

G.K. Dudani & Ors. Etc vs S.D. Sharma & Ors on 6 April, 1986

Equivalent citations: 1986 AIR 1455, 1986 SCR (2) 250, AIR 1986 SUPREME COURT 1455, 1986 LAB. I. C. 1454, (1987) 1 GUJ LR 70, 1986 2 CURLR 166, 1986 SCC (SUPP) 239, 1986 SCC (L&S) 622, (1986) 2 LAB LN 766, (1986) 2 SCJ 183, (1986) 2 SERVLR 638

Author: D.P. Madon

Bench: D.P. Madon, R.S. Pathak, A.P. Sen

PETITIONER:

G.K. DUDANI & ORS. ETC.

Vs.

RESPONDENT:

S.D. SHARMA & ORS.

DATE OF JUDGMENT 06/04/1986

BENCH:

MADON, D.P.

BENCH:

MADON, D.P.

PATHAK, R.S.

SEN, A.P. (J)

CITATION:

1986 AIR 1455

1986 SCR (2) 250

1986 SCC Supl. 239

1986 SCALE (1) 1374

CITATOR INFO :

R 1987 SC 716 (13)

ACT:

Bombay Civil Service Rules, 1959, Rule 9 - 'Cadre' Definition of - Temporary and permanent post - Difference between Temporary post - Whether can be held in substantive capacity.

Bombay Reorganisation Act, 1960, ss. 80 and 82 Inter-se seniority between direct recruits/promotees to the cadre of Deputy Collector - Gujarat Civil service Class I and Class II.

Code of Civil Procedure, 1976, s.11 - Principle of res judicata - Whether applicable to writ petitions under Article 226.

HEADNOTE:

The dispute in these appeals relates to the inter se seniority between the direct-recruits and promotees to the cadre of Deputy Collectors formerly designated as 'Bombay Civil service Executive Branch : Deputy Collectors (Upper Division) ' and now designated as "Gujarat Civil Service Class I and Class II". In the predecessor Province of Bombay the source of recruitment to the posts of Deputy Collectors used to be Mamlatdars who were promoted as Deputy Collectors. In 1939, direct recruitment policy was also introduced for this post, but during the years 1950 to 1959 the scheme of direct recruitment to the cadre of Deputy Collectors was discontinued. However, the Bombay Government by its Resolution dated 30.7.59 again revived the scheme of direct recruitment and fixed the ratio of appointment by the direct recruits and the promotees as 50:50 as far as practicable.

On 1.5.1960 the Bombay State was bifurcated into Gujarat and Maharashtra. During the period 1960-62 no direct-recruits were appointed to the posts of Deputy Collectors due to administrative difficulties and 61 Mamlatdars were promoted to those posts. However, since 1963 onwards, the direct-recruits

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also came to be appointed. The Government of Gujarat issued on Dec. 12, 1971 a seniority list as on Jan. 1, 1971. The list of the promotees was prepared on the basis of their continuous length of service and the list of the direct-recruits was prepared on the basis of the dates of their respective appointments. A combined seniority list showing seniority inter se between the promotees and the direct-recruits was also prepared. The direct-recruits challenged the aforesaid seniority list before the High Court and the matter ultimately came up before the Supreme Court in N.K. Chauhan and Ors. v. State of Gujarat and Ors., [1977] 1 S.C.R. 1037. The Supreme Court, after discussing the case law, summed up its conclusions and gave the requisite directions for reframing inter se seniority as under :

a. The quota system does not necessitate the adoption of the rotational rule in practical application. Many ways of working out 'quota' prescription can be devised of which rota is certainly one.

b. While laying down a quota when filling up vacancies in a cadre from more than one source, it is open to Government, subject to tests under

Art. 16 to choose 'a year' or other period or the vacancy by vacancy basis to work out the quota among the sources. But once the court is satisfied, examining for constitutionality the method proposed, that there is no invalidity, administrative technology may have free play in

choosing one or other of the familiar processes of implementing the quota rule.

c. Seniority, normally is measured by length of continuous, officiating service - The actual is easily accepted as the legal. This does not preclude a different prescription, constitutionally tests being satisfied.

d. A periodisation is needed in the case to settle rightly the relative claims of promotees and direct recruits.- 1960-62 forms period A and 1962 onwards forms period B. Promotees regularly

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appointed during period A in excess of their quota, for want of direct recruits (reasonably sought but not secured and because tarrying longer would injure the administration) can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.

e. Promotees who have been fitted into vacancies beyond their quota during the period - the year being regarded as the unit - must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota."

The Government of Gujarat accordingly prepared a seniority list pursuant to the directions given by the Supreme Court in Chauhan's case. The direct recruits and the promotees again filed writ petitions before the Gujarat High Court challenging the aforesaid seniority list. The main contention of the direct recruits before the High Court was that there were only 30 substantive vacancies in the permanent strength of the Deputy Collectors cadre and the balance of 31 vacancies was in the temporary posts created by the said Government or ex-cadre posts and consequently the 31 promotees could not be deemed to be regularly appointed as required by direction 'd' given in Chauhan's case. On the other hand, the promotees contended that quota was not distributed on the basis of actual or utilised vacancies but only the filled up vacancies of the officers who had continued to officiate till retirement or death. Accepting the contention of the direct recruits, the Division Bench of the High Court observed that the officers promoted during the period 'A' to the posts of Deputy Collectors fell in four categories, namely,

- (i) Promotees appointed to substantive vacancies in the cadre of Deputy Collectors.
- (ii) Promotees appointed to hold ex-cadre posts.
- (iii) Promotees appointed to temporary posts cadre posts or ex-cadre posts.

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(iv) Promotees who were first placed on conditional select list during period 'A' and were placed on unconditional select list after their performance was found satisfactory.

The High Court held: (a) that the promotees falling under category No. (1) in excess of their quota would be senior to subsequently appointed direct recruits in accordance with their length of continuous officiating service; (b) that so far as the last category is concerned, the Mamlatdars were placed on a conditional select list and were appointed to hold the posts of Deputy Collector and if their performance was found satisfactory during the trial period, they would be confirmed in those posts and that such confirmation had nothing to do with the length of continuous officiating service of such Mamlatdars and that it was the placement of the Mamlatdars on the select list which was material. As regards the second and the third categories, the Division Bench held that the expression "promotees regularly appointed during the period A in excess of their quota" had a direct reference to promotees regularly appointed in substantive vacancies which occurred in the cadre of Deputy Collector between 1960 and 1962 and that reading the principle laid down in the direction 'D' in Chauhan's case in the light of the Government Resolution of 1959, promotees appointed in substantive vacancies which occurred in the cadre of Deputy Collectors during the period 'A' in excess of their quota could alone gain seniority over the direct recruits in terms of the principle of the length of continuous officiating service and that those who were promoted to the posts of Deputy Collectors for being appointed to ex-cadre posts could not be said to be regularly appointed because their appointments were not in substantive vacancies in terms of the said Government Resolution and that the seniority of those who were so promoted had to be determined from the date on which they were appointed to fill the substantive vacancies in the cadre of Deputy Collectors and, therefore, those who were promoted to the posts of Deputy Collectors for being appointed to hold temporary posts could not be said to have been "regularly appointed" within the meaning of the decision in Chauhan's case.

Allowing the appeal of the State in full and that of the promotees-appellants in part,

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HELD : 1.1 The judgment of the Division Bench of the High Court in so far as it held that "promotees appointed to ex-cadre posts" and "promotees appointed to temporary posts, cadre posts or ex-cadre posts" were not regularly appointed during period A and, therefore, were not covered by direction (d) in Chauhan's case, was clearly wrong and is hereby reversed. [275 E-F]

1.2 It was not open to the direct recruits to contend

before the High Court that promotees appointed to hold ex-cadre posts and temporary posts, whether cadre posts or ex-cadre posts, were not regularly appointed during period 'A' And the High Court after perusing Chauhan's case was in error in permitting them to raise this contention. This contention had been raised by the direct recruits in their earlier writ petition, namely, Special Civil Application No. 1401 of 1972 and the learned Single Judge of the High Court had rejected this contention and had held that the appointments of the promotees between 1961 and 1963 were regular. The Division Bench of the High Court also did not disturb this finding nor was this finding upset by the Supreme Court in Chauhan's case. [272 B-E]

1.3 Although by reason of the Explanation which was inserted in s. 141 of the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act 1976, s. 11 of the Code does not in terms apply to any proceeding under Art. 226 of the Constitution, the principle of res judicata does apply to all writ petitions under Art. 226. This point was, therefore, barred by the principle of res judicata and should never have been allowed by the High Court to be reagitated. [272 F-H]

2. The interpretation placed by the Division Bench upon the words "promotees regularly appointed" in direction (d) in Chauhan's case was wholly erroneous. Under the guise of interpreting the judgment in that case, the Division Bench of The High Court virtually sat in appeal over the judgment of the Supreme Court and modified it. The High Court ought to have taken the words in that judgment in the sense in which they were used and ought to have applied them to the facts before it, instead of trying to put words in the mouth of the Supreme Court. The Division Bench ignored the fact that the Supreme Court had categorically held that in the case before it the appointments had been regularly made in accordance with

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the rules to fill substantive vacancies. Further, copies of the relevant Gazette notifications clearly bear out not only this fact but also show that the appointments of these promotees were regularly made. [273 A-C]

In the instant case, the record shows that during period 'A' there were thirty vacancies in permanent posts and thirty-one vacancies in temporary additional posts. These thirty-one posts were created initially for a period of one year but renewed from year to year from 1960 onwards and have been in existence continuously since then. These temporary additional posts were, therefore, not fortuitous posts created for the purpose of special tasks but formed an integral part of the regular cadre, and appointments to those posts were made from the approved select list of Mamlatdars prepared in consultation with the Gujarat Public Service Commission. [273 D-F]

3.1 Rule 9(8) of the Bombay Civil Service Rules, 1959,

defines "cadre" as meaning the strength of a service or a part of service sanctioned as a separate unit. The service of Deputy Collectors is admittedly a separate unit under the Revenue Department. A cadre consists of permanent posts and temporary posts added to the cadre from time to time according to the exigencies of the service. The difference between permanent and temporary posts is brought out by the definition of these expressions given in Rule 9. Under Rule 9(43), a permanent post is a post carrying a definite rate of pay sanctioned without limit of time and under Rule 9(56) a temporary post is a post carrying a definite rate of pay sanctioned for a limited time. Rule 71 sets out the manner of fixation of pay of the officer appointed to a temporary post. Even officers holding permanent posts are often deputed to hold an ex-cadre post. It was, therefore, immaterial whether these promotees after being appointed Deputy Collectors were deputed to hold an ex-cadre post or not. [273 F-H; 274 A]

3.2 The position that a temporary post can be held in a substantive capacity is now firmly established by the decisions of the Supreme Court. All persons holding substantive posts or temporary posts in substantive capacity are members of the service. A person can be said to hold a post, permanent or temporary, in a substantive capacity only if his appointment to that post is not fortuitous or ad hoc. [275 B-E]

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Baleshwar Dass & Ors. etc. v. State of U.P. and Ors. etc., [1981] 1 S.C.R. 449 and O.P. Singla and Anr. v. Union of India & Ors., [1984] 4 S.C.C. 450, relied upon.

Ramchandra Shankar Deodhar and Ors. v. The State of Maharashtra & Ors., [1974] 2 S.C.R. 216 and N.K. Chauhan and Ors. v. State of Gujarat & Ors., [1977] 1 S.C.R. 1037, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2359 of 1980.

From the Judgment and Order dated 18/19th March, 1980 of the Gujarat High Court in Spl. Application Civil No. 2199 of 1978.

AND Civil Appeal No. 1816 of 1980.

From the Judgment and Order dated 18/19th March, 1980 of the Gujarat High Court in Spl. Civil Application No. 1407 of 1978.

P.H. Parekh and Ms. Indu Malhotra for the Appellants in C.A. No. 2359 of 1980.

G.A. Shah and R.N. Poddar for the Appellants in C.A. No. 1816/80 and for Respondent No.5 in C.A. 2359/80.

Rajiv Dutt for Respondent No. 3 in both the appeals. S.K. Dholakia, P.C. Kapoor, B.S. Gupta and R.C. Bhatia for Respondents 1, 2 and 4 in both the appeals.

G.A. Shah for the State of Gujarat.

The Judgment of the Court was delivered by MADON, J. On January 26, 1950, when the Constitution of India came into force, under Article 1 read with the First Schedule to the Constitution, India became a Union of States consisting of nine Part A States, nine Part States and ten Part States. Under Article 3, Parliament has the power by law to form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; increase the area of any State; diminish the area of any State; alter the boundaries of any State; or alter the name of any State. By reason of repeated reorganizations of States, the Union of India today consists of twenty-two States and nine Union territories and it is difficult to visualize when this process of fragmentation of India will end and the practice of sacrificing the sense of oneness in being an Indian on the alter of parochial and linguistic chauvinism will stop. These reorganizations have resulted in benefit to some, detriment to others and bewilderment to many. Each reorganisation has brought in its wake a host of problems mostly relating to those in services of the States, many of them still unsolved.

We are concerned in these Appeals only with the reorganization effected by the Bombay Reorganization Act, 1960 (Act No. 11 of 1960), which divided the State of Bombay into the State of Maharashtra and the State of Gujarat. At the commencement of the Constitution, the territory of the State of Bombay comprised the territories which before the E commencement of the Constitution were comprised in the Province of Bombay. Saurashtra was then a Part State and Kutch a Part State. Under the States Reorganization Act, 1956 (Act No. 37 of 1956), certain territories of the State of Bombay were transferred to other States, parts of the territories of the State of other States were transferred to the State of Bombay and the territories of the State of Saurashtra and the State of Kutch were comprised in the new State of Bombay which emerged as a result of this reorganization. Part X of this Act consisting of sections 114 to 118 made provisions with respect to All-India Service and other services. Section 115 made provisions relating to other services. Under it, allotment of personnel of the State Services serving in a reorganized State as existing on the date of the reorganization of States was to be made either to a successor state or to the original State in the manner provided therein.

Each Act providing for reorganization of States contains similar provisions. Thus, a transfer of territories results in a transfer of service personnel. Those who have been so transferred have found themselves higher or lower in seniority in the same cadre than in their original State. The question of corresponding posts and "the deemed date of appointment" has been a knotty one and much administrative ingenuity has been applied in unravelling the tangle created by political expediency. Solutions to this question have resulted in giving an advantage to some in promotional matters while the hopes of promotion of others have foundered between the Scylla of political expediency

and the Charybdis of administrative ingenuity. Subsequent reorganizations involving the same States have led to these problems multiplying like Pelion piled on Ossa. The second reorganization of the State of Bombay by the Bombay Reorganization Act, 1960, has not proved an exception to this rule and the problems raised by it have reached this Court but even the judgments of this court have failed to provide a final solution as is illustrated by the present Appeals.

As we are concerned in these Appeals with services other than All India Services, we need refer only to those provisions of the Bombay Reorganization Act which concern these services. Sub-sections (1) to (3) and (6) of Section 81 of the said Act provides as follows :

81. Provisions relating to other services. ---

(1) Every person who, immediately before the appointed day, is serving in connection with the affairs of the State of Bombay shall, as from that day, provisionally continue to serve in connection with the affairs of the State of Maharashtra, unless he is required, by general or special order of the Central Government, to serve provisionally in connection with the affairs of the State of Gujarat.

(2) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the State to which every person provisionally allotted to the State of Maharashtra or Gujarat, shall be finally allotted for service and the date with effect from which such allotment shall take effect or be deemed to have taken A effect.

(3) Every person who is finally allotted under the provisions of sub-section (2) to the State of Maharashtra or Gujarat shall, if he is not already serving therein, be made available for serving in that State from such date as may be agreed upon between the two State Governments or, in default of such agreement, as may be determined by the Central Government.

x x x (6) Nothing in this section shall be deemed to affect, after the appointed day, the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to the determination of the conditions of service of persons serving in connection with the affairs of the State of Maharashtra or Gujarat :

Provided that the conditions of service applicable immediately before the appointed day to the case of any person provisionally or finally allotted to the State of Maharashtra or Gujarat under this section shall not be varied to his disadvantage except with the previous approval of the Central Government."

Section 82 of the said Act provides as follows :

"82. Provisions as to continuance of officers in same post.

Every person who, immediately before the appointed day, is holding or discharging the duties of any post or office in connection with the affairs of the State of Bombay in any area which on that day falls within the State of Maharashtra or Gujarat shall continue to hold the same post or office in that State and shall be deemed, as from that day, to have been duly appointed to the post or office by the Government of, or other appropriate authority in, that State :

Provided that nothing in this section shall be deemed to prevent a competent authority, after the appointed day, from passing, in relation to such person, any order affecting his continuance in such post or office."

Under section 87, all laws which were in force in the territories of the State of Bombay prior to the coming into force of the said Act continue to apply both in the State of Maharashtra and the State of Gujarat until otherwise provided by a competent Legislature or other competent authority. The term 'law' is defined in clause (d) of section 2 as follows :

"(d) 'law' includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay".

Under clause (a) of section 2 the expression "appointed day"

means "the 1st day of May, 1960".

The dispute in these Appeals relates to the inter se seniority between the direct recruits and promotees to the cadre of Deputy Collectors formerly designated as "Bombay Civil Service Executive Branch : Deputy Collectors (Upper Division)" and now designated as "Gujarat Civil Service Class I and Class II". This cadre is recognized for recruitment to the Indian Administrative Service by the relevant Recruitment Rules.

The State of Bombay prior to its division into the State of Maharashtra and the State of Gujarat, for purposes of revenue administration, was divided into divisions which were separate units for promotional prospects, incidence of transfer, etc., of Deputy Collectors. In the predecessor Province of Bombay, the source of recruitment to these posts used to be Mamlatdars who were transferred to these posts by promotion. In 1939 a different recruitment policy was evolved and suitable candidates were directly recruited. The creation of two sources of appointment to the cadre of Deputy Collector required a rule to be framed to determine the inter se seniority between the promotees and the direct recruits.

Accordingly, the Government of Bombay, Political & Service Department, issued a Resolution dated November 21, 1941. The 1941 Resolution provided as follows :

"Government is pleased to direct that the following principles should be observed in determining the seniority of direct recruits and promoted officers in the provincial

services (except the Bombay Services of Engineers, Class I)

(i) In the case of direct recruits appointed substantively on probation, the seniority should be determined with reference to the date of their appointment on probation.

(ii) In the case of officers promoted to substantive vacancies, the seniority should be determined with reference to the date of their promotion to the substantive vacancies, provided there has been no break in service prior to their confirmation in those vacancies."

Thereafter, the promotee officers through their Association made a representation to the Government that since direct recruits were confirmed immediately on the expiration of their probation and promotees were not so confirmed, it would adversely affect their prospects of promotion. By its reply dated January 11, 1949, the Government replied to the said Association as under :

"Confirmation of direct recruits to the cadre Collectors :

The officers appointed by direct recruitments and those appointed by promotion are confirmed in vacancies reserved for their respective classes. If, therefore, a clear vacancy in the cadre of Deputy Collectors reserved for a direct recruit occurs earlier, it is natural that such a recruit should be confirmed earlier. The seniority of such a direct recruit vis-a-vis a promoted officer is not, however, determined according to the date of confirmation but according to the principles laid down in Government Resolution, Political and Services Department No. 4283/34 dated the 21st November 1941 i.e. with references to the date of first appointment on probation in the case of the direct recruit and of continuous officiation in the case of the promoted officers. The promoted officers, therefore, can have no grievance in this behalf."

From 1950 until 1954 the scheme of direct recruitment to the cadre of Deputy Collectors was abandoned but it was again revived in 1959 by a Resolution dated July 30, 1959, issued by the Government of Bombay, Revenue Department. The said Resolution was as follows :

"Government had for sometime under consideration the question of reviving the system of direct recruitment to the cadre of Deputy Collectors. It has now been decided that in the interest of administration the revival of that system is quite necessary. Government is accordingly pleased to cancel the orders contained in Government Resolution No. 9313/45, dated 6th February, 1950 and those in Government Resolution No. 9313/45, dated the 24th July 1951, in so far as they relate to the recruitment of Bombay Civil Service Executive Branch Deputy Collectors (Upper Division) and to direct that as far as practicable, 50 per cent of the substantive vacancies occurring in the cadre with effect from 1st January, 1959 should be filled in by nomination of candidates to be selected in accordance with the rules appended herewith.

2. The Political and Services Department should be requested to issue necessary correction slips to the Bombay Civil Services Classification and Recruitment Rules."

The rules appended to the said Resolution dated July 30, 1959, were called the "Recruitment Rules for the Posts of Deputy Collectors". Rule 1 is as follows :

" Appointment to the posts of Deputy Collectors shall be made either by nomination or by promotion of suitable Mamlatdars Provided that the ratio of appointment by nomination and by promotion shall as far as practicable be 50:50 :

Provided further that half the vacancies reserved for appointment by promotion shall be filled by directly recruited Mamlatdars who have put in at least seven years service in the posts including the period spent on probation." C Rule 2 provided for appointment by nomination. Such nomination was to be made on the result of a competitive examination to be held by the State Public Service Commission in accordance with the rules in respect thereof appended as Annexure I to the Recruitment Rules. The said Rule 2 also prescribed the qualifications for candidates desiring to appear in the said examination. Amongst the qualifications so prescribed was that the candidates should "possess adequate knowledge of Marathi or Gujarati." Rules 3 and 4 of the Recruitment Rules were as follows : "3. Candidates appointed by nomination shall be on probation for a period of two years, the probation being regulated according to the rules appended hereto as Annexure II.

4. After appointment as Deputy Collector, whether by nomination or by promotion, the selected candidate will have to pass the prescribed examinations in Hindi and in a regional language according to the prescribed rules."

Following upon the reorganization of the States, Revenue Divisions were abolished and by a Circular of the Government of Bombay dated February 3, 1960, the legal fiction of "deemed dates on the commencement of service" for the purpose of inter se seniority of personnel drawn from different pre-reorganization States and from the Division was abolished. The Circular applied to all the services and consequently the cadre of Deputy Collectors stood converted into a State-wide cadre. On the State of Gujarat coming into existence a similar notification was issued by the Government of Gujarat on May 1, 1960. Thereafter, the Government of Gujarat issued another circular dated May 27, 1960. The said circular is as follows :

"Doubts have arisen as respects the directions given under Government Circular No. GSF-1060 dated the 1st May, 1960.... To remove any doubt in that behalf, therefore, Government is pleased to direct that the following Explanation shall be and shall be deemed always to have been added to the said circular, namely -

Explanation. - Nothing herein shall apply to appointments of officers, authorities or persons or to the constitution of tribunals or other bodies which may be made by Government on or after the 1st May, 1960 and the conditions of service of the

officers, authorities or persons appointed or the members of the Tribunals or bodies so constituted."

Until then the select list of Mamlatdars fit to be appointed as Deputy Collector used to be prepared on the basis of divisional seniority in their respective Divisions. In *Ramchandra Shankar Deodhar and others v. The State of Maharashtra and others*, [1974] 2 S.C.R. 216 the second proviso to Rule 1 of the Recruitment Rules was held by this Court to be void as being violative of Article 16 of the Constitution. In that case this Court further held that the procedure for promotion based on divisional seniority was also violative of Article 16 and that the State should readjust seniority according to State-wide seniority.

During the period 1960 to 1962 no direct recruits were appointed to the post of Deputy Collectors, but sixty-one Mamlatdars were promoted to that post. The reason why not direct recruitments were made during this period was that on October 31, 1961, the Government sent a requisition for twelve October 31, 1961, the Government sent a requisition for twelve posts of Deputy Collectors to the Gujarat Public Service Commission but the Commission raised certain queries with regard to the qualification Prescribed by clause (c) of Rule 2 of the Recruitment Rules that the candidate should possess an adequate knowledge of Marathi or Gujarati". The reason for this query was that on the reorganization of the State of Bombay, the State of Gujarat which came into being consisted of those areas of the State of Bombay which were predominantly Gujarati-speaking areas while the State of Maharashtra consisted of the territories of the State of Bombay of which the predominant language was Marathi and the City of Bombay of which Marathi was not the predominant language. Considerable correspondence took place between the Commission and the Government. Ultimately, a competitive examination for the posts of Deputy Collectors was held in July 1962. The results of this examination were declared in January 1963 and the Commission sent its recommendations in February 1963. The Government thereupon issued orders for appointment of the candidates so selected by the Public Service Commission in May 1963. Thus, in 1963 and later the direct recruits came to be appointed. The Government of Gujarat issued on December 12, 1971, a seniority list as on January 1, 1971. The list of the promotees was prepared on the basis of their continuous length of service and the list of the direct recruits was prepared on the basis of the dates of their respective appointments. A combined seniority list showing seniority inter se between the promotees and the direct recruits was also prepared. It may be mentioned that ever since 1941 in the Province of Bombay and thereafter in the State of Bombay and subsequently in the State of Gujarat the principle of continuous officiation had been admittedly followed. The direct recruits filed a writ petition in the Gujarat High Court being Special Civil application No. 1401 of 1972 challenging the said seniority list. The parties, apart from the State of Gujarat, namely, the promotees and the direct recruits, were arraigned in a representative capacity in the said writ petition. The grievance of the direct recruits was that the promotees who were promoted during the period 1960 to 1963 were given seniority over those directly recruited in 1963 and later. It was their contention that as the appointments to the cadre of Deputy Collectors were made on the basis of a quota allocation, a system of rotation should also apply. A learned Single Judge of the Gujarat High Court by his judgment dated November 30, 1973, dismissed the said writ petition holding that Rule 1 of the Recruitment Rules required implementation of the quota as far as it was practicable and, therefore, the promotions of Mamlatdars made between 1961 and 1963 were regular. The direct recruits thereupon filed a Letters

Patent Appeal being letters Patent Appeal No. 113 of 1974. In the said Letters Patent Appeal the direct recruits contended that the promotees had not been appointed in substantive vacancies, but were appointed in such vacancies only on the date on which they were confirmed. By its judgment dated November 12, 1975, the Division Bench of the Gujarat High Court held that the Government ought to have followed the roster method. The promotees thereupon approached this Court in appeal. During the pendency of the appeal, on January 1, 1976, the Government prepared a seniority list on the basis of the judgment of the Division Bench. By its judgment delivered on November 1, 1976, and reported as N.R. Chauhan and others v. State of Gujarat and others, [1977] 1 S.C.R. 1037 this Court partly allowed the said appeal filed by the promotees.

In Chauhan's Case the Court accepted the explanation given by the State of Gujarat for its inability to hold the examination. The Court summarized the conclusions it had reached as follows (at page 1053) :

"1 The promotions of mamlatdars made by Government between 1960 and 1962 are saved by the 'as far as practicable' proviso and therefore valid. Here it falls to be noticed that in 1966 regular rules have been framed for promotees and direct recruits flowing into the pool of Deputy Collectors on the same quota basis but with a basic difference. The saving provision 'as far as practicable' has been deleted in the 1966 rules. The consequence bears upon seniority even if the year is treated as the unit for quota adjustment.

2. If any promotions have been made in excess of the quota set apart for the mamlatdars after rules in 1966 were made, the direct recruits have a legitimate right to claim that the appointees in excess of the allocable ratio from among mamlatdars will have to be pushed down to later years when their promotions can be regularised by being absorbed in their lawful quota for these years. To simplify, by illustration, if 10 deputy collectors' substantive vacancies exist in 1967 but 8 promotees were appointed and two direct recruits alone were secured, there is a clear transgression of the 50 : 50 rule. The redundancy of 3 hands from among promotees cannot claim to be regularly appointed on a permanent basis. For the time being they occupy the posts and the only official grade that can be extended to them is to absorb them in the subsequent vacancies allocable to promotees. This will have to be worked out down the line wherever there has been excessive representation of promotees in the annual intake.....

3. The quota rule does not, inevitably, invoke The application of The rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to

be pushed down as indicated earlier."

(Emphasis supplied.) After discussing the case law, the Court then summed up the further conclusions it had reached and gave the requisite directions for reframing the inter se seniority list. These conclusions and directions are as follows (at pages 1057-58) :

"(a) The quota system does not necessitate the adoption of the rotational rule in practical application. Many ways of working out 'quota' prescription can be devised of which rota is certainly one.

(b) While laying down a quota when filling up vacancies in a cadre from more than one source, it is open to Government, subject to tests under Art.

16, to choose 'a year' or other period or the vacancy by vacancy basis to work out the quota among the sources. But once the Court is satisfied, examining for constitutionality the method proposed, that there is no invalidity, administrative technology may have free play in choosing one or other of the familiar processes of implementing the quota rule. We, as Judges, cannot strike down the particular scheme because it is unpalatable to forensic taste.

(c) Seniority, nor ally is measured by length of continuous, officiating service - the actual is easily accepted as the legal. This does not preclude a different prescription, constitutionally tests being satisfied.

(d) A periodisation is needed in the case to settle rightly the relative claims of promotees and direct recruits. 1960-62 forms period A and 1962 onwards forms period B. Promotees regularly appointed during period A in excess of their quota, for want of direct recruits (reasonably sought but not secured and because tarrying longer would injure the administration) can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.

(e) Promotees who have been fitted into vacancies beyond their quota during the period - the year being regarded as the unit - must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota." (Emphasis supplied.) Thereafter, on January 19, 1978, the Government of Gujarat prepared a seniority list pursuant to the directions given by this Court in Chauhan's Case. Thereupon, in March 1978 the direct recruits filed a writ petition in the Gujarat High Court being Special Civil Application No. 1407 of 1978 challenging the said seniority list dated January 19, 1978. This writ petition was also filed in a representative capacity and the parties thereto are the same as in the earlier writ petition, namely, Special Civil Application No. 1401 of 1972, save that as N.K. Chauhan had retired, G.K. Dudani has been joined as a party in his place. The main contention of the direct recruits in the said Special Civil Application No. 1407 of 1978 was that there were only thirty substantive vacancies in the permanent strength of the Deputy Collectors' cadre and the balance of thirty-one vacancies was in the temporary posts created by the State Government or ex-cadre posts and consequently the thirty-one promotees could not be deemed to be "regularly appointed" as

required by direction 'd' given in Chauhan's Case.

In October 1978 the promotees also filed a writ petition in the Gujarat High Court, being Special Civil Application No. 2199 of 1978, challenging the said seniority list of January 19, 1978, raising two contentions. The first contention was that quota was not distributed on the basis of actual or utilized vacancies but only the filled-up vacancies of the officers who had continued to officiate till retirement or death. The second contention was that the appointment of junior time-scale I.A.S. Officers in the cadre of Deputy Collectors was irregular because the relevant rule prescribed only two sources of recruitment, namely, promotion from lower rank and direct recruitment. We may mention that the second contention raised by the promotees was given up as it transpired at the hearing of the said writ petition that the junior time-scale I.A.S. Officers were appointed to the posts of Assistant Collector and not to the posts of Deputy Collector, and even a Deputy Collector after he was nominated to the I.A.S. was appointed as an Assistant Collector.

Both the said writ petitions were heard together by a Division Bench of the Gujarat High Court. Accepting the above contention of the direct recruits, the Division Bench of that High Court observed that the officers promoted during period A to the posts of Deputy Collectors fell in four categories, namely,

- (i) Promotees appointed to substantive vacancies in the cadre of Deputy Collectors.
- (ii) Promotees appointed to hold ex-cadre posts.
- (iii) Promotees appointed to temporary posts cadre posts or ex-cadre posts.
- (iv) Promotees who were first placed on conditional select list during period A and were placed on unconditional select list after their performance was found satisfactory.

So far as the first category is concerned, it was conceded by the direct recruits at the hearing of the said writ petitions and, in our opinion, rightly so, that promotees falling under that category in excess of their quota would be senior to subsequently appointed direct recruits in accordance with their length of continuous officiating service. So far as the last category is concerned, the Division Bench rejected the contention of the direct recruits and observed that Mamlatdars were placed on a conditional select list and were appointed to hold the posts of Deputy Collector and if their performance was found satisfactory during the trial period, they would be confirmed in those posts and that such confirmation had nothing to do with the length of continuous officiating service of such Mamlatdars. The Division Bench held, and in our opinion, rightly, that it was the placement of the Mamlatdars on the select list which was material. This finding of the Division Bench is not challenged in the Appeal before us filed by the direct recruits.

The only dispute before us, therefore, revolves round the second and the third categories. According to the Division Bench, the question which fell for consideration with respect to these categories was whether the expression "promotees regularly appointed" used in the said direction

(d) in Chauhan's case meant a regular appointment in the regular course to a cadre post as contra-distinguished from ad hoc appointment or appointment to an ex-cadre post. According to the Division Bench, the expression "promotees regularly appointed during period A in excess of their quota" had a direct reference to promotees regularly appointed in substantive vacancies which occurred in the cadre of Deputy Collector between 1960 and 1962. According to the Division Bench, the concept of regular appointment which was laid down in Chauhan's case was indissolubly wedded to the said Government Resolution of 1959 read with the said Government Resolution of 1941 and, therefore, to read the said direction independently of the said two Resolutions was to decree an artificial and unnatural divorce between them. The Division Bench held, "Therefore, regularity of appointment is not any regularity which our forensic tests may warrant but it is the regularity in terms of those RESOLUTIONS." The High Court further held that reading the principle laid down in the direction (d) in the light of the said Government Resolution of 1959, promotees appointed in substantive vacancies which occurred in the Cadre of Deputy Collectors during period A in excess of their quota could alone gain seniority over the direct recruits in terms of the principle of the length of continuous officiating service and that those who were promoted to the posts of Deputy Collectors for being appointed to ex-cadre posts could not be said to be regularly appointed because their appointments were not in substantive vacancies in terms of the said Government Resolution and that the seniority of those who were so promoted had to be determined from the date on which they were appointed to fill the substantive vacancies in the cadre of Deputy Collectors. The High Court then proceeded to consider the case of those who were promoted to the posts of Deputy Collectors for being appointed to hold temporary posts. According to the Division Bench, they could not be said to have been "regularly appointed" within the meaning of the decision in Chauhan's case. The Division Bench observed:

"A temporary post and a substantive vacancy go ill together. There can be a substantive post and a temporary vacancy but it is difficult for us to think that there can be a substantive vacancy in a temporary post. The very fact that the post is temporary militates against there being a substantive vacancy in that post. We are, therefore, of the opinion that the Mamlatdars who were, during period A, promoted to the posts of Deputy Collectors and appointed to hold temporary posts could not claim seniority in terms of the length of their continuous officiating service from the date or dates of such promotions. They can claim seniority in the cadre of Deputy Collectors only from the date or dates from which they were appointed to the posts of a Deputy Collector in substantive vacancies in the cadre of Deputy Collectors.

In our opinion, it was not open to the direct recruits to contend in their Special Civil Application No. 1407 of 1978 that promotees appointed to hold ex-cadre posts, and temporary posts, whether cadre posts or ex-cadre posts, were not regularly appointed during period A and the High Court after perusing Chauhan's case was in error in permitting them to raise this contention. This contention had been raised by the direct recruits in their earlier writ petition, namely, Special Civil Application No. 1401 of 1972. The learned Single Judge had rejected this contention and had held that the appointments of the promotees between 1961 and 1963 were regular. Though this point was taken in the Memorandum of Appeal in the Letters Patent Appeal filed by

the direct recruits, the Division Bench which heard this appeal did not disturb this finding nor was this finding upset in Chauhan's case. On the contrary, in Chauhan's case this Court observed (at page 1055) "In the instant case it is common ground that the appointments are not on a purely ad hoc basis but have been regularly made in accordance with the rules to fill substantive vacancies except that the promotees have exceeded their quota, direct recruits being unavailable."

In view of this categorical finding in Chauhan's case, it was not open to the direct recruits to reargue this point. Although by reason of the Explanation which was inserted in section 141 of the Code of Civil Procedure, 1908, by the Code of Civil Procedure (Amendment) Act, 1976, section 11 of the Code does not in terms apply to any proceeding under Article 226 of the Constitution, the principle of res judicata does apply to all writ petitions under Article 226. This point was, therefore, barred by the principle of res judicata and should never have been allowed by the High Court to be reargued.

Even apart from the question of res judicata, the Division Bench was not right in its approach to Chauhan's case. The interpretation placed by the Division Bench upon the words "promotees regularly appointed" in direction (d) in Chauhan's case was wholly erroneous. Under the guise of interpreting the judgment in that case, the Division Bench of the High Court virtually sat in appeal over the judgment of this Court and modified it. The High Court ought to have taken the words in that judgment in the sense in which they were used and ought to have applied them to the facts before it instead of trying to put words in the mouth of this Court. The Division Bench ignored the fact that this Court had categorically held that in the case before it the appointments had been regularly made in accordance with the rules to fill substantive vacancies. According to the Division Bench, direction (d) in Chauhan's case meant that these appointments should be regularly made only to the vacancies in the permanent posts in the cadre and did not apply to promotees appointed to hold ex-cadre posts. The record shows that during period A there were thirty vacancies in permanent posts and thirty-one vacancies in temporary additional posts. These thirty-one posts were created initially for a period of one year but renewed from year to year from 1960 onwards and have been in existence continuously since then. These temporary additional posts were, therefore, not fortuitous posts created for the purpose of special tasks but formed an integral part of the regular cadre, and appointments to those posts were made from the approved select list of Mamlatdars prepared in consultation with the Gujarat Public Service Commission. The mode of appointment to these posts was to appoint first a particular officer to the cadre post of Deputy Collector and to continue him as Deputy Collector or depute him to other Departments in equivalent posts. Rule 9(8) of the Bombay Civil Service Rules, 1959, defines "cadre" as meaning the strength of a service or a part of service sanctioned as a separate unit. The service of Deputy Collectors is admittedly a separate unit under the Revenue Department. A cadre consists of permanent posts and temporary posts added to the cadre from time to time according to the exigencies of the service. The difference between permanent and temporary posts is brought out by the definition of these expressions given in Rule 9. Under Rule 9(43), a permanent post is a post carrying a definite rate of pay sanctioned without limit of time and under Rule 9(56) a temporary post is a post carrying a definite rate of pay sanctioned for a limited time. Rule 71 sets out the manner of fixation of pay of the officer appointed to a temporary post. The note below Rule 8 is illuminative and is as follows:

"Substantive appointments to temporary posts should be made in a limited number of cases only, as for example, when posts are, to all intents and purposes, quasi permanent or when they have been sanctioned for a period of not less than, or there is reason to believe that they will not terminate within a period of three years. In all other cases, appointments in temporary posts should be made in an officiating capacity only".

Instruction No.3 to Rule 71 is also illuminative. It provides as follows "Temporary posts may be divided into the categories - (i) posts created to perform the ordinary work for which permanent posts already exist in a cadre, the only distinction being that the new posts are temporary, and not permanent and

(ii) isolated post created for the performance of special task unconnected with the ordinary work which a service is called upon to perform. An example of the latter type of post is on a commission on enquiry. A distinction by strict verbal definition is difficult, but in practice there should be little difficulty in applying the distinction in individual cases. The former class of post should be considered as a temporary addition to the cadre of a service whoever may be the individual appointed to the post. The latter class of temporary post should be considered as unclassified and isolated ex-cadre posts. Temporary posts which by this criterion should be considered as temporary addition to the cadre of a service should be created in the time-scale of the service ordinarily without extra remuneration. Incumbents of these posts will, therefore, draw their ordinary time-scale pay."

mis is precisely what has been done in the case of officers whom the Division Bench has categorized as promotees appointed to hold ex-cadre posts or promotees appointed to a temporary post, whether an ex-cadre post or a cadre post. Even officers holding permanent posts are often deputed to hold an ex-cadre post. It was, therefore, immaterial whether these promotees after being appointed Deputy Collectors were deputed to hold an ex-cadre post or not. The position that a temporary post can be held in a substantive capacity is now firmly established by decisions of this Court in Baleshwar Dass & Ors. etc. v. State of U.P. & Ors., [1981] 1 S.C.R. 449 and O.P. Singla and Anr. v. Union of India & Ors., [1984] 4 S.C.C. 450. According to these decisions, all persons holding substantive posts or temporary posts in substantive capacity are members of the service. In Singla's case this Court further pointed out (at page 483) "A person can be said to hold a post, permanent or temporary, in a substantive capacity only if his appointment to that post is not fortuitous or ad hoc." The judgment in Chauhan's case is clear on the point that the appointment of none of the promotees in question was a fortuitous or an ad hoc appointment. Further, copies of the relevant Gazette notifications have been produced in these Appeals which clearly bear out not only this fact but also show that the appointments of these promotees were regularly made.

The judgment of the Division Bench, in so far as it held that "promotees appointed to ex-cadre posts" and "promotees appointed to temporary posts, cadre posts or ex- cadre posts" were not regularly appointed during period A and, therefore, were not covered by direction (d) in Chauhan's case was clearly wrong and is hereby reversed.

Civil Appeal No. 2359 of 1980 is filed by the promotees and is directed against the judgment and order of the Division Bench of the Gujarat High Court making the rule issued by that High Court in Special Civil Application No. 1407 of 1978 filed by the direct recruits absolute and dismissing Special Civil Application No. 2199 of 1978 filed by the promotees. So far as that part of the said Appeal which is directed against dismissal of Special Civil Application No. 2199 of 1978 is concerned, the two contentions which were raised before the High Court and which have been set out above were also raised before us. The promotees had given up in the High Court the first contention relating to the appointment of junior time-scale I.A.S. Officers in the cadre of Deputy Collectors and it is now not open to them to raise this contention. So far as the second contention is concerned, it is the case of the promotees that in addition to thirty vacancies in permanent posts and thirty-one in temporary additional posts, there were nineteen further vacancies, making in all eighty vacancies. The submission of the promotees before us was that this Court should direct the Government of Gujarat to prepare a fresh seniority list and to give the promotees the benefit of these further nineteen vacancies also. The State of Gujarat has categorically stated both in its affidavit in reply filed in the Gujarat High Court as also in its affidavits filed in this Court that there were in all only sixty-one vacancies. The contention of the promotees that there were nineteen further vacancies does not seem to be correct as the record bears out the above statement made by the State of Gujarat, and after this length of time it is not necessary to remit this matter to the High Court to ascertain this fact or to direct the State Government to prepare a fresh seniority list. This litigation has gone on too long and there must be a rest and quietus to all things. In our opinion, Special Civil Application NO. 2199 of 1978 filed by the promotees was rightly dismissed by the Division Bench.

In the result, we partly allow Civil Appeal No. 2359 of 1980 and while confirming the order of the Gujarat High Court dismissing Special Civil Application No. 2199 of 1978, we set aside its order making absolute the rule issued in Special Civil Application No. 1407 of 1978 and dismiss the said Special Civil Application.

Civil Appeal No. 1816 of 1980 is filed by the State of Gujarat against the order of the Division Bench of the Gujarat High Court in Special Civil Application No. 1407 of 1978 filed by the direct recruits. This Appeal is accordingly allowed.

All interim orders passed in both these Appeals are hereby vacated.

The real result of this prolonged and unfortunate litigation is that most of the promotees have retired from service and only a few are left to enjoy the fruits of their victory in the concrete shape of being able hereafter to fill a higher post in the Indian Administrative Service. Their misfortune was due to the inability of the Government of Gujarat to hold a competitive examination for nominating direct recruits to the posts of Deputy Collector because of the query raised by the Gujarat Public Service Commission with respect to the particular vernacular language of which the candidate was expected to possess an adequate knowledge, namely, whether it should be Gujarati or either Marathi or Gujarati. This query would not have been raised had what was then called the bilingual State of Bombay not been bifurcated into two so-called unilingual States. Those who have retired have, however, had the honour of being sacrificial lambs on the altar of the God of Linguistic States and can console themselves with the knowledge that the local, and in a large measure even the State,

administration of their State has after the division of the old State been carried on in the mother tongue of the residents of the new State. It is time we lifted the Language Curtain which has descended criss-cross across India so that an Indian can understand another Indian. St. Paul said in his First Epistle to the Corinthians (xiv.11), "Therefore if I know not the meaning of the voice, I shall be unto him that speaketh a barbarian, and he that speaketh shall be a barbarian unto me." Let us then have a common tongue, whatever it be. We may take pride in our mother tongue. We may take pride in the locality, town or region from where we come. But let us above all prides take pride in being Indians.

The parties will bear and pay their own costs of these Appeals.

C.A. 2359/80 partly allowed.

M.L.A.

C.A. 1816/80 allowed.