, and PMS II and Selection Grade to consist of 71/2% of the total number of permanent posts in the ordinary grade. By para 2 it was specified that "the permanent and temporary posts in PMS I and PMS II grades shall continue to remain as such on their

merger until the temporary posts are made permanent subsequently". By para 4, the Government proposed to issue a further order regarding the fixation of the inter-se seniority while the right to fix inter-se seniority of the members of the two services was reserved, no provision was made in the order which either applies or continues the Rules of 1945 even, 3 in respect of inter-se seniority of members of each merging service. Thereafter another order was passed on 20-2-1965 by which the U.P. Medical Service (Men's Branch) Rules 1945 were made applicable provisionally to the new PMS with the words "unless otherwise ordered". Ultimately, a final order laying down the principles on the basis of which the inter-se seniority of the members of the two services was to be determined in the new service was made on 18-12-68. In consonance with the directions contained in this order, the Government fixed the seniority of appellants 1 to 7 and petitioners 1 to 12. The appellants fell within the ambit of direction (b) of the order dt. 18-12-68 which provided for officers appointed to PMS either on a permanent or temporary basis prior to the merger in a regular manner in consultation with The Lok Sewa Ayog (Public Service Commission) in order of their seniority. By a Notification dated July 3, 1970 issued under Art. 309 of the Constitution, the Governor made certain amendments to Rule 25 of the 1945 Rules, which dealt with promotion to the post of Civil Surgeon. The Government Thereafter directed through its order dt. 18-12-71 certain principles to be followed regarding fixation of seniority. As per this order the Government by its order dt. 31-12-71 fixed the inter-se seniority of the members of the new service, placing the appellants above the petitioners/respondents and awarding to them the selection grade prior to the petitioners.

HEADNOTE:

The petitioners/respondents challenged the vires of these orders as (a) ultra vires Articles 14 and 16 of the Constitution; (b) inconsistent with the Rules 17 and 18 of the 1945 Rules. The High Court accepted the plea of the petitioners/respondents. Hence the appeals by special leave by the appellants and the State.

Allowing the appeals, the Court

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HELD: 1. The combined effect of Rules 12, 13, IS and 17 of the United Province Medical Service (Men's Branch), Rules, 1945 is that whereas in the case of direct recruitment, the matter was to be considered by the Public Service Commission after advertising the vacancies, so far as recruitment to the Service by promotion is concerned, a Selection Committee constituted under the Rules had to send the lists to the Commission. In a third category of cases to which appointments were made purely on a temporary or

officiating basis there was no provision for reference either to a Selection Committee or to

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the Commission and such appointments could be made by the Governor under sub-rule (2) of Rule 17. [262B-C]

In the instant case, the direct recruit applied to the Government in pursuance of an advertisement and they were appointed to the Senior Service only after they were recommended by the Public Service Commission. The appointment, therefore, was not a purely officiating, temporary or ad hoc appointment as contemplated by Rule 17(2). [262D-E]

2. There is no magical formula or special charm in the word "substantive". The mere use of the term 'appointment in a temporary vacancy' by itself would not conclude the matter or lead to the irresistible inference that the appointment was not made in a substantive capacity, because even a substantive appointment could be made to a purely temporary vacancy. In order, therefore, to determine the nature of appointment, the Court must look to the substance of the matter, the surrounding circumstances, the mode, the manner and the terms of appointment and other relevant factors. In the instant case. Reading the advertisement and the manner and mode of the appointment of the appellants it is clear that they were appointed in a substantive capacity to temporary posts which according to the advertisement were likely to continue. Moreover the appellants were appointed to PMS I which was doubtless a [superior service carrying a higher scale than PMS II of which the petitioners were members. [265B-E]

Purshottam Lal Dhingra v. Union of India, [1958] SCR 828; followed.

3. The fact that due to some oversight on the part of appointing authority or to other fortuitous circumstance the order placing the appellants on probation was not passed for long would not give any special advantage to the petitioners, (respondents) who were themselves drawn from a lower service and even if they held a substantive post in such service, they cannot by virtue of promotion to the higher service after the appellants, claim seniority over the latter. [266E-F]

4. Articles 14 and 16 of the Constitution have not been violated because a person who is appointed to a higher service carrying a higher scale must ordinarily be deemed to be senior to an employee who is promoted from a lower service to the higher service even though his appointment may have been substantive in the lower service. [266 F-G]

Kewal Krihsan Bagga v. The Chairman Railway Board and Ors., [1976] 4 S.C.C. p. 733; followed.

5. In the absence of any provision in the order dated 2-11-64 either applying or continuing the Rules of 1945 even in respect of the inter-se seniority of members of each merging service, which was also passed under Art. 309 of the

Constitution and was therefore of a statutory character or at any rate had a statutory flavour, the Rules of 1945 could not be applied to the situation obtaining after 2-11-64. [268G-H]

6. The Directions in the order dated 18-12-68 strike a just balance between the officers of erstwhile services after they were merge into the New Services. Direction (b) of order dt. 18-12-68 regarding fixation of seniority does not speak of any substantive appointment whatsoever but equates the

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officers appointed to PMS I on permanent or temporary basis prior to the merger. In other words, the direction contemplates that any officer appointed to a post whether permanent or temporary in PMS I which was the Senior Service prior to merger, would rank after merger above those officers who were drawn from PMS II. [271B, C, G]

7. The 1945 Rules did not apply to the New Service at its inception and what they were made applicable to the new service only for a shortwhile by virtue of the order dated 20th February 1965, purely on a provisional basis as the Government made it quite clear in that order itself that the 1945 Rules will apply 'unless otherwise ordered' and thus had reserved the right to pass final orders regarding seniority later which was done in 1968. [271D-E]

8. Direction (b) of the order dt. 18-12-68 is not inconsistent with Rule 18 of the 1945 Rules. Having regard to the history of PMS I and PMS II, if Rule 18 of the 1945 Rules were applied to the parties and the 1968 order ignored, the resultant effect would be that equals and unequals would be treated similarly which would amount to a direct infraction of Articles 14 and 16 of the Constitution. The appellants and the petitioners were not similarly situate and if the petitioners were put above the appellants in the matter of seniority, it would have resulted in a gross and wholly unreasonable discrimination by making junior officers senior to superior officers. This is clear from the following propositions: D

(i) To begin with, the Rules of 1945 had absolutely no application to the new Service. Those Rules applied to the old PMS I Service only and, therefore, to a situation completely different from 'hat which prevailed after the merger of the two Services on 1-11-1964. As the Government order merging the two Services was also an order passed under 309 of the Constitution, it had statutory force and was binding on all the officers of the new Service.

(ii) At the time when the 1964 order was passed the Government deliberately did not frame any rules in order to determine the inter se seniority of the members of the new Service but reserved the right to do so.

- (iii) It was under the order dated February 20, 1965 that for the first time the Rules of 1945 were applied to the new Service and that too "unless otherwise ordered" i.e., purely on a provisional basis. The order of 1968 laid down the principles for fixing seniority and, being a statutory order, superseded all the Rules in question including Rules 17 and 18 of the 1945 Rules. It was further confirmed by the order dated 18-12-1971. [273G-H, 274A-E, 275D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2870 & 2869 of 1977.

Appeals by Special Leave from the Judgment and order dated 31-1-1977 of the Allahabad High Court in Civil Misc Writ Petition No. 2852 of 1972.

G. L. Sanghi, Manoj Swarup, Miss Lalita Kokli and Miss Indu Khindri for the Appellant in CA 2869/77.

L. N. Sinha, Attorney General, G. N. Dixit and O. P Rana for the Appellant in CA 2870/70.

S. P. Gupta and Pramod Swarup for RR 12 in both the appeals.

R. K Jain for RR 13 in CA 2870/77.

The Judgment of the Court was delivered by FAZAL ALI, J.-These two appeals by special leave are directed against a judgment dated January 31, 1977 of the Allahabad High Court by which the High Court accepted the writ petitions filed by the pre sent respondents 1 to 12 and quashed the order dated December 31, 1971 of the Government of U.P. insofar as it related to respondents numbers 3 to 12 and 14 to 39 before the High Court. The High Court further directed the State to redetermine the seniority of the regular PMS II officers and the temporary PMS I officers in the light of the observations made and the findings given by the High Court.

Against the order of the High Court two appeals have been filed to this Court-one by the State of Uttar Pradesh (which is Civil Appeal No. 2870 of 1977) and the other by the appellants 1 to 8 (Civil Appeal No. 2869 of 1977) who were respondents numbers 3 and 33 to 39 before the High Court. For the purpose of brevity and to avoid confusion we would refer to respondents 1 to 12 before the High Court as the 'petitioners' and respondents numbers 3 and 33 to 39 before the High Court as the 'appellants'.

The main controversy between the parties centered round fixation of their seniority in a new service which was created by an order of the Government dated November 2, 1964. Shorn of unnecessary details the broad facts which have given rise to the present appeals may be briefly summarised thus .

In the State of U.P. prior to 1945 there were two Medical Services consisting of Doctors serving in the State. The senior service was called the P.M.S., that is to say, the Provincial Medical Service. This service was a gazetted service carrying a higher scale of pay than the other service which was known as P.S.M.S. (Provincial Subordinate Medical Service) which was a non-gazetted service with a lower scale of pay. It may also be noticed that so far as PMS was concerned, the incumbents of the posts in the Service were appointed by the Governor whereas in the case of the PSMS, the employees were appointed by the Director, Health Services. We have mentioned these two facts because the nature of the Services, the scales of pay, the mode and member of appointment of incumbents to the two Services would be a very relevant factor in order to determine whether or not the decision rendered by the High Court was correct. On June 14, 1945, the Government of U.P. framed rules known as The United Provinces Medical Service (Men's Branch) Rules, 1945' which were applicable to PMS only and contained definitions, the relevant parts of which being covered by clauses (b), (f) and (h) may be extracted thus:-

"3. (b) 'Direct recruitment' means recruitment under B. rule S(l).

(f) 'member of the Service' means a person appointed in a substantive capacity under the provisions of these rules or of the rules in force previous to the promulgation of these rules, to a post in the cadre of the service;

(h) 'Subordinate Medical Service' means the Subordinate medical Service (Men's Branch) of the U.P."

Rule 5 provided that recruitment to the Service covered by the Rules (hereinafter referred to as the 'Senior Service') was to be made by two modes-

(i) by selection from among the persons who were eligible for appointment to the Service under the provisions of the Rules whether or not they were already in the permanent service of the Crown, and

(ii) by promotion from the Subordinate Medical Service provided that the number of posts to be filled by promotion was limited to 10 per cent of the total number of posts borne on the permanent cadre of the service.

Rule 9 provided that a candidate for appointment to the Senior Service must be between 22 and 32 years of age on the 1st July of the year in which the recruitment was to be made. By a subsequent amendment it was provided that in the case of scheduled caste candidates the age limit could be extended by another five years, and that the Governor could, in consultation with the Public Service Commission, relax the upper age limit upto 40 years in favour of any candidate or class of candidates. Rule 10 laid down the academic qualifications for a candidate to be eligible for recruitment to the Senior Service. The relevant portion of that Rule may be quoted thus:-

"10. Academic qualifications A candidate for recruitment to the Service must-

(a) hold a M.B.B.S. Or an equivalent degree of a University established by law in India and recognised by the Medical Council in India;

OR

(b) possess a foreign qualification recognised by the Medical Council of India if he does not hold a M.B.B.S. or an equivalent degree of a University established by law in India.

A candidate who possesses post-graduate degree or diploma recognised by the Medical Council of India in any branch of Medical Science shall, be given preference in the matter of recruitment to the Service."

Rule 12 provided that selection of candidates for direct recruitment shall be made in consultation with the Public Service Commission who, when called upon to do so, was to invite applications in the prescribed form. Rule 13 prescribed the mode in which the interview was to be held in respect of candidates who applied for recruitment to the Service. The relevant portion of that Rule may be extracted thus:-

"13. Interview-(I) The Commission will scrutinise the applications received by them and require so many candidates qualified for appointment under these rules as seem to them desirable to appear before them for interview at their own expense.

(2) No candidate will be admitted to the interview unless he holds a certificate of admission granted by the Commission.

(3) The Commission shall draw up a list of such candidates as it considers suitable for appointment in order of preference and shall forward it to the Government.

(4) Subject to the provisions of rules 6 and 16(2) the Governor shall appoint as vacancies occur the candidates who stand highest in order of preference in the list prepared by the Commission under sub-rule (3), provided that he is satisfied that they are duly qualified in other respects."

Rule 15 was the provision which required the recruitment of candidates by promotion and may be quoted thus :-

"15. Recruitment by promotion-(1) officers of the Subordinate Medical Service, who have more than 14 years' service and are less than 45 years of age on the 1st of August of the year in which recruitment is to be made, shall be eligible for promotion to the Service.

(2) The principle of selection shall be seniority subject to the exclusion of those who are not fit for promotion.

(3) The Inspector-General shall recommend names of officers of the Subordinate Medical Service who are eligible and whom he considers suitable for promotion to the Service on the basis of the record of their work and, if necessary, interview.

(4) A preliminary selection from amongst the officers recommended by the Inspector General and other eligible persons shall be made by departmental selection committee consisting of the-

(i) Secretary to Government, United Provinces, Medical department,

(ii) Inspector-General, and

(iii) Director of Public Health, U.P." It would thus be seen that so far as promotion from the Subordinate Medical Service to the Senior Service was to be made, this could be done on the recommendation of the Inspector-General which was to be endorsed by a Selection Committee constituted under Rule 15(4), quoted above. It was further provided under Rule 15 that the Selection Committee after considering the relative merits of the candidates will submit lists to the Government and Rule 15(5) required the Government to forward both the lists to the Commission alongwith the necessary papers. Sub-rule (6) of Rule 15 empowered the Governor to make the final selection after considering the advice of the Commission. Rule 17 which has been the subject matter of serious controversy between the parties may be extracted thus:-

"17. Appointing authority: (1) Appointment to the Service shall be made by the Governor on the occurrence of substantive vacancies. Appointment in vacancies to be filled by direct recruitment shall be made from amongst the persons included in the list prepared under rule 13(3). Similarly appointments in vacancies to be filled by promotion shall be made from amongst the persons selected under rule 15(6). G- (2) The Governor may make appointments in temporary or officiating vacancies from amongst persons who are eligible for permanent appointment to the Service under these rules."

A perusal of Rule 17 would reveal that the appointment was to be made to the Senior Service by the Governor on the occurrence of substantive vacancies. It is also clear from this rule that appointment in vacancies to be filled by direct recruitment would have to be made from amongst persons included in the lists prepared under rule 13(3) (supra) and appointment in other vacancies to be filled by promotion under Rule 15(6) (supra). Sub-rule (2) of Rule 17 empowered the Governor to make temporary or officiating appointments in vacancies from amongst persons who were eligible for permanent appointments to the Service under these Rules. We might mention here that the combined effect of Rules 12, 13, 15 and 17 is that whereas in the case of direct recruitment, the matter was to be considered by the Public Service Commission after advertising the vacancies, so far as recruitment to the Service by promotion is concerned, a Selection Committee constituted under the Rules had to send the lists to the Commission. In a third category of cases which were

appointments made purely on a temporary or officiating basis there was no provision for reference either to a Selection Committee or the Commission and such appointments could be made by the Governor. This is rather important because while the High Court had laid very great emphasis on the fact that appellants I to 8 were appointed not in substantive vacancies but on a purely temporary basis, it cannot be contended by any show of force that the appointment of the appellants, who were admittedly direct recruits, could be made under Rule 17(2). The admitted position is that the direct recruits applied to the Government in pursuance of an advertisement and they were appointed to the Senior Service only after they were recommended by the Public Service Commission. The appointment of the appellants, therefore, was not a purely officiating, temporary or Gd hoc appointment as contemplated by Rule 17(2) (supra). We might also emphasize the fact at this stage that it is undisputed that the petitioners while being members of PSMS had also applied for promotion to the Senior Service sometime in the year 1963 but their cases were not recommended by the Selection Committee at all. We shall, however, deal with this aspect of the matter at a later stage of this judgment. Rule 18 is the provision which lays down the criterion for determining seniority and may be extracted thus, because the High Court has strongly relied on this provision "18. Seniority Seniority in the Service shall be determined by the date of order of appointment in a substantive vacancy, provided that if two or more candidates are appointed on the same date their seniority shall be determined according to the order in which their names are mentioned in the order of appointment."

According to this Rule, the yardstick to determine the seniority appears to be the date of the order of appointment in a substantive vacancy. The sheet-anchor of the argument of the petitioners both in the High Court and in this Court has been that as the appellants were not appointed in substantive vacancies they cannot claim seniority under Rule 18 whereas the petitioners having been promoted to the Senior Service from the PSMS and in more or less substantive vacancies, they would be deemed to be senior to the appellants. The High Court, as already noticed, accepted the case of the petitioners although the State of U.P. supported the case of the appellants and has also filed an appeal against the order of the High Court.

Relevant part of Rule 19 which is also important may be extracted thus:-

"19. Probation, Discharge, etc.: (1) All persons whether recruited directly or by promotion, shall on their appointment in or against a substantive vacancy be placed on probation for a period of one year, provided that the Government may extend the period of probation in individual case. The previous officiating or temporary service in a post in the cadre of the Service shall count toward the period of probation." Rule 20 lays down the circumstances under which a person appointed to a post in the Service on probation may be confirmed. According to this Rule the incumbent can be confirmed if he has completed the period of his probation or any extended period and the Governor is satisfied that he is fit for promotion.

On the 14th of March 1946, two new Medical Services were constituted, viz., (1) Provincial Medical Service Grade 1, popularly known as 'PMS I', in the scale of Rs. 200-10- 320-15-500, and (2) Provincial Medical Service Grade II, known as PMS II, carrying a scale of Rs. 120-4-10-8-200. It was decided that existing members of PMS were to be absorbed in PMS I and further recruitment of

medical graduates should be made to PMS II in order to replace the PSMS. By order No. 4534A/V-614/1949 dated July 24, 1951, the Government laid down that 50 per cent of the vacancies in PMS I were to be filled in by direct recruitment and 50 per cent by promotion. Unfortunately, the prin. Simple for determination of inter se seniority between direct recruits and the promotees in PMS I was not laid down at the time when the Government order was made. It appears that upto the year 1952, while five PMS II officers were promoted to PMS I and four officers of merged States working in PMS I were adjusted against the promotion quota in PMS I, 23 officers were appointed to PMS by direct recruitment against substantive vacancies. Certain modifications were made by Government office Memorandum No. 1591/II B-50-1955 dated May 15, 1956 as modified by another Government office Memorandum No. 4760/II B-50-55 dated December 18, 1956. But these changes are not germane for the purpose of the present appeals. It appears, however, that in spite of the quota fixed by the order dated 24-7-1951, no promotion from PMS II to PMS I could be made between the years 1952 to 1963 exception an ad hoc basis. This brings us to a very important date which forms the pivotal basis for the decision of the points in controversy and for the determination of inter se seniority of the petitioners and the appellants. On July 14, 1962 by virtue of an advertisement, the Public Service Commission invited applications for recruitment to 56 Gazetted posts out of which 9 posts were permanent and the rest were temporary but were likely to continue. The relevant portion of the advertisement may be extracted thus:

"Applications are invited for the following 16 Gazetted posts (a) For Medicine-8, (b) For Surgery-8,

(c) For orthopaedics-S, (d) For E.N.T. Surgery-4, (e) For T.B.-7, (f) For Radiology-8, (g) Mental Specialists-3, (h) For Anaesthesia-13; 9 posts of (h) are permanent, rest are temporary but likely to continue (Advt. No. 671), Dept. No. R.B. 6) Qualifications:

(i) M.B.B.S. degree from Lucknow or Agra University.

Applicant should be amongst First twenty position holders in order of merit from K.G. Medical College. Lucknow or S.N. Medical College, Agra or must have any of the post graduate qualifications approved by the Indian Medical Council.

Desirable: Experience as Resident officer or an Equivalent post.. "

It is not disputed that in pursuance of this advertisement, the appellants applied for direct recruitment to PMS I and they were ultimately appointed on a temporary basis sometime in June 1963 but before the merger of the two Services (PMS I & PMS II) which came into existence on November 2, 1964. One of the dominant questions to be determined in this case is whether the appellants were appointed purely on a temporary basis or in a substantive capacity though against temporary posts. In our opinion, the High Court seems to have laid undue stress on the fact that the appellants were appointed on a temporary basis while overlooking the surrounding circumstances and the terms of the advertisement and the Rules, A referred to above, under which the appellants were appointed. We have already indicated that Rule

17(2) was the only Rule under which an appointment could be made by the Governor without reference to the Public Service Commission. In the instant case, it is not disputed that the appellants were appointed after reference to and on the recommendations of the Public Service Commission. The appointment of the appellants, therefore, would, not fall under Rule 17(2). What then is the nature of the appointments of the appellants is the serious question to be decided. In our opinion, reading the advertisement and the manner and mode of the appointment of the appellants, it must be held that they were appointed in a substantive capacity to temporary posts which according to the advertisement were likely to continue. There does not appear to be any magical formula or special charm in the word 'substantive'. The mere use of the term 'appointment in a temporary vacancy' by itself would not conclude the matter or lead to the irresistible inference that the appointment was not made in a substantive capacity because even a substantive appointment could be made to a purely temporary vacancy. In order, therefore, to determine the nature of the appointment, we have to look to the heart and substance of the matter, the surrounding circumstances, the mode, the manner and the terms of appointment and other relevant factors. In the instant case, we cannot ignore the advertisement which forms the pivotal basis of the direct recruitment in pursuance of which the appellants were appointed. Another circumstance that supports our view is that the appellants were not appointed merely on an ad hoc basis but through the Public Service Commission and in a regular way. Finally, the appellants were appointed to PMS I which was doubtless a superior service carrying a higher scale than PMS II of which the petitioners were members. The question as to what is a 'substantive appointment' is no longer res integra but was clearly expounded in the case of *Parshotom Lal Dhingra v. Union of India*, (1) where this Court made the following observations:

"The appointment of a Government servant to a permanent post may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post. Likewise an appointment to a temporary post in Government service may be substantive or on an officiating basis. Here also, in the absence of any special stipulation or any specific service rule, the servant so appointed acquires no right to the post and his service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period. The substantive appointment to a temporary post, under the rules, used to give the servant so appointed certain benefits regarding pay and leave, but was otherwise on the same footing as appointment to a temporary post on probation or on an officiating basis."

It was contended by Mr. Gupta, learned counsel for the petitioners that according to the 1945 Rules, the appellants could not be said to have been appointed in a substantive capacity because one of the essential ingredients of such an appointment was that they should have been placed on probation for a period of one year. Reference was made in this connection to Rule 19, the relevant portion of which may be again quoted thus:

"All persons whether recruited directly or by promotion, shall on their appointment in or against a substantive vacancy be placed on probation for a period of one year. It was submitted that there is nothing to show that the appellants were on their appointment to the PMS I placed on probation and, on the other hand, the order of probation was passed long afterwards, i.e., in 1970, which was shortly before their confirmation. It does appear that due to some oversight on the part of the appointing authority or to other fortuitous circumstance, the order placing the appellants on probation was not passed for long but that would not give any special advantage to the petitioners who were themselves drawn from a lower service and even if they held a substantive post in such service, they cannot by virtue of promotion to the higher service after the appellants, claim seniority over the latter. The petitioners also cannot complain on any discrimination on the ground that Article 14 or 16 of the Constitution was violated because a person who is appointed to a higher service carrying a higher scale must ordinarily be deemed to be senior to an employee who is promoted from a lower service to the higher service even though his appointment may have been substantive in the lower service. In the case of *Kewal Krishan Baga v. The Chairman, Railway Board & Ors* (1) this Court observed as follows.

"It was finally urged that clerks in the old establishment were wrongly accorded seniority over godown keepers in the cadre of clerks in the Northern Railway in which both clerks and godown keepers were assimilated. This argument overlooks the basic consideration that clerks in the Amritsar godown while working under the Punjab Government were placed in a higher scale of pay than godown keepers. The decision to treat clerks as senior to godown keepers was therefore not arbitrary or irrational. In fact, some injustice done earlier to clerks by fixing their inter se seniority with godown keepers in the new establishment on the basis of their length of service in the respective cadres was later rectified by providing that clerks will be considered as senior to godown keepers."

In view of the circumstances discussed above, we are inclined to take the view that not much can be made of the fact that the order appointing the appellants 1-7 does not mention that they were appointed in a substantive capacity and that what is said is that they were appointed on a temporary basis. We shall consider this aspect more fully after we have completed the history of the Services and their ultimate merger as well as the events following thereafter. We might mention, however, that Dr. M. J. Siddiqui (respondent No. 1 in Civil Appeal No. 2870 of 1977) had filed a petition in the High Court regarding his seniority and other matters but before the petition could be heard the two Services were merged and the petition was ultimately dismissed on 2-8-1965 as infructuous. After making promotions from the lower service to the higher service, the Government finally decided to have one medical service and with this object in view by order No. U- 1312-A-II/V-2566/63 dated 2-11-64, the Government merged the two Services, namely, PMS I and PMS II with effect from 1-11-64. The relevant portions of this order may be extracted thus:-

"With a view to removing this shortage as also to making the service conditions more attractive, the Governor is pleased to order that instead of having two medical

services, viz, P.M.S. I and PMS II and a selection grade in PMS I, there shall be, with effect from November 1, 1964, one service to be called Pradeshik Medical Service (Men/Women), Carrying the scale of Rs. 250-25-350-EB-25-475-EB-25-600 EB-25-700, ordinary grade, and Rs. 500-50-1000-E.B. 50-1200 selection grade, and shall consist of the following:

(a) Ordinary Grade:

(i) all the existing posts of P.M.S. I (both Men and Women)

(ii) all the existing posts of P.M.S. II (both Men and Women)

(b) Selection Grade:

7-1/2 per cent of the total number of permanent posts in the ordinary grade.

2. The permanent and temporary posts in PMS I and PMS II cadres shall continue to remain as such on their merger into PMS until the temporary posts are subsequently converted into permanent ones."

A perusal of this order manifestly reveals that the distinction between PMS I and PMS II was abolished and the two Services were constituted into one designated as 'Pradeshik Medical Service (Men/Women)' (hereinafter called the 'new Service') which had two grades (1) the ordinary Grade which was in the range of Rs. 250-700 and (2) the selection grade which was in the range of Rs. 500-1200. It was further provided that 7-1/2 per cent of the total number of permanent posts in the ordinary grade would be reserved for the selection grade. Para 2 of the order is rather important as it appears to have kept alive, to some extent, the distinction between the permanent and the temporary posts in PMS I and PMS II. Para 4 of the order is very important for our purpose and may be extracted thus:

"4. Orders regarding fixation of the inter seniority of the existing P.M.S. I and P.M.S. II officers in the P.M.S. will issue separately."

It was rather unfortunate that while merging the two services into one, the Government did not consider it expedient to lay down rules for fixing inter se Seniority of the officers of the two erstwhile services. It was, however, mentioned in para 4 that rules regarding fixation of the said seniority would issue separately. Another important aspect of the matter which is germane to the issues arising in these appeals is that while the right to inter se seniority of the members of the two services was reserved, there is no provision in the order which either applies or continues the Rules of 1945 even in respect of the inter se seniority of members of each merging service. It was, therefore, rightly contended by the appellants that in the absence of any such provision in the order which was also passed under Art. 309 of the constitution and was therefore of a statutory character or, at any rate, had a statutory flavour, the Rules of 1945 could not be applied to the situation obtaining after 31-15-1964 subsequent orders passed by the Government throw some light on this point. As the

Government was not in a position to lay down the Rules for fixation of inter se seniority immediately after the constitution of the new service, by way of a stopgap arrangement, the Government passed order No. 20661-AII/V-2566-1963 dated February 20, 1965, the relevant portions of which may be extracted thus "Subject:-Merger of P.M.S. I and n into P.M.S. Sir, In continuation of G.O. No. U-1312-A-II/V- 2566/1963 dated November 2, 1974 on the subject mentioned above, I am directed to say that in supersession of all previous orders on the subject the Governor has been pleased to order as follows:-

(1) The U.P. Medical Service (Men's Branch) Rules, 1945 shall apply to the new, PMS unless otherwise ordered.

(2) The appointing authority of P.M.S. shall be the Governor.

(3) Disciplinary proceedings against the officers of the P.M.S. will be drawn at Secretariat level, as in the case of other gazetted officers.

(5) The following will be eligible for appointment to P.M.S.

(a) Medical graduate of all Universities in India recognised by the Indian Medical Council.

(b) Medical graduates who hold the M.B.B.S. degree of Lucknow University, provided they have served in house appointment for a term of nine months in a teaching hospital before they offer themselves for appointment.

.. . . .

3. The number of permanent and temporary post in P.M.S. I and II (Men and Women) as on the afternoon of October 31, 1964 may please be reported to Government immediately so that the strength of P.M.S. cadre on November 1, 1964 may be fixed. Seniority lists of the officers (Men & Women) in P.M.S. I and II also kindly be furnished at once in duplicate as in the attached proforma."

It is, therefore, manifest that during the interregnum, that is to say, 1-11-64 to 22-2-65, the Rules of 1945 were inapplicable so far as the new Service was concerned. It was for the first time on the 20th February 1965 that by the order, extracted above, the U.P. Medical Service (Men's Branch) Rules, 1945 were made applicable to the new Service and that too on a purely provisional basis until fresh Rules were framed by the Government for determining the inter se seniority of the officers concerned. The words 'unless otherwise ordered' clearly show that the application of the 1945 Rules was purely provisional and was to remain in force unless fresh rules were made. Another order by the Government was passed on 26-12-67 regarding the mode of recruitment, qualifications, etc., which is not very relevant for our purpose. Ultimately, a final order laying down the principles on the basis of which the inter se seniority of the members of the two Services was to be determined in the new Service were laid down. This order was passed by virtue of G.O. No.3976

A-II/V-68/1757/65 dated 18-12-68 which may be extracted thus:

"In supersession of G.O. No. 1004-A-II/V-2566/63 dated April 23, 1963, on the above subject, I am directed to say that the Governor has been pleased to order that the inter se seniority of the officers of the merged cadre known as PMS should be arranged in the following order:-

(a) Permanent PMS I officers in order of their seniority already determined by Government followed by,

(b) officers appointed/promoted to PMS I on permanent or temporary basis prior to the merger of PMS I and PMS II in the regular manner in consultation with the Lok Sewa Ayog in order of their seniority determined by Government, followed by,

(c) officers of PMS II in order of their seniority in the PMS II cadre prior to the merger of PMS I and PMS II.

Note: If a PMS II officer was officiating in PMS I but he has not been approved for promotion/appointment to PMS I by the Lok Sewa Ayog, he shall rank in the PMS in accordance with his seniority in PMS II.

2. I am to request that a seniority list of PMS officers may please be prepared on the lines indicated above and it may be sent to Government for their approval as early as possible."

It was in consonance with these directions that the Government fixed the seniority of appellants 1 to 7 and petitioners 1 to 12. So far as the appellants were concerned, they clearly fell within the ambit A of direction (b) which provided for officers appointed to PMS I either on a permanent or temporary basis prior to the merger in a regular manner in consultation with the Lok Sewa Ayog (Public Service Commission) in order of their seniority. It may be pertinent to note here that direction (b) does not speak of any substantive appointment whatsoever but equates the officers appointed to PMS I on permanent or temporary basis prior to merger. In other words, what the direction contemplates is that any officer appointed to a post whether permanent or temporary in PMS I which was the Senior Service prior to merger, would rank after merger above those officers who were drawn from PMS II. That the appellants fulfilled all the conditions mentioned in direction (b) is not disputed but the constitutionality of that direction was challenged before the High Court on the ground that it was inconsistent with Rule 18 of the 1945 Rules. This contention found favour with the High Court which held that direction (b) was invalid as being inconsistent with the Rules of 1945. In coming to this finding, the High Court appears to have overlooked the fact that the 1945 Rules did not apply to the new Service at its inception and that they were made applicable to the new Service only for a short while by virtue of the order dated 20th February 1965, purely on a provisional basis as the Government made it quite clear in that order itself that the 1945 Rules will apply 'unless otherwise ordered' and thus had reserved the right to pass final orders regarding seniority later which was done in 1968. In these circumstances, therefore, the order of the High Court suffers from two infirmities-

(i) that there was no real or apparent inconsistency between rule 18 of the 1945 Rules and the 1968 directions,.

(ii) that initially the 1945 Rules ceased to apply to the new Service but were made applicable thereto only for a shortwhile by way of a stop-gap arrangement in 1965.

The High Court appears to have interpreted the directions of 1968 completely out of context. On the other hand, we feel that those directions seek to strike a just balance between the officers of the erstwhile Services after they were merged into the new Service. We shall immediately show that having regard to the exigencies of the situation created by the merger, no other mode of seniority, which was just and fair, could be evolved for the new Service.

By a notification dated July 3, 1970 issued under Act. 309 of the Constitution, the Governor made certain amendments in the 1945 Rules including Rule 25 which related to recruitment to the posts of Civil Surgeons and other PMS selection grade posts. The amended rule may be extracted thus:-

"Part IX-Promotion to the post of Civil Surgeon and other PMS-Selection grade posts.
Rule 25 (i) Recruitment to the posts of Civil Surgeons and other PMS Selection grade posts, borne on the cadre of the Service, shall be made by promotion on the basis of seniority subject to rejection of the unfit from among the members of the Service who hold the M.B.B.S. Or higher degree and who have rendered not less than 10 years' service."

Under this rule the promotion to the selection grade of the new Service was to be made purely on the basis of seniority subject to rejection of the unfit from among the members of the Service or those who had rendered service for less than ten years. The petitioners appear to have put forward their claim to seniority as being above the appellants in order to earn the selection grade before the appellants on the ground that they had been appointed in a substantive capacity, though in a lower service, prior to the appointments of the appellants to the higher service. Thereafter, it appears that the Government, after considering the representations received from the former officers of PMS and in consultation with the Public Service Commission, more or less endorsed the principles laid down for fixation of seniority in the 1968 order and directed in an order dated 18-12-1971 seniority should be fixed on the following principles:-

"(k) Keeping in view the balance in the seniority list among the appointment by direct recruitment upto 1951 and the promotee officers. 19 promotee officers may be given first 19 posts at the same time.

(kh) In the list of the officer by promotion and direct recruitment, Ratio of 1: 1 may be kept in the seniority list in both the categories of the officers from the 20th post, i.e, 20th post to the promotee officer and 21st post may be given to officer by direct recruitment. This will continue until the batch of direct recruits upto 1963.

Thereafter the remaining promotee officers of batch 1963 may be placed all together in the seniority list. Thereafter, the direct recruits of batch 1964 may be placed in the seniority list together.

(G) The officers selected for permanent posts in a year A may be placed over the officers selected for temporary posts in the same year.

(GH) Five officers of the reserve list by the direct recruitment of the year 1951 who were appointed temporarily in 1952 and whose permanent appointment was approved by the Commission in 1958 may be placed below in the list of the officers by direct recruitment in 1957 batch.

Note: 1. The lists of the officers by direct recruitment and by promotion will contain only the names who were appointed temporary and permanent in PMS (I) with the approval of the Public Service Commission.

2. In accordance with the aforesaid principles 'G' the names of the officers will be placed in the list by direct recruitment after approval by the Commission for regular appointment.

3. The names of the officers will be placed in the list of promotee officers in order of the determined seniority in accordance with the above mentioned principles 'G' vide notification No. 2780 K/5/247/57 dated the 13th June 1963."

It was in consequence of these directions that the Government by virtue of the order impugned fixed the seniority of the members of the new Service, placing the appellants above the petitioners and awarding to them the selection grade Prior to the petitioners.

Thus, in short, the, heart of the matter is whether the order of 1968 as confirmed by the order dated 18-12-1971 was in any way inconsistent with Rules 17 and 18 of the 1945 Rules so as to nullify the mode of seniority adopted by the Government and the promotion to the selection grade made by it under the impugned order. In our opinion, the following propositions emerge from the history of the new service and the foregoing discussion:-

(1) To begin with, the Rules of 1945 had absolutely no application to the new Service. Those Rules applied to the old PMS I Service only and, therefore, to a situation completely different from that which prevailed after the merger of the two Services on 1-11-1964. As the Government order merging the two Services was also an order passed under Art. 309 of the Constitution, it had statutory force and was binding on all the officers of the new Service.

(2) At the time when the 1964 order was passed the Government deliberately did not frame any rules in order to determine the inter se seniority of the members of the new Service but reserved the right to do so.

(3) It was under the order dated February 20, 1965 that for the first time the Rules of 1945 were applied to the new Service and that too "unless otherwise ordered" i.e.,

purely on a provisional basis. The order of 1968 laid down the principles for fixing seniority and, being a statutory order, superseded all the Rules in question including Rules 17 and 18 of the 1945 Rules. It was further confirmed by the order dated 18-12-1971.

We, therefore, find ourselves unable to agree with the view taken by the High Court that direction (b) of the 1968 order should be struck down as being inconsistent with Rule 18 of the 1945 Rules.

We might further point out that having regard to the history of PMS I and P.M.S. II if Rule 18 of the 1945 Rules were applied to the parties and the 1968 order ignored, the resultant effect would be that equals and unequals would be treated similarly which would amount to a direct infraction of Articles 14 and 16 of the Constitution. In order to illustrate our point we give below a chart showing the different attributes possessed by the two set of officers, namely, the appellants and the petitioners:

Appellants Petitioner

1. Appellants were direct recruits to PMS I; sent for consideration by the appointed in a substantive selection Committee in June 1963 but they were not considered

in a similar manner on the record fit for selection vide recommendation of the Public Service Commission though from the Affidavit of Mukund to temporary posts. Swarup Srivastava. Upper Division Assistant, Medical Section, U.P. civil Secretariat:

" All the petitioners who were eligible for promotion were eligible for promotion by the public Service Commission and the Departmental Selection Committee in the manner prescribed, vide office memorandum dated May 15, 1956 as modified by Office memorandum dated December 18, 1956. The cases of the petitioners were not recommended by the Selection Committee for promotion to Provincial Medical Service I."

(Emphasis ours)

2. The appellants were 2. The Petitioner belonged to admittedly appointed by the PMS II which was a subordinate Governor to a higher Service, Service with a lower scale ; Viz., PMS I Carrying a higher their appointing authority Scale of pay with better being the Director, Medical prospects and higher Service and not the Governor. responsibilities.

3. At the time of appointment 3. The petitioner did not put to the selection grade the in the requisite experience in appellants had put in there- PMS I for promotion to requisite experience of more

selection grade.

than eight years in PMS I
required for promotion to the
selection grade.

Having regard to these factors, it is obvious that the appellants and the petitioners were not similarly situate and if the petitioners were put above the appellants in the matter of seniority, it would have resulted in a gross and wholly unreasonable discrimination by making junior officers senior to superior officers.

A number of authorities were cited before us on the question of the principles of seniority but they are not at all applicable to the peculiar facts of the present case which have special features of their own and we have therefore not considered it necessary to deal with those authorities.

As regards the case of appellant No. 8, Dr. Sudhir Gupta, it stands on an altogether different footing which is even higher than those of appellants 1 to 7. To begin with this appellant was recruited directly to PMS I from PMS II through the Public Service Commission on 13-7-1959. He actually joined the PMS I Service on 11-11-1959. He passed M.B.B.S. in 1954 and was among the first ten candidates. In 1956, he obtained Child Health Diploma. Thus, in all respect the case of appellant No. 8 is exactly similar to that of the other appellants with this difference that he was appointed to PMS I about five years before the PMS II was merged into PMS I and therefore the petitioners could not claim seniority over him.

Thus, on a careful consideration of all the circumstances of this case, we are clearly of the opinion that the High Court committed an error of law in quashing the order of the Government dated 31-12-1971 and directing it to refix the seniority of the parties. Accordingly, Appeals Nos. 2869 and 2870 of 1977 are allowed and the orders passed by the High Court are set aside. The order of the Government dated December 31, 1971 is hereby restored. In the circumstances of the case, there will be no order as to costs.

S.R.

Appeals allowed.