

G.P. Doval And Others vs The Chief Secretarygovernment Of U.P. ... on 18 July, 1984

Equivalent citations: 1984 AIR 1527, 1985 SCR (1) 70, AIR 1984 SUPREME COURT 1527, 1984 LAB. I. C. 1304, (1984) KER LT 95, (1984) 2 LAB LN 517, 1984 (4) SCC 329, (1984) 2 SERVLR 555, (1984) 2 SERV LJ 166, (1984) 10 ALL LR 619, 1984 SCC (L&S) 767

Author: D.A. Desai

Bench: D.A. Desai, Amarendra Nath Sen

PETITIONER:

G.P. DOVAL AND OTHERS

Vs.

RESPONDENT:

THE CHIEF SECRETARYGOVERNMENT OF U.P. AND ORS.

DATE OF JUDGMENT18/07/1984

BENCH:

DESAI, D.A.

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DESAI, D.A.

SEN, AMARENDRA NATH (J)

CITATION:

1984 AIR 1527 1985 SCR (1) 70

1984 SCC (4) 329 1984 SCALE (2)11

CITATOR INFO :

D 1987 SC 424 (24)

RF 1987 SC2359 (17)

D 1988 SC 268 (22)

D 1989 SC 278 (18,20)

D 1990 SC1311 (7)

ACT:

Constitution of India 1950, Articles 14,16, and 32.

Seniority-Fixation of-Past service to be given credit if stop-gap arrangement is followed by confirmation.

Khandsari Licensing Scheme-Appointment of Khandsari Inspectors-Inter-se seniority of ad hoc appointees and direct recruits through Public Service Commission-Fixation of-Whether to be reckoned from date of appointment to temporary post or from date of approval by Public Service Commission.

Provisional Seniority List issued-Violation of fundamental right guaranteed under Articles 14 and 16-Burden of proof on whom lies.

Provisional Seniority List issued in 1971-Writ petition filed in 1983-Whether liable to be dismissed on ground of laches or delay.

Words and Phrases: 'Or from the date of the order of the first appointment if such appointment is followed by confirmation'-Meaning of.

HEADNOTE:

In the year 1958-59 the State Government framed the Khandsari Licensing Scheme to regulate the supply of sugarcane to sugar factories. Posts of Khandsari Inspectors initially designated as Licensing Inspectors were created in the pay-scale of Rs. 120-250. Petitioners in the writ petitions were appointed as Khandsari Inspectors between March and May, 1960. Thereafter some of the respondents were recruited as Khandsari Inspectors and along with some others who were recruited departmentally were approved by Public Service Commission. On March, 22, 1971 the third respondent-the Sugar Commissioner-circulated a provisional seniority list of Khandsari Inspectors.

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The petitioners represented against the seniority list contending that they were assigned lower place in the seniority list even though they were recruited earlier and have been continuously in service. The representations having been rejected, writ petitions were filed in this Court.

In their writ petitions to this Court, the petitioners contended that when recruitment was made in the year 1960, the post of Khandsari Inspector was not within the purview of the Public Service Commission and that they were regularly recruited to posts which were temporarily sanctioned but indefinitely continued and therefore, in reckoning their seniority, they must be given the benefit of the length of continuous officiation, and that once approval is granted by the Public Service Commission it would relate back to the date of their appointment and that the previous length of service cannot be ignored or denied in computing seniority in the absence of any statutory rule or administrative instruction. It was further pointed out that petitioner Nos. 4 to 8, who were recruits of 1961 had been assigned places Nos. 30, 34, 42, 35 and 31 respectively in the seniority list while recruits of 1963 had scored a march over them in the provisional seniority list.

The respondents contested the writ petitions contending that by a Government order temporary post of Licensing Inspectors were re-designated as Khandsari Inspectors and that the post right from inception was within the purview of

the Public Service Commission, that on the framing of the Khandsari Licensing Scheme, it became necessary to urgently appoint Inspectors to implement the scheme, and therefore the third respondent-the Sugar Commissioner who was the appointing authority pending regular selection through open competition through Public Service Commission proceeded to make the appointments of the petitioners as stop-gap or ad hoc nature and that their appointment created no right to the post. The drawing up of the tentative seniority list was justified as being based on the recommendations of the Public Service Commission, and it was submitted that the service which can be taken into consideration for determining the length of continuous officiation must commence from the date of substantive appointment and that the provisional seniority list had been drawn up keeping in view the date of approval by the Public Service Commission in respect of each candidate and that there was no error in drawing up the seniority list. It was further contended that promotions which were granted on the basis of the provisional seniority list were not questioned by the petitioners and they have acquiesced in it, and that the petitioners had moved the Court after a long unexplained delay and that the Court should not grant any relief.

Allowing the Writ Petitions,

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HELD: (1) The impugned seniority list dated March 21, 1971 in respect of Khandsari Inspectors is quashed. Respondents 1 to 3 are directed to draw up a fresh seniority list based on the principle of length of continuous officiation reckoned from the date of first appointment if the appointment is followed by confirmation i.e. selection approval by the State Public Service Commission. [87 F]

(2) (i) The Memorandum of 1940 merely prescribed guidelines for the departments of the Secretariat either to frame statutory rules or executive instructions governing conditions of service in respect of existing services if there are no rules, or they may be modified or amended so as to bring them generally in conformity with the 1940 Order, and whenever a new post or a new cadre in a service is set up to frame rules in conformity with guidelines prescribed in the 1940 Order. The 1940 Order does not purport to lay down conditions of service governing any cadre either specifically or generally. It provides a model and unless the model is adopted it is not binding. [82 D-F]

(ii) Assuming that the model principle set out in the 1940 order has a binding effect the impugned seniority list does not conform to the prescribed guidelines and is invalid. [85 F]

(3) (i) A fair rule of seniority should ordinarily take into account the past service if the stop-gap arrangement is followed by confirmation. [86 E]

(ii) If a stop-gap appointment is made and the

appointee appears before the Public Service Commission when the latter proceeds to select the candidates and is selected, there is no justification for ignoring past service. There is also no justification for two persons selected in the same manner being differently treated. If once a person in a stop-gap arrangement is confirmed in his post by proper selection, his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made. In the instant case, that has not been done to all the petitioners. The error is apparent in the case of petitioner No. 1 and respondent No. 7. [86 B-D]

(iii) When a seniority list is challenged as being violative of the guarantee of equality enshrined in Articles 14 and 16 and prima facie it appears that those who came into the cadre later on scored a march over those who were already in the cadre, it would be for the authority justifying the seniority list to plead and point out the rule for determining seniority on the basis of which the list is drawn up. If any such rule is pleaded it would be for those impugning the seniority list to aver and establish that

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the alleged seniority rule is violative of the fundamental rights guaranteed by Articles 14 and 16. [78 G-H; 79A]

(4) (i) It is open to the Government to lay down general conditions of service governing all services in the State either by rules framed under Section 241 of the Government of India Act 1935, or on the advent of the Constitution under the proviso to Article 309 of the Constitution. In the absence of statutory rules, conditions of service in a particular cadre may be governed by executive instructions issued by the Government in exercise of its executive power. [81 C-E]

(ii) In the absence of any other rule valid for determining seniority under Article 16, seniority being determined by the length of continuous officiation has been accepted as valid by the courts. [82 H; 83 A]

P.S. Mahal and Ors. v. Union of India and Ors. [1984] 3 S.C.R. 823 and Bishan Sarup Gupta v. Union of India, [1975] 1 SCR 104, referred to.

(5) Model Rule 11 suggests as guidelines two independent principles for determining seniority; namely (1) seniority should be reckoned from the date of substantive appointment, and (2) from the date of the order of first appointment if such appointment is followed by confirmation. [84 A]

In the instant case, recitals in the appointment order do not spell-out that the appointees were to hold stop-gap arrangement till a candidate selected by the Public Service Commission is made available. On the contrary, the recitals clearly indicate that those appointees will have to face the approval test by the Public Service Commission. If

petitioner Nos. 1 and 2 came to be appointed in 1960 and respondent Nos. 4, 5 and 6 came to be appointed in 1961 and the appointment of each of them had to be approved by the Public Service Commission, once the approval is granted the same will relate back to the date of first appointment. That is the meaning of the expression in Model No. 11; 'or from the date of the order of the first appointment if such appointment is followed by confirmation.' [85 A-C]

(6) Where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list. [86 G]

Baleshwar Dass and Ors. etc. v. State of U.P. and Ors. etc., [1981] 1 SCR 449, referred to.

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In the instant case, respondents 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making representations after representation which did not yield any response, reply or relief. Further, the petitioners belong to the lower echelons of service and it is not difficult to visualise that they may find it extremely difficult to rush to the court. The contention that the writ petitions should be thrown out on the ground of delay, latches an acquiescence must therefore be rejected. [87 C-D]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition Nos. 5105-13 of 1983.

(Under article 32 of the Constitution of India) M.K. Ramamurthi, Mrs. Indra Sawhney, Mrs. C. Malhotra and M. A. Krishnamoorthy for the Petitioners.

Yogeshwar Prasad, Mrs. Rani Chabra, Gopal Subramaniam and Mrs. Sobha Dikshit for the Respondent.

The Judgment of the Court was delivered by DESAI, J. The petitioners in this group of petitions under Art. 32 of the Constitution were inducted as Khandsari Inspectors between March, 1960 and 1964. Respondents 4 to 19 were also recruited as Khandsari Inspectors on different dates. Respondents 1 and 2 are the Chief Secretary, Govt. Of U. P. and the Secretary, Industries respectively of the U. P. Government and respondent No. 3 is the Sugar Commissioner of U. P. The dispute amongst the petitioners and the respondents 4 to 19 is about inter-se seniority between them in the cadre of Khandsari Inspectors.

It appears that in the year 1958-59, the State Government framed what is styled as Khandsari Licensing Scheme' to regulate the supply of sugarcane to sugar factories by G.O. No. 4588 (1) XVIII-A-680/59 dated November 21, 1959. Posts of Khandsari Inspectors initially designated as Licensing Inspectors were created in the pay-scales of Rs. 120-250. Petitioners Nos. 1, 2 and 3 were appointed as Khandsari Inspectors between March and May, 1960. Thereafter some of the respondents were recruited as Khandsari Inspectors and some others who were recruited departmentally were approved by the Public Service Commission. On March 22, 1971, the third respondent the Sugar Commission circulated a provisional seniority list of Khandsari Inspectors. The grievance of the petitioners is that some of the petitioners have been assigned lower place in the seniority list even though they were recruited earlier and have been continuously in service. To illustrate, petitioners pointed out that petitioners 1 to 3 have been placed at Serial Nos 25,29 and 27, respectively though all of them were recruits of 1960 while respondent No. 7-J.S. Negi, who was recruited on March 23, 1961 was assigned the place at Serial No. 15 and respondent No.4 O. N. Chaturvedi, who was recruited on March 23, 1961 was shown at Serial No. 6. Similarly, respondent No. 9-P.N. Rai, who was also recruited on March 23, 1961 was shown at Serial No 17 and respondent No. 5 was shown at Serial No. 8. The petitioners further pointed out that petitioners Nos. 4, 5, 6, 7 and 8, who were recruits of 1961 have been assigned places Nos. 30, 34, 42, 35 and 31 respectively while recruits of 1963 have scored a march over them in the provisional seniority list. The petitioners assert that when the recruitment was made in the year 1960, the post of Khandsari Inspector was not within the purview of the Public Service Commission and that they were regularly recruited to posts which were temporarily sanctioned and indefinitely continued till today and therefore, in reckoning the seniority, they must be given the benefit of the length of continuous officiation. They further contend that when the post of Khandsari Inspector was later brought within the purview of the Public Service Commission, the names of the petitioners who were already recruited in service as also of some of the respondents were forwarded to the Public Service Commission for approval and except petitioner No 9 S. P. Gupta, the names of rest of the petitioner were approved by the Public Service Commission on September 30, 1963, the relevant date in the case of petitioner No. 9 is April 14, 1978. The petitioners assert that even assuming that their appointment would be regular after approval of the Public Service Commission, yet once such approval is granted' it would relate back to the date of appointment and the previous length of service cannot be ignored or denied in computing their seniority in the absence of any statutory rule or administrative instruction which has the force of law. The petitioners further aver that in the absence of any other statutory rule or administrative instruction for determining seniority, length of continuous officiation provides a valid principle for determining seniority. Viewed from this angle, petitioners 1 to 3 would be senior to all the respondents and the placement of the remaining petitioners vis-a-vis the respondents will have to be recomputed. On the circulation of the provisional seniority list, the petitioners submitted various representations pointing out the error in drawing-up the provisional seniority list but till this day no reply was given nor any final seniority list circulated nor reasons assigned for rejecting the representations. The petitioners further say that despite their representation, respondents 1, 2 and 3 are operating the tentative seniority list for making further promotions to the post of Khandsari Officer and Assistant Sugar Commissioner and thereby they are being denied equality of opportunity in the matter of promotion. The petitioners accordingly questioned by these writ petitions the validity and legality of the provisional seniority list asserting that as the final seniority list is not being drawn up and as the representations are

being ignored and yet the provisional seniority list is being operated to the disadvantage of the petitioners thereby denying them equality of opportunity in the matter of promotion which action of the respondents 1 to 3 is violative of Arts. 14 and 16.

Kailash Narain Pandey, Additional Sugar Commissioner filed affidavit in opposition. It was admitted that by the Govt. Order dated November 21, 1959 temporary posts of Licensing Inspectors later redesignated as Khandsari Inspectors in the pay scale of Rs. 120-250 were created but according to him as the maximum of the scale was over Rs. 200 right from its inception, the post was within the purview of the Public Service Commission in view of Regulation 5 (a) of Appointment Department Misc. No. 99/II- B-151-60 dated January 29, 1954 issued under the Uttar Pradesh Public Service Commission (Limitation of Func-

tions) Regulations, 1954. It was then stated that on the framing of the Khandsari Licensing Scheme, it became necessary to urgently appoint Inspectors to implement the scheme and therefore, the third respondent-Sugar Commissioner as Appointing Authority pending regular selection through open competition by the Public Service Commission proceeded to make appointments and the appointment of the petitioners were of a stopgap or ad-hoc nature and that it created no right to the post. It was admitted that petitioners Nos 1 and 2 were recruited after holding departmental competitive test on March 4, 1960. Petitioner No. 3, who was then working as a Clerk in Cane Union Federation Ltd., Lucknow was selected on May 24, 1960 by applying a weeding out test. Petitioners Nos. 4 to 8 were recruited after holding qualifying test and interview on 23rd March, 1961 and Petitioner No. 9 was appointed as and by way of stopgap arrangement. It was contended that the petitioners were appointed on an ad-hoc and temporary basis as a measure of stopgap arrangement. It was conceded that all the petitioners except petitioner No. 9, were approved by the Public Service Commission for regular appointment in the year 1963, to be specific on 30th September, 1963 and they have continued uninterruptedly in the posts of Khandsari Inspectors. It was further averred that within a period of one year and seven months from the date of appointment of the petitioners the State Public Service Commission selected candidates to replace the already working unapproved Licensing Inspectors on the request of the Department and sent a list of approved candidates on September 14, 1961, but only 5 out of 44 such selected candidates joined and hence the Department has to permit the petitioners to continue though according to the third respondent notice of termination of service were served on some of the petitioners. It was further pointed out that when the State Public Service Commission proceeded to recommend candidates for the post of Khandsari Inspectors, some of the petitioners applied for such posts, but their applications were rejected at the stage of scrutiny. But on a request from the Department the State Public Service Commission entertained the applications, called the petitioners for interview and approved them. It was admitted that except petitioner No. 9 all the rest of the petitioners were approved by the Public Service Commission on September 30, 1963. Justifying the drawing-up of the tentative seniority list as being based on recommendations of Public Service Commission, it was said that the service which can be taken into consideration for determining the length of continuous officiation must commence from the date of substantive appointment and accordingly the provisional seniority list has been drawn-up keeping in view the date of approval by the Public service Commission in respect of each candidate. It was averred that if this principle is valid for the purpose of Art. 16, there is no error in drawing-up the seniority. It was specifically stated that it was open to the Government to ignore

officiating service or service rendered on appointment in an ad hoc or stopgap arrangement. It was broadly stated that before a man can claim to have his seniority determined in the cadre, he must belong to the cadre and he can only enter the cadre on substantive appointment.

The rival contentions would bring into focus the controversy between the parties. The impugned provisional seniority list dated March 22, 1971 is drawn-up on the length of continuous officiation determined by the date of selection/approval of each person by the State Public Service Commission. In the process service prior to the approval by the Public Service Commission is wholly ignored while reckoning seniority with the result that the recruits of 1961 have scored a march over those who were recruited earlier in the cadre and have been uninterruptedly officiating in the post and who at a later date were approved by the Public Service Commission for appointment as Khandsari Inspectors. The question is: where on account of exigencies of service, recruitment to a post within the purview of the Public Service Commission is made by the appointing authority, but at a later date the Public Service Commission puts its seal of approval on such an appointee, whether the continuous and uninterrupted service rendered by such appointee prior to the approval by the Public Service Commission can and should be taken into computation while determining seniority based on the principle of length of continuous officiation ?

When a seniority list is challenged as being violative of the guarantee of equality enshrined in Arts. 14 and 16 and prima facie it appears that these who came into the cadre later on scored a march over those who were already in the cadre, it would be for the authority justifying the seniority list to plead and point out the rule for determining seniority on the basis of which the list is drawn up. If any such rule is pleaded, it would be for those impugning the seniority list to aver and establish that the alleged seniority rule is violative of the fundamental rights guaranteed by Arts. 14 and 16.

In the affidavit-in-opposition filed by the Additional Sugar Commissioner on behalf of respondents 1 to 3, it was asserted that the impugned seniority list of the Khandsari Inspectors was drawn-up on the principle of the length of continuous officiation reckoned from the date of selection/approval by the Public Service Commission in respect of each employee belonging to the cadre. It is necessary to refer to this aspect because the averment is vague and of a general nature and later on at the hearing of the petitions reliance was placed on memo No. O-66/II-233- 1938 dated January 30, 1940 ('1940 Order' for short) for sustaining the seniority list, the affidavit being conspicuously silent with regard to this order. There is not a whisper of the 1940 Order in the whole of the affidavit- in-opposition. However, if the respondents would be in a position to justify the seniority list on any existing statutory rule or administrative instruction which has been invariably followed, it would not be proper to attach too much importance to the vagueness in drawing-up pleadings shifting, the stand in the course of the proceedings. It must, however, be made clear that Mr. Gopal Subramaniam, learned counsel who appeared for respondent No. 1 to 3 attempted to reconcile the averments in the affidavit and the oral submissions made at the hearing of the petitions by urging that when it is said in the affidavit that the seniority in respect of each member of the cadre was reckoned on the principle of length of continuous officiation commencing from the date of selection/approval of each member by the State Public Service Commission respondents 1 to 3 had the 1940 Order in mind.

It is therefore, necessary first to examine the nature and character of the 1940 Order and whether it lays down either by way of a statutory rule or administrative instruction a binding rule of seniority for determining the seniority in the cadre of Khandsari Inspectors. If it does, it will have to be further ascertained whether upon its true construction, the relevant rule excludes any service rendered by a member of the service prior to his approval/selection by the State Public Service Commission.

The 1940 Order styled as a Memorandum was not annexed to the affidavit-in-opposition. A copy of it was submitted at the time of hearing of the petitions. In its preamble it proceeds to recite that in view of the 'Appointment Department Memorandum No. 233(1)/II-38 dated July 27, 1939 the Department of Secretariat are informed that under Section 241 (1) (B) and (2) (b) of the Government of India Act, 1935, rules have to be framed for appointment to the civil services and posts and conditions of services of persons serving.' It further proceeds to state that the existing rules for the various provincial specialist and subordinate services under the Government should be revised so as to bring them to conformity with the provisions of the Government of India Act, 1935 and new rules should also be drawn-up for services and posts which existed prior to April 1, 1937 but for which no rules were framed, or which have been created after that date.' The 1940 Order further recites that enquiries are being received as to the lines on which either the old existing rules have to be revised or new rules have to be framed. It then states that 'the general principles which have been accepted by Government are stated below' Para 2 of the Order, clearly brings out the nature and character of the 1940 Order, the relevant portion of which reads as under:

"2. Among other things the rules should provide for the following matters."

At Item No. 11, seniority is mentioned. Elaborating how the rule about seniority should be drawn-up, the memorandum proceeds to prescribe guidelines as under:

"Seniority in service shall generally be determined from the date of substantive appointment to a service, or from the date of the order of first appointment, if such appointment is followed by confirmation. In special cases seniority may be determined in accordance with the conditions which may suit a particular service."

After extensively referring to the 1940 Order, it was urged on behalf of the respondents that the impugned seniority list is drawn-up keeping in view the date of appointment, the date of selection/approval by the Public Service Commission, which is the relevant date for the purpose of computing seniority under G.O. of 1940 and the date of confirmation by the department and date of promotion.

The first question is: does the 1940 Order lay down a binding rule of seniority in respect of Khandsari Inspectors ? It may at once be made clear that the cadre of Khandsari Inspectors was first formed under 'Khandsari Licensing Scheme' which was framed somewhere in November, 1959. It is difficult to believe that two decades earlier, a seniority rule for a future cadre was prescribed. It is of course open to the Government to lay down general conditions of service governing all services in the State either by rules framed under Sec. 241 of the Government of India Act, 1935 or on the

advent of the Constitution under the proviso to Art. 309 of the Constitution. It must be conceded that in the absence of statutory rules, conditions of service in a particular cadre may be governed by executive instructions issued by the Government in exercise of its executive power. At any rate, 1940 Order does not purport to lay a statutory rule framed under Sec. 241 of the Government of India Act, 1935 because the memorandum recites that in view of the provisions contained in Sec. 241, rules have to be framed for appointment to civil service and posts and conditions of service of persons serving. It further recites that rules will have to be framed in respect of services which may be created for the first time after the advent of the Government of India Act, 1935. The memorandum further provides that whenever there is an occasion for framing statutory rules or issuing executive instructions governing conditions of service, there must be some uniformity in this behalf and accordingly the memorandum proceeded to point out what should generally be the contents of the rules and on what model they should be framed. Therefore, unquestionably the memorandum prescribes guidelines for framing rules governing conditions of service. The memorandum is something akin to model standing orders. At any rate it does not purport to prescribe statutory rules or executive instructions governing conditions of service.

This further becomes clear from the penultimate paragraph of the memorandum in which it is stated that the principles set out in the memorandum will be generally suitable for service or posts recruitment to which is conducted through the Public Service Commission and whenever the departure is made the same should be justified. Directions are given by the memorandum that the departments of the Secretariat should proceed with the revision of the existing service rules or frame rules for new service and posts under their control in accordance with the principles set out in the memorandum. The departments were directed to draw-up the draft rules and when ready they were required to be submitted for the scrutiny of the appointment department and should be accompanied by a self contained note in which the important points and deviation from the above principles should be explained and justified. It is thus abundantly clear that the memorandum of 1940 merely prescribed guidelines for the departments of the Secretariat either to frame statutory rules or executive instructions governing conditions of service in respect of existing services, if there are no rules or they may be modified or amended so as to bring them generally in conformity with the 1940 Order and whenever a new post or a new cadre in a service is set up to frame rules in conformity with guidelines prescribed in 1940 Order. The 1940 Order does not purport to lay down conditions of service governing any cadre either specifically or generally. It provides a model and unless the model is adopted, it is commonsense to say that it is not binding. Therefore, the contention that 1940 Order prescribes binding conditions of service and which have been followed in drawing-up the seniority list does not commend to us and must be rejected.

Assuming that in the absence of any specific rule to the contrary having not been shown to have been adopted, the Department accepted the model as the binding one, the next question is: whether upon its true construction it permits previous service to be wholly ignored in reckoning seniority.

The model set out at Item No. 11 governing seniority merely enacts the well-known rule of seniority in Government Service, namely, seniority being determined in accordance with length of continuous officiation. In the absence of any other rule valid for determining seniority under Art. 16 rule or seniority being determined by the length of continuous officiation has been accepted as valid by the

courts. In a very recent opinion of this Court in P.S. Mahal and Ors. v. Union of India and Ors. Bhagwati, J. after referring to Bishan Sarup Gupta v. Union of India observed as under:

"There was no specific seniority rule to determine inter-se seniority between the direct recruits and the promotees appointed regularly within their respective quota from and after 16th January, 1959 and though, in the absence of any specific seniority rule, the Court could have applied the residuary rule based on length of continuous officiation, the Court did not do so because it felt that since the old seniority rule had ceased to operate by reason of the infringement of the quota rule, it would be for the Government to devise "a just and fair seniority rule as between the direct recruits and the promotees for being given effect to from 16th January, 1959."

Therefore, in the absence of any specific rule of seniority governing a cadre or a service, it is well-settled that length of continuous officiation will provide a more objective and fair rule of seniority. And that is exactly what the model in the memorandum prescribes. It says that seniority in service shall generally be determined from the date of substantive appointment to a service. If the rule were to stop here, the question would arise: what constitutes substantive appointment to a post within the purview of the Public Service Commission ? But the rule does not stop by merely saying that the seniority shall generally be determined from the date of substantive appointment to a service. It further provides that it may be determined commencing from the date of the order of the first appointment, but proceeds to qualify the last clause by providing: 'if such appointment is followed by confirmation'. In other words, a rule for determining seniority may provide length of continuous officiation from substantive appointment or from the date of the order of the first appointment if such appointment is followed by confirmation. In the latter case, once confirmation is made and the service till then is uninterrupted and continuous it relates back to the date of the order of the first appointment.

Now model Rule 11 suggests as guidelines two independent principles for determining seniority, namely (1) seniority be reckoned from the date of substantive appointment and (2) from the date of the order of first appointment, if such appointment is followed by confirmation. Two different starting points for reckoning seniority are set out in the model and it is difficult to assume that department adopted one and rejected the other without making a specific rule in that behalf.

The question that can then be posed is: what constitutes substantive appointment in a cadre which is within the purview of the Public Service Commission. Now the cadre of Khandsary Inspectors was formed in 1959. There is no material to show that at that time it was within the purview of the Public Service Commission. A vague statement was made that under the Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954, any post with a sanctioned scale, the maximum of which exceeds Rs. 200/- would be within the purview of the Public Service Commission. It was therefore, said that the post of Khandsari Inspector was within the purview of the Public Service Commission. It was then urged that as the 'Khandsari Licensing Scheme' was to be urgently implemented, the appointing authority filled-in the posts pending recruitment by the Public Service Commission. This statement is not borne out by the record. On May 4, 1960, 9 persons including petitioners Nos. 1 and 2 were temporarily appointed as Licensing Inspectors. The

appointment order does not show that the appointment was pending selection of regular candidates by the Public Service Commission. In fact, some confusion in this behalf crept in because a statement was made at the hearing of these petitions that the post of Khandsari Inspectors came within the purview of the Public Service Commission in 1961. Undoubtedly, the post of Licensing Inspector was created in the first instance upto March, 31, 1960. But it may be mentioned that it has continued uninterruptedly till today and has become a permanent cadre. Identical appointment orders was issued in favour of petitioner No. 3 some of the petitioners including petitioners Nos. 4, 5, 6, 7 and 8 and some of the respondents including respondents Nos. 4, 5, 6, 7 and several others came to be appointed by the Order dated March, 23, 1961. (Annexure 'B' to the petition). In this appointment order it was clearly stated that 'on the result of the qualifying test and interview held for the posts of Khandsari Inspectors in the months of February, and March, 1961, the candidates as noted in the enclosed list are temporarily appointed as officiating Khandsari Inspectors in the scale of Rs. 120-6-210-EB-10-250 plus usual dearness allowance per month subject to final selection by Public Service Commission at any later date.' The recitals in the order do not spell-out that the appointees were to hold stop-gap arrangement till a candidate by the Public Service Commission is made available. On the contrary, the recitals clearly indicate that those appointees will have to face the approval test by the Public Service Commission. Now if petitioner Nos. 1 and 2 came to be appointed in 1960 and respondents 4, 5 and 6 came to be appointed in 1961 and the appointment of each of them had to be approved by the Public Service Commission, once the approval is granted, the same will relate back to the date of first appointment. That is the meaning of the expression in Model No.11; 'or from the date of the order of the first appointment, if such appointment is followed by confirmation.' It is not disputed that all the petitioners except Petitioner 4 were approved by the Public Service Commission on September, 30, 1963 and yet respondent No. 7-J.S. Negi is shown at S. No. 17 while petitioner No. 1 who joined service on March, 4, 1960 and whose appointment was approved on the same day has been assigned S. No. 27 in the seniority list. If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular, it is obvious commonsense that in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. That had not been done in this case. Therefore, assuming that the model principle set out in the 1940 Order has a binding effect, the impugned seniority list does not conform to the prescribed guideline and would certainly be invalid.

Once it is shown that the 1940 Order did not prescribe any binding rule or seniority, but it was a model prescribed for adoption and the adoption having not been shown, it cannot prescribe a binding rule of seniority. Assuming that it is deemed to have been adopted the seniority list does not conform to the model as interpreted by us.

Now if there was no binding rule of seniority it is well-settled that length of continuous officiation prescribes a valid principle of seniority. The question is from what date the service is to be reckoned ?

It was urged that any appointment of a stop-gap nature or pending the selection by Public Service Commission cannot be taken into account for reckoning seniority. In other words, it was urged that to be in the cadre and to enjoy place in the seniority list, the service rendered in a substantive capacity can alone be taken into consideration. We find it difficult to accept this bald and wide submission. Each case will depend upon its facts and circumstances. If a stop-gap appointment is made and the appointee appears before the Public Service Commission when the latter proceeds to select the candidates and is selected, we see no justification for ignoring his past service. At any rate, there is no justification for two persons selected in the same manner being differently treated. That becomes crystal clear from the place assigned in the seniority list to petitioner No. 1 in relation to respondent No. 7. In fact if once a person appointed in a stop-gap arrangement is confirmed in his post by proper selection, his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made. That has not been done in the case of all the petitioners. The error is apparent in the case of petitioner 1 and respondent No. 7. These errors can be multiplied but we consider it unnecessary to do so. In fact a fair rule of seniority should ordinarily take into account the past service in the stop-gap arrangement is followed by confirmation. This view which we are taking is borne out by the decision of this Court in *Baleshwar Dass and Ors. etc. v. State of U.P. and Ors. etc.*, wherein this Court observed that the principle which has received the sanction of this Court's pronouncement is that 'officiating service in a post for all practical purposes of seniority is as good as service on a regular basis. It may be permissible, within limits for government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categorical and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the service rendered in the two types of posts.' It was said that service rules will have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16. It is thus well-settled that where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list. Admittedly, that has not been done and the seniority list is drawn up from the date on which the approval/selection was made by the Public Service Commission in respect of each member of the service, which is clearly violative of Art. 16, and any seniority list drawn up on this invalid basis must be quashed.

A grievance was made that the petitioners have moved this Court after a long unexplained delay and the Court should not grant any relief to them. It was pointed out that the provisional seniority list was drawn up on March, 22, 1971 and the petitions have been filed in the year 1983. The respondents therefore submitted that the court should throw- out the petitions on the ground of delay, laches and acquiescence. It was said that promotions granted on the basis of impugned seniority list were not questioned by the petitioners and they have acquiesced into it. We are not disposed to accede to this request because respondents 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making representations after representations which did not yield any response, reply or relief. Coupled with this is the fact that the petitioners belong to the lower echelons of service and it is not difficult to visualise that they may find it extremely difficult to rush to the Court. Therefore, the contention must be rejected.

In view of the discussion, these petitions succeed and are allowed and a writ in the nature of certiorari is issued quashing the impugned seniority list dated March 22, 1971 in respect of Khandsari Inspectors. The respondents 1 to 3 are directed to draw-up a fresh seniority list based on the principle of length of continuous officiation reckoned from the date of first appointment if the appointment is followed by confirmation i.e. selection/approval by the State Public Service Commission. We order accordingly, but in the circumstances of the case, there will be no order as to costs.

N.V.K.

Petitions allowed.