

Dr. Chandra Prakash & Ors vs State Of U.P. & Anr on 4 December, 2002

Equivalent citations: AIR 2003 SUPREME COURT 588, 2002 (10) SCC 710, 2002 AIR SCW 5235, 2003 LAB. I. C. 379, 2003 ALL. L. J. 227, 2002 (7) SLT 288, 2003 (1) SERVLJ 222 SC, (2003) 1 SERVLJ 222, 2003 (2) SRJ 107, (2002) 8 SUPREME 577, (2002) 8 SERVLR 439, (2002) 9 SCALE 159, (2003) 2 ESC 124, (2003) 1 SCT 374, (2003) 1 UC 598

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Bench: Chief Justice, Ruma Pal, Brijesh Kumar

CASE NO.:

Writ Petition (civil) 43 of 1998

PETITIONER:

Dr. Chandra Prakash & Ors.

RESPONDENT:

State of U.P. & Anr.

DATE OF JUDGMENT: 04/12/2002

BENCH:

CJI, RUMA PAL & BRIJESH KUMAR.

JUDGMENT:

J U D G M E N T With W.P.(C) No.237/98,220/98,276/98,532/98 539/98,547/98,176/99,229/99 and 299/99 RUMA PAL, J.

A tangled web of facts and law would best describe this case which involves the question of the seniority of doctors in the Uttar Pradesh Medical Services. To untangle the factual aspect, we need to start from 1945.

Prior to 1945 there were two medical services in the state of U.P - the Provincial Medical Service (PMS) and Provincial Subordinate Medical Services (PSMS). On June 14, 1945 the Government of U.P. framed rules known as 'The United Provinces Medical Service (Men's Branch) Rules, 1945' (referred to hereafter as the '1945 Rules'). In 1946, two new medical services were constituted, namely, PMS Grade I and PMS Grade II. On 2nd November, 1964 PMS Grade I and Grade II were merged with effect from 1st November 1964. However, there were no rules for fixing inter-se seniority of the officers of the two erstwhile services which were so merged. The issue of the inter-se seniority between the members of the new service as merged i.e. between PMS I and PMS II, was

resolved ultimately by this Court by its decision in State of U.P. v. M.J. Siddiqui 1980(3) SCC 180. As far as recruitment to the new PMS was concerned by way of a stop gap arrangement the State Government passed an order dated 20th February 1965 making the 1945 Rules applicable to the new PMS. The order said, "The U.P. Medical Service (Men's Branch) Rules, 1945 shall apply to the new PMS, unless otherwise ordered". and prescribed the eligibility criteria for appointment:

"The following will eligible for appointment to PMS:

(A) Medical Graduates of all universities in India recognised by the Indian Medical Council. (B) Medical Graduates who hold the BMBS degree of Lucknow University, provided they have served in house appointments for a term of nine months in a teaching hospital before they offer themselves for appointment."

The writ petitioners Nos. 1 and 2 before us were selected by the Departmental Selection Committee (DSC) and issued letters of temporary appointment in the new PMS by the Governor on 24th September 1965 and 30th November 1965 respectively. There is no dispute that they were eligible to be appointed under the prescribed criteria.

The second chapter begins in 1968 when the State Government made a request to the State Public Service Commission for recruiting doctors to the medical service of the PMS. The Public Service Commission (PSC) prepared a Select List in 1972. Some of the respondents are those who came into the picture for the first time when they were selected in 1972 by the PSC. The petitioner No. 2 was also one of the selectees. However, before the select list could be given effect to, on 26th June 1973 the PMS was merged with the Provincial Health Service (PHS) and a new cadre was formed, namely, the Provincial Medical and Health Service (PMHS). With the merger 995 posts of PHS, 574 posts of PMS(Male) and 19 permanent and 407 temporary posts of PMS(Female) i.e. a total of 2056 posts stood abolished in the erstwhile PMS and PHS on the date of the merger therefore 2056 posts were in the new cadre. Prior to the merger i.e. between 1968 to 1973 some of the writ petitioners before us were also temporarily appointed like the petitioners 1 and 2, against substantive posts by the Governor after selection by the DSC. Temporary appointment letters were issued to some of the selectees not on the basis of the Select List but after selection by the DSC.

The third chapter starts with a letter dated of the State Government dated 11th April 1974 which stated that as there were certain deficiencies in the 1972 Select List the ad hoc appointments of PMS officers would be extended upto 31st October 1973. A request was then sent by the State Government to the UPPSC for recruitment of 2025 medical officers. During this period also a number of persons were appointed by the State Government on temporary basis after selection by the DSC till 1976. On 23rd December 1977 the UPPSC sent a list of 1703 persons selected against the aforesaid posts. Subsequently by letters dated 16th June 1978 and 18th May 1979, the UPPSC sent two separate lists of a total of 25 candidates to the Government. Some of the writ petitioners who had been temporarily appointed during 1968 to 1976 were recommended in the 1977-78-79 Select List. However, no letters of permanent appointment were issued by the Government to any of these 1798 selected candidates.

In other words, during the period 1968 to 1979 there were three groups of qualified doctors:

- (1) Those given temporary appointment and who had also been selected by PSC;
- (2) Those given temporary appointment but were not selected by PSC;
- (3) Those who were selected by PSC without being temporarily appointed earlier.

The fourth chapter begins with the issue of the UP Regulation of Ad hoc Appointments (On posts within the purview of UP Public Service Commission) Rules, 1979 (hereinafter referred to as the '1979 Rules'). Rule 7 of the 1979 Rules provides:

"Saving (1) A person appointed under these rules shall be entitled to seniority only from the date of order of appointment after selection in accordance with these rules and shall in all cases, be placed below the persons appointed in accordance with the relevant service rules or as the case may be, the regular prescribed procedure, prior to the appointment of such person under these rules.

(2) If two or more persons are appointed together, their seniority inter se shall be determined to the undermentioned in the order of appointment."

In terms of the 1979 Rules the 'ad hoc appointees' could not count their services which they may have rendered earlier as temporary appointees. Thus the doctors who had been appointed temporarily upto 1976 were sought to be regularized under the 1979 Rules and letters of appointment were issued to them, after a period of 'probation', whereby they were treated as having joined the service with effect from the date of these appointment letters. A seniority list was published in 1983 in which the candidates who had been recommended by the PSC for appointment in 1972 were placed at the top followed by all the 'temporary appointees' like the writ petitioners although almost all of them had been appointed at least temporarily much prior to the 1972 selectees who had not been issued regular appointment letters at all.

On 13th March 1984, the State Government issued an order which was communicated to the UPPSC that the Select List prepared by the UPPSC for the year 1977, 1978 and 1979 was cancelled and would not be given effect to.

All these facts gave rise to litigation by the different groups. The first set of litigation was filed by the temporary appointees before the Allahabad High Court. Three separate writ petitions were filed by Dr. H.C. Mathur, Dr. P.L. Nigam and Dr. Jagdish Narayan Rai. All three of them had been appointed temporarily to the PMS prior to its merger with PMHS and had been continuously working since the date of their respective appointments. They impugned the decision taken by the State Government to treat them as ad hoc appointees under the 1979 Rules. The High Court disposed of these three writ petitions by a common judgment dated 26th April 1991 (hereinafter referred to for the sake of convenience as 'Mathur's case'). The High Court noted that the petitioners had been appointed and selected temporarily pursuant to notifications for filling up of posts and in

consultation with the UPPSC. All the petitioners had MBBS degrees with the requisite experience and were entitled to be appointed against the vacancies then existing. Although the petitioners were appointed temporarily their appointments were against substantive vacancies. The Court also noted that the Civil List which had been published in 1967 showed that the temporary PMS officers like the petitioners in Mathur's case had been approved by the UPPSC. The High Court held that the petitioners could not be treated as having been appointed on ad hoc basis and that the 1979 Rules did not apply to them. Consequently their seniority was not to be fixed from the date of their regularisation under the 1979 Rules, namely 1982, but from the date of their initial appointment in the PMS cadre.

The State of U.P. filed a special leave petition from the decision of the High Court in Mathur's case. This was dismissed by this Court on 24th November 1992 by a reasoned order in which this Court said, "We see no infirmity in the judgment of the High Court. We agree with the reasoning and the conclusions reached therein". This order was passed by a Bench of three-Judges of this Court. Several other writ petitions had also been filed by temporary appointees. Writ Petition No. 6227/81 by the High Court was treated as a representative writ petition. Pursuant to directions of the High Court, notices were published in the 'Northern India Patrika' and 'The Sunday Pioneer' on 22nd May 1988. In those notices, the contentions of the petitioners were indicated. By order dated 9th September 1981, the High Court held that the issues raised were covered by the judgment of the High Court in Mathur's case and accordingly similar relief was granted to the writ petitioners. The Special Leave Petition from W.P.No.6227/81 filed by the State was dismissed on 21st January 1993.

Thereafter in a number of writ petitions, namely, W.P.No.3550/88 Dr. V.P. Singh & Ors. V. State of U.P.; W.P. No. 6368/82 Raj Nath Sharma and Ors. v. State of U.P.; W.P. No. 6124/91 Ram Jee Khare and Anr. V. State of U.P. & Anr. the High Court passed orders following the decision in Mathur's case. Each of the special leave petitions preferred by the State of U.P. from the several decisions of the High Court were dismissed by this Court. Apart from this there were three other decisions such as CMWP No.7281/93 etc. where the State did not file any SLP although the High Court had followed the decision in Mathur's case. As a consequence of the decision in Mathur's Case, those persons who had been appointed temporarily against substantive posts were entitled to rank above any other appointees who were subsequently appointed either on the basis of the 1972 Select List or the 1977-78-79 Select List.

The second set of litigation commenced in 1993 with the case of Dr.P.C. Aggarwal and Others V. State of U.P. (CMWP 10315/82). The Division Bench of the High Court reiterated the view taken in Mathur's case and directed the writ petitioners who were originally temporary PMS appointees to be given seniority taking into account the services rendered by them from the date of their respective appointments. The decision of P.C. Aggarwal was followed by the same High Court in several writ petitions. (CMWP No. 12257/89 and 18781/89 Dr. G.Agnihotri & Ors. V. State of U.P.; CMPW No. 18781/89 and CMPW No.12267/89 Dr.Maheshpal & Ors. V. State of U.P.; W.P.No.4163/93 Dr. Riyazul Hasan V. State of U.P. & Ors.; CMWP No._____of 1993 F.M.Pachari & Ors. V. State of U.P. & Ors.; CMPW No._____of 1993 Dr.Sanat Kr. Ghosh V. State of U.P. & Ors.) The State did not impugn some of the decisions which had been decided following Mathur's and Aggarwal's case. However, it filed a special leave petition against the decision in P.C. Aggarwal's case and in five other

matters. It appears from the records that no notices were issued on these special leave petitions which only came to be tagged with another matter, namely, C.A. No. 4438-42 of 1995 - State of U.P. V. R.K. Tandon & Ors. This brings us to the final set of litigation. These were initiated by those persons who claimed appointment on the basis of the 1977- 78-79 Select List. Several petitions were filed before the U.P. Public Services Tribunal challenging the decision of the State Government to cancel the Select List of 1977-78-79. The Tribunal allowed the petitions and cancelled the Government's order thereby reviving the 1977-78-79 Select List. The State Government appealed from the Tribunal's decision. The High Court modified the order of the Tribunal holding that only the 14 petitioners before the Tribunal who were working on ad hoc basis would be deemed to have been appointed when the vacancies were first filled by regularisation and they would be entitled to seniority and other benefits accordingly. From this decision, the State of U.P. filed several special leave petitions in which the Court allowed leave to appeal. The lead appeal was W. P. No.7066 of 1986 and 5809 of 1987 - State of U.P. v. R.K. Tandon & Ors. and is hereinafter referred to as 'Tandon's case'. The batch of special leave petitions challenging the decision in P.C. Aggarwal were also tagged with the appeal in Tandon's case. On 23rd March, 1995 a Bench of two learned Judges of this Court disposed of Tandon's appeal as also the several tagged special leave petitions without any notice having been issued in those petitions. The Court held:

(I) As the PSC had notified, selected and recommended the names of candidates in 1972 they were entitled to be appointed and the State Government was directed to appoint them with effect from the date on which the State Government had received the merit list from PSC.

(II) Those candidates whose names were recommended in 1977, 1978 and 1979 were directed to be appointed in the order of merit in their respective lists. Their seniority would be determined on the basis of their position in the respective list and they would be deemed to have been appointed from the date on which the State Government had received the list. They would be placed below the appointees in Class I. (III) The remaining candidates were the ad hoc appointments made de-hors the rules and therefore though the doctors had put in more than 33 years of service they remained ad hoc hands and would not get seniority from the respective dates of their appointments.

However, those of them who had been granted benefit of regularity of service from the dates of their appointments by Court and who had retired would not be affected by the decision of this Court as those matters had become final. Their appointments would be merely notional only for the purpose of giving them seniority and retiral benefits admissible according to the relevant rules and would not disturb inter se seniority amongs the other doctors appointed in the service. Otherwise those who had not been selected but were still continuing in service would be placed last and their seniority would be determined with effect from the date of their regularisation under the 1979 Rules and their respective dates of appointment thereunder.

The writ petitioners in Tandon's case filed a contempt application before this Court alleging violation by the State Government of the order dated 23rd March 1995 by non-framing of a seniority

list in keeping with that judgment. While disposing of the contempt application the Court also took notice of Intervenor applications by those in whose favour the High Court had passed orders and against which special leave petitions had been filed and disposed of all the applications by an order dated 26th July 1996. By this order, the Court noted that letters of appointment had not in fact been issued to either the persons on the 1972 Select List or the persons in the 1977, 1978 and 1979 Select List. Nevertheless it reiterated the stand that the candidates selected in the year 1972 would become senior to all other ad hoc appointees since they were continuing on ad hoc basis. It was also held that the candidates recommended by the PSE in the Lists of 1977-78-79 would rank below the 1972 appointees and that as far as "non selectees" were concerned they would be governed by Rule 7 of the 1979 Rules and given seniority from the date of their appointments under the 1979 Rules. It was made clear that the order "would cover all the cases and would apply to all the candidates who are concerned in the service and that "the Government would determine their inter-se seniority in accordance with these directions within four months".

In compliance with the orders dated 23rd March 1995 and 26th July 1996, the Government published a seniority list on 24th November 1996 which placed the persons who had been placed as the senior most by virtue of Mathur's case at the bottom of the seniority list. It was in these circumstances that several writ petitions were filed in this Court stating that the decision of this Court in Tandon's case was directly in conflict with the earlier decision of this Court in Mathur's case and that since the decision in Tandon's case was rendered by a Bench of a lesser number of Judges than in Mathur's case, this Court should reaffirm the principles already laid down in Mathur's case and fix the seniority of all the doctors in PMHS cadre from the date of their initial appointment and declare that Rule 7 of the 1979 Rules did not apply to them at all.

The matter was placed before a bench of three-Judges. By an order dated 4th February 1999, this Court noted that there were five categories of persons in the service:

1. Those persons who are in service as temporary recruits and who have not been selected by the Public Service Commission but are given seniority from the date of joining service on the basis of Court orders passed by the High Court or by a bench of three Hon'ble Judges of this Court;
 2. Those persons who were in service as temporary recruits and who have been later selected by the Public Service Commission in 1972;
 3. Those persons who were in service as temporary recruits and who have been later selected by the Public Service Commission during the years 1977, 1978 and 1979;
 4. Those persons who are in service as temporary recruits and who have not got the benefit of any order of the High Court or this Court i.e. (those temporary recruits other than unselected temporary recruits falling in Category
- 1). These persons are the persons affected by the U.P. Regularisation of Ad hoc Appointments (of Posts within the Purview of the Public Service Commission) Rules,

1979;

5. Fresh recruits who were selected by the Public Service Commission in 1977, 1978 and 1979 and who have been subsequently appointed."

It was also noted that there would be pensioners falling in each of the categories. The Court directed the State of U.P. to issue notice in two daily newspapers, namely, 'Amar Ujala' in Hindi and 'Times of India', Lucknow Edition in English and stated that the matters would be heard by this Court and those persons whose seniority was likely to be effected were entitled to come before this Court to put forward their point of view including all those persons were governed by earlier Court orders. A circular was also directed to be issued to the same effect by the State to all District Headquarters.

After publication and completion of the procedures as directed, this Court by order dated 17th August 2000 referred the writ petitions to a Bench of five-Judges for disposal in view of the dissimilarity of views expressed in Tandon's case and Mathur's case. Before the bench of five-Judges, it was contended by the respondent that there was in fact no conflict between the decisions in Mathur's and Tandon's case. The Court by its judgment dated 4th April 2002 held that there was a conflict and that having regard to the doctrine of precedent, the decision of this Court in Tandon's case dated 23rd March 1995 as modified on 26th July 1996 could not stand. However, since the decision in Tandon's case was being set aside only on the ground that it was in conflict with a larger Bench decision, the Constitution Bench did not decide the inter-se rights of the petitioners and the other respondents or the correctness of the judgment in Mathur's case. The writ petitions were accordingly remitted back to the three-Judges Bench to be disposed of finally on merits.

The matters have thereafter been placed before us for final disposal.

According to the writ petitioners they were appointed on temporary basis against substantive vacancies in accordance with the Rules prevalent at the time of their respective appointments. They had the requisite qualifications and their appointments were made after selection by the DPC, after sanction granted by the Governor and with the approval of the PSC. They claim to have at least continued to serve in such substantive vacancies after consultation with the PSC and had been granted leave benefits, promotions, increments and other service benefits of regular service. They therefore claim seniority from the date of their initial appointments on the principles laid down in Mathur's case. According to the petitioners the PSC select lists prepared in 1972 and 1977-78-79 are not available with the State respondents as they have been admittedly destroyed or misplaced and the 1996 seniority list was purportedly based on them. It is stated that State Government has not issued any letters of regular appointment to any selectee till today. It is contended that the selectees who had not been temporarily appointed earlier, were given temporary appointments after their recommendations by the PSC in 1972 or 1977-78-79. Many of them joined services on the basis of these orders of temporary appointment much later. Now on the basis of the decision in Tandon's case, they were claiming seniority from the date of their selections whether in 1972 or 1977-78-79 even though they had not joined services at all then. It is submitted that the selectees could not claim seniority on the basis of PSC recommendation which apart from any other consideration, could not be kept alive for such a long period.

Supporting the case of the writ petitioners are the interveners. The first category of interveners are those who were also temporarily appointed between 1962 and 1963 and who have since been superannuated. They claim the same relief/benefit as the writ petitioners. The second category of Interveners are those temporarily appointed doctors who had challenged their "appointments" under the 1979 Rules by way of writ applications and whose writ petitions have been allowed by the High Court holding that they were entitled to count their seniority from the date of their initial appointments. They claim that the orders in their cases had attained finality and have in fact been given effect by the State Government and that their status should not be disturbed. The third category of interveners are those temporary appointees who had also obtained orders in their favour on writ applications filed by them before the Allahabad High Court, the special leave petitions wherefrom have been dismissed and who have since retired from services without getting any benefit as directed by the Allahabad High Court. They claim that their orders had attained finality and should not be re-opened.

As against these submissions the selectees have contended that the decision in H.C. Mathur's case requires re-consideration since the writ petitioners were appointed on ad hoc/temporary basis without the approval of the UPPSC. Their appointments were de hors the Rules and could not be termed as regular merely by a passage of time. It is further contended that the provisions of the U.P. Medical Services Men's Branch Rules 1945 had been mis- interpreted in Mathur's case. It is contended that the 1945 Rules continued to apply to the medical services till 1981. Even assuming that the 1945 Rules did not apply after 1973, a civil post could be filled up only in consultation with the UPPSC and therefore the selectees by the PSC had been properly appointed. It was contended that in any event the writ petitioners are estopped from challenging the selections made by the PSC because most of them had participated in the selections and were unsuccessful. The writ petitioners, according to the selectees, had obtained the benefit of regularisation and further promotion under the 1979 Rules. The selectees had been given preference in the matter of their appointments for their post graduate work and if they were reverted, more meritorious employees would be adversely affected. The prayer of the selectees is that Mathur's case should be referred to a larger bench for its decision.

We are unable to accept the submissions of the selectees. Although, it is not necessary to go into the correctness of the reasoning in Tandon's case when it has been set aside by the Constitution Bench, nevertheless it needs to be noted that the 14 writ petitioners in that case had only challenged the cancellation of the 1977-78-79 Selection List. They wanted appointment on the basis of the Selection List. The question of inter se seniority with other members of the Medical Service was not in issue. The Court, however, determined the issue of seniority in the absence of the interested groups. Since both the orders in Tandon's case have been set aside, the seniority as determined by those orders can no longer be relied upon. The disposal of the Interlocutory Applications filed by those who had obtained orders from the High Court following Mathur's case, by the order dated 26th July, 1976 cannot also stand, since both this order as well as the order dated 23rd March 1995 in Tandon's case have been held by the Constitution Bench to be "not good law". By the same token, since the 1996 seniority list was prepared on the basis of this Court's decisions in Tandon's case, with the setting aside of the latter, the list cannot be held to have been validly prepared. This leaves the field with only the principles as determined in Mathur's case. It is doubtless correct that as long as a decision

stands, it has to be followed unless the Court has reason to differ with the view expressed. In such event, the Court must refer the issue to a larger Bench. This principle is however not applicable if the earlier decision has concluded issues in a particular set of facts in a given lis between the same parties. Such a decision cannot be reopened on the principles of res judicata except by way of an application for review. There is no application for review which requires us to reopen the issues which were concluded by a Bench of three-Judges of this Court about a decade ago. The writ petitioners before us claim to be the beneficiaries of the order in Mathur's case. They do not seek a review of that decision. It is also not open to the selectees to question the correctness of Mathur's decision now. Selectees and others had the opportunity of ventilating their grievances before the Court in Writ Petition (C) No.6227 of 1981 which was a representative action. None of the respondents responded to the advertisements admittedly published on the directions of the Court. The order passed in W.P.No. 6227/81 on 9th September 1981, therefore, binds them and they cannot seek to reopen the issues concluded thereby. We have already noted that the order in W.P.6227/81 was sought to be impugned before this Court by way of a special leave petition which was dismissed on 21st March 1993. There has been no prayer for review of this order either. Besides the decision in Mathur's case has been followed consistently in a large number of cases since its pronouncement by the High Court in 1991 and by this Court in 1992. Special leave petitions from those decisions have also been dismissed by this Court. It would not be proper in these circumstances to upset the principles and introduce further uncertainty in an already chaotic situation particularly when the matter involves the question of service conditions of Government employees.

In these circumstances, the issue of seniority of the parties before us is to be determined in keeping with the decision in Mathur's case.

The questions therefore are:-

- 1) Are the cases of the writ petitioners different from writ petitioners in Mathur's case ?
- 2) What would be the position of those who have been appointed on the basis of the decision in Tandon's case?

Before answering the questions we wish to make it clear that the interveners who have final orders in their favour from either this Court or the High Court with regard to their appointments and seniority, are entitled and will continue to enjoy the benefits granted thereby. This decision will not operate to jeopardize the reliefs finally obtained by them from Court.

As far as the writ petitioners are concerned we see no materially distinguishing factor between their circumstances and the writ petitioners in Mathur's case.

We have already noted the facts in Mathur's case but it is convenient to recapitulate the facts briefly for the purpose of comparison with the writ petitioners' cases before us. The petitioners in Mathur's case were qualified to be appointed in what was then known as PMS. The High Court upheld the

claim that they were eligible to be appointed according to the Rules framed in 1981 amending the 1945 Rules with effect from 4.10.1961. They had been temporarily appointed against substantive vacancies and their appointment in continuous service was in consultation with PSC. Even though their appointments were stated to be temporary in their appointment letters, they were not treated as ad hoc appointees at all till the State sought to appoint them in 1982 under the 1979 Rules and fix their seniority with effect from 3rd August 1982 ignoring the 20 years of service put in by them from the date of their initial appointments.

The writ petitioners before us were temporarily appointed by the Governor against substantive vacancies. The petitioner No.1 and 2 were appointed in 1965. For example, the letter of appointment of the petitioner No. 1 dated 22.9.1965 states that he was appointed as temporary PMS Officer "as per the approval of Government". The appointment was "for the period of one year or till the services are required by the Government or till you are replaced by a candidate duly selected by Public Service Commission whichever is earlier". The other letters of appointment issued upto 1976 use similar language. What is clear from the language is that the appointments were made against substantive vacancies. In the Civil List published on 1.7.1967 which was compiled in the Appointment Department of the State Civil Secretariat under the heading "Temporary officers approved by Lok Sewa Ayog", the petitioner No.1's name appears against Srl. No. 336. The names of the writ petitioners similarly temporarily appointed upto 1976 were published in the Official Gazette.

It has been earlier noted that prior to the merger of the PMS with the PHS in 1973, the 1945 Rules were made applicable to the PMS by Notification dated 20th February 1965. After the 1973 merger and the creation of PMHS, no specific rules laying down service conditions of the new service were framed. On 23.11.1981, the State Government issued a notification under Article 309 promulgating the Uttar Pradesh Medical Services (Men's Branch) (Amendment) Rules 1981, Rule 1 (ii) states that:

"They shall be deemed to have come into force with effect from 4.10.1961".

By the 1981 Amendment, Rule 10 of the 1945 Rules was amended. This appears to indicate that, if at all, the 1945 Rules continued to apply to the PMHS. Rule 10 of the 1945 Rules provided the academic qualifications of a candidate for recruitment to the service. These included an M.B or an equivalent degree of a university established by law in India and recognized by the Medical Council of India. By the 1981 amendment, "a candidate who possessed a BMBS degree from Lucknow University having served in houses appointments, a term of nine months in a teaching hospital (sic)" was also made eligible. There is no dispute that each of the writ petitioners held an MBBS degree and had the requisite qualifications for being appointed under the 1945 Rules. Rule 17 (2) of the 1945 Rules provides:

"The Governor may make appointments in temporary or officiating vacancies from amongst persons who are eligible for permanent appointment to the service under these rules".

It could not, therefore, be said as was held in Tandon's case that the writ petitioners were appointed de hors the service rules. As far as the question of seniority is concerned, Rule 18 of the 1945 Rules reads as follows:

Seniority - "Seniority in the service shall be determined by the date of the order of appointment in a substantive vacancy provided that if two or more candidates are appointed on the same date their seniority shall be determined according to the order in which their names are mentioned in the order of appointment".

Thus even under the Medical Service Rules 1945, the determination of seniority under those rules was from the date of appointment against a substantive vacancy. It is clear that in accordance with the Rules, and as held by the High Court in Mathur's case, appointment could be temporary or permanent. But where the appointment is against a substantive vacancy, the year of appointment was determinative in fixing seniority under the Rule. On this basis, calculations of the writ petitioners' seniority from the date of their initial appointment cannot be said to be incorrect. Furthermore It has not been disputed that the writ petitioners have been continuing to serve and had till 1983 enjoyed all the benefits of regular service since their initial appointments like the writ petitioners in Mathur's case. As held in Rudra Kumar Sain and Others V. Union of India and Others 200 (8) SCC at para 20:

"In the service jurisprudence, a person who possess the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc."

The writ petitioners cannot, for all these reasons, be treated as 'ad hoc appointees' who were to be regularised by appointment after selection and a period of probation under the 1979 Rules nor can it be said that the decision in H.C. Mathur's case mis- construed the provisions of the 1979 Rules so as to exclude temporary appointees like the writ petitioners from its application. In the circumstances the writ petitioners are entitled to be granted the same relief as was granted to the petitioners in Mathur's case and count their seniority from the date of their initial appointments.

The 'selectees' on the other hand whether selected in 1972 or in 1977-78-79 cannot claim seniority on the basis of their mere selection, assuming the selection lists to be valid. According to the 1945 Rules, the selection made by the PSC was merely recommendatory. This is settled law and is also so provided in Rule 13 (3) & (4) which read as follows (where the reference to the Commission is the PSC):

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

13 (4) Subject to the provisions of rules 6 and 16 (2) the Governor shall appoint as vacancies(sic) the candidates who stand highest in order of performance in the list preferred by the Commission under sub Rule (3), provided that he is satisfied that they are duly qualified in other prospects".

That selection does not mean automatic appointment also follows from Rule 16 (2) which provides:

"Before a candidate is finally approved for appointment by direct requirement he shall be required to pass an examination by a Medical Board, which shall be conducted after he has been selected by the Commission".

In any event as already noted, under Rule 18 seniority is to be determined from the date of their orders of appointment and not from the date of their selection by the PSC or receipt of the Selection List by the Government. As noted in Tandon's case, the selectees had not been issued orders of regular appointment at all. Clearly, therefore, they cannot claim seniority over the writ petitioners some of whom have been serving since 1965 and the rest at least since 1976. Assuming that the writ petitioners had appeared before the PSC, it would not mean that by reason thereof seniority was to be counted from the date of preparation or submission of the Selection Lists. If the selectees on the basis of the decision in Tandon's case were treated as having been appointed, their appointment would at the highest relate to 1996 when this Court directed their appointments from the date of receipt of the selection lists by the Government; a direction which was wholly contrary to the Rules. Strictly speaking with the setting aside of the decision in Tandon's case the selectees cannot even have this order to fall back on. But the fact remains that the selectees have actually been serving. Therefore having regard to the peculiar circumstances of this case, it would , in our view, be equitably appropriate to treat them as having been appointed from the date on which they actually joined the service.

We accordingly allow the writ petitions and declare that

1) the writ petitioners are not within the purview of the 1979 Rules;

2) the State Government will fix the seniority of all doctors in the PMHS cadre from the date of the orders of their initial appointment within a period of six weeks from the date of this order and give all consequential benefits including promotions and positions on the basis of such seniority list; 3) Those doctors who were selected in 1972 and 1977-78-79 by the PSC and who were not issued any orders of appointment and joined the service on the basis of Tandon's case, will be treated as having been appointed on the date that they actually joined the service and their seniority will be counted from that date. There will be no order as to costs.