

PETITIONER:
S.B. PATWARDHAN & OTHERS ETC. ETC.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA & OTHERS

DATE OF JUDGMENT 04/05/1977

BENCH:
CHANDRACHUD, Y.V.
BENCH:
CHANDRACHUD, Y.V.
GOSWAMI, P.K.
FAZALALI, SYED MURTAZA

CITATION:
1977 AIR 2051 1977 SCR (3) 775
1977 SCC (3) 399
CITATOR INFO :

RF	1979 SC 228	(13,14,16)
R	1979 SC 979	(9,17)
RF	1979 SC1073	(11,13,15)
F	1979 SC1136	(3)
D	1980 SC 42	(8)
F	1980 SC1246	(2,7)
RF	1981 SC 41	(29,30)
F	1983 SC 769	(23)
F	1983 SC 881	(3,56)
RF	1984 SC 885	(26)
R	1984 SC1291	(19)
R	1984 SC1595	(34,70)
D	1985 SC 774	(21)
RF	1985 SC1558	(25)
F	1985 SC1605	(12)
RF	1986 SC 638	(12)
E&D	1987 SC 424	(12,13,24)
RF	1987 SC1676	(18)
RF	1988 SC 268	(18)
RF	1988 SC 654	(10,13)
R	1988 SC1673	(7)
R	1989 SC 278	(21)
F	1990 SC1607	(24,27,29)
RF	1991 SC1202	(26)

ACT:

Service matter--Promotees and direct recruits--Rule that "the probationer recruited directly to the service of Engineer Class II cadre in any year shall, in a bunch, be placed senior to promotees confirmed during that year"--Validity of--If quota rule applicable for recruitments should be applicable at the time of confirmation in the same cadre.

HEADNOTE:

In exercise of the power conferred by s. 241(2)(b) of the Government of India Act, 1935 the Governor of Bombay framed rules called Recruitment Rules of the Bombay Service of Engineers (Class I and Class II 1939), Rule 2 laid down the method of recruitment to Class I of the Service by direct recruitment and by promotion from the existing Bombay Service of Engineers or from the Bombay Service of Engineers

Class II. Rule 10 provided that recruitment to Class II service shall be either by direct recruitment or by promotion from (i) the Bombay Subordinate Engineering Service (ii) permanent or temporary supervisors and (iii) temporary engineers.

In 1941 the Government of Bombay passed a resolution directing that in the case of direct recruits appointed substantively on probation, seniority should be determined with reference to the date of appointment on probation, while in the case of officers promoted to substantive vacancies, seniority should be determined with reference to the date of their promotion to the substantive vacancies provided there had been no break in their service prior to their confirmation in these vacancies.

In 1949 the Chief Secretary to the Government of Bombay in reply to a representation made by the Bombay Civil Service Association regarding emergency recruitment to the I.A.S. and "other matters" stated that promotees could have no grievance in the matter of seniority since the seniority of a direct recruit to the cadre of Deputy Collector vis a vis a promoted officer was determined not according to the date of confirmation but according to the principles laid down in the Rules of 1941, i.e., with reference to the date of first appointment on probation in the case of direct recruits and of continuous officiation in the case of promoted officers.

In April 1960, a resolution embodying the rules of recruitment to Bombay Service of Engineers Class I and Class II was passed by the Government and signed by the Under Secretary to the Government "by order and in the name of the Governor of Bombay". They provided for direct recruitment through common competitive examination conducted by the State Public Service Commission for both classes of service as well as by promotion. Direct recruits were to be confirmed after two years in their respective cadres. The rules also provided that the ratio of appointments by nomination and promotion to both classes shall, as far as practicable, be 75:25. Rule 8(i) says that the various categories which manned the Class II sub-divisional posts were being compiled into two lists: (i) of Bombay Service of Engineers, Class II cadre of permanent Deputy Engineers and (ii) of officiating Deputy Engineers. The future recruitment to Class II cadre was to be made by (a) nomination of candidates recruited directly by competitive examination and (b) promotion from the list of officiating Deputy Engineers in the ratio of 2: 1. Rule 8(ii) provides that further officiating vacancies would be manned from the ranks of the Subordinate Service of Engineers. For this purpose of state-wise Select Seniority List was to be maintained of members of the Subordinate Service of Engineers, considered fit to hold sub-divisional charge. For inclusion in this list graduates, diploma holders and non-qualified persons had to have to their credit service of not less than 3, 8 and 13 years respectively. For confirmation as a Deputy
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Engineer the officer was expected to have put in not less than three years' service as officiating Deputy Engineer. Rule 8(iii) provides that the probationers recruited directly to the Bombay Service of Engineers, Class II cadre in any year shall, in a bunch, be placed senior to promotees confirmed during that year.

On July 29, 1963 the Government of Maharashtra passed a resolution superseding the 1941 rules and framing new rules for determining inter se seniority of direct recruits and promotees.

On December 19, 1970 the State Government passed a resolution superseding the resolution of 1960. Rule 33 of the 1970 rules provides that the seniority list in respect of each of Class I and Class II shall consist of: Part A confirmed officers and Part B, not confirmed officers, that Part A shall be arranged with reference to the year of confirmation and confirmed officers shall be treated as senior to the unconfirmed officers in the respective cadre and Part B, names shall be arranged with reference to the date of continuous officiation except where a promotion in an officiating capacity was by way of purely temporary or local arrangement.

Immediately after the 1960 rules were made by the Government of Bombay the State of Bombay was bifurcated into the State of Maharashtra and Gujarat. The Government of Gujarat passed a resolution on May 1, 1960 providing that all rules, regulations, circulars etc., prevailing in the former State of Bombay will continue to operate in the new State of Gujarat until changed or modified. In 1965 the Government of Gujarat modified the 1960 rules in exercise of the powers conferred by the proviso to Art. 309 of the Constitution and introduced a new clause 10 in the 1960 rules.

On the bifurcation certain permanent and temporary posts of Deputy Engineers were allocated to the State of Gujarat. Some of the promotee Deputy Engineers from the lower ranks were also allocated to the State of Gujarat and several of them having completed three years' qualifying service had become eligible for confirmation under r. 8(ii) of the 1960 rules but were not confirmed.

The two appellants who were recruited as Overseers in 1953 were promoted temporarily as Deputy Engineers in 1959 and 1957 and were confirmed as Deputy Engineers in 1970. Respondents Nos. 2 and 3, who were direct recruits, were appointed as Deputy Engineers in 1963 and 1959 and were confirmed in 1965 and 1961.

The two appellants alleged that though they had been in continuous service as Deputy Engineers since 1959 and 1957, respondents 2 and 3, who were appointed in 1963 and 1959 were shown as senior to them and that their (the appellants') seniority should have been fixed under the 1941 rules. In any case the 1960 rules could not take away the right accrued to them under the rules existing at the time of their promotion in 1959 and 1957 and that r. 8(iii) of the 1960 rules and r. 33 of the 1970 rules were ultra vires Arts. 14 and 16 of the Constitution.

The respondents on the other hand contended that neither the 1941 rules nor 1963 rules had any application to them and that under the 1960 rules which superseded the 1939 rules, posts of Deputy Engineers were required to be filled in by direct recruits and promotees in the ratio of 75:25 and the question of seniority of the appellants could not arise until they were confirmed and their seniority fixed from the date of confirmation in terms of r. 8(iii) of the 1960 rules.

HELD: I (a) Except the Bombay Rules of 1939 and the Gujarat notification dated August 21, 1965 the rest of the rules are in the nature of executive instructions, which, unlike rules regulating recruitment and conditions of service framed under the proviso of Art. 309 of the Constitution or s. 241(2)(b) of the Government of India Act, 1935 cannot have any retrospective effect. The rules of 1941, 1960, 1963, 1965 and 1970 were not framed by the State Government in the exercise of constitutional or statutory power. The rules of 1960 and 1970 were issued "By order and in the name

of the Governor" but that
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does not mean that the two sets of rules must be deemed to have been made under Art. 309 of the Constitution. All executive action of the Government of a State is required by Art. 166 to be taken in the name of the Governor.

[790 B-E]

(b) The 1939 rules have constitutional authority but being rules made "to regulate the methods of recruitment" they afford no assistance in finding a solution to the problem. They neither fix a quota for recruitment from the two avenues nor do they provide in any other manner a guide line for fixation of seniority as between appointees recruited from different sources. Rule 10 is beside the point because the crux of the promotees' grievance is not that they are denied opportunities of promotion but that they are discriminated against in the matter of seniority in comparison with the direct recruits. [790 E-G]

(c) The departmental promotees are being treated unequally in the matter of seniority because whereas, promotees rank for seniority from the date of their confirmation, seniority of direct recruits is reckoned from the date of their initial appointment. The disparity is so glaring that though direct recruits have to successfully complete a two year probationary period before confirmation, even that period is not excluded while counting their seniority. A promotee ranks below the direct recruit even if he has officiated continuously as a Deputy Engineer for years before the appointment of the direct recruit is made and even if the promotees could have been confirmed in an available substantive vacancy before the appointment of the direct recruit. [789 B-D]

2(a) The 1941 resolution expressly governed the seniority of direct recruits and promoted officers in all provincial services except the Bombay Service Engineers, Class I. Since Deputy Engineers do not belong to Class service, their seniority was governed by the Resolution. [791 A]

(b) The wording of the Resolution leaves no doubt that the Government of Bombay applied two different standards for fixing inter se seniority of direct recruits and promotees appointed as Deputy Engineers. The former were entitled to reckon their seniority with effect from the date of their initial appointment on probation while the seniority of the latter had to be determined with reference to the date of their promotion to substantive vacancies subject to the further qualification that there was no break in their service prior to their confirmation in those vacancies. Thus, for the purposes of seniority, the promotees had to depend firstly on the availability of substantive vacancies and secondly on the arbitrary discretion of the Government to confirm or not to confirm them in those vacancies. The fact that a substantive vacancy had arisen and was available did not proprio vigore, confer any right on the promotee to be confirmed in that vacancy. The 1941 rules contained the real germ of discrimination because the promotees had to depend upon the unguided pleasure of the Government for orders of confirmation. In the pre-Constitution era, such hostile treatment had to be suffered silently as a necessary incident of government service. [791 B-D]

(c) It is difficult to uphold the claim of the promotees that the 1941 rules were modified by the letter dated January 11, 1949. The Chief Secretary's letter cannot improve the promotees' case. [791 G]

(d) The part of the letter on which the promotees rely deals exclusively with the case of Deputy Collectors which

makes it difficult to extend the benefit of what is said therein to Deputy Engineers, working in an entirely different branch of government service. The Association had addressed its letter, not to the Ministry which handled problems of Engineering Services, but to the Ministry of Home and Revenue, the latter of which was concerned to consider the grievance of Deputy Collectors. The opening sentence of paragraph 2 of the Chief Secretary's reply shows that he was referring to a class of service in which a quota system was then operating, which did not apply either under the 1939 or under the 1941 rules to Engineering Services. [792 A-C]

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3(a) Clause 8(iii) is highly discriminatory against promotees and accords preferential treatment to direct recruits and must be struck down as unconstitutional.

(b) There is no Universal rule either that a cadre cannot consist of both permanent and temporary employees or that it must consist of both. That is primarily a matter of rules and regulations governing the particular service in relation to which the question regarding the composition of a cadre arises. [793 E]

Bishan Sarup Gupta v. Union of India, [1973] 3 S.C.C. 1 and A. K. Subraman v. Union of India, [1975] 2 S.C.R. 979 referred to.

Ganga Ram & Ors. v. Union of India, [1970] 3 S.C.R. 481 distinguished.

(c) It is difficult to hold that the officiating Deputy Engineers do not belong to Class II of the Bombay and Gujarat Service of Engineers. [794 A]

(d) The contention that in view of cl. (i) and (ii) of r. 8 of the 1960 rules officiating Deputy Engineers do not belong to Class II cadre of the Bombay and Gujarat Service of Engineers must be rejected since the point is concluded by the decision of this Court in P.Y. Joshi v. State of Maharashtra [1970] 2 SCR, 615. It was held in that case that the list referred to in cl. (ii) of r. 8 is the same list which is referred to in the latter part of cl. (i) of that rule which speaks of "future recruitment". Consequently a promoted officiating Deputy Engineer, who belonged to Class II cadre, was held entitled to be considered for promotion under r. 7 to the post of officiating Executive Engineer if he had put in 7 years' qualifying service. The eligibility for promotion did not require that the officiating Deputy Engineer must have put in 7 years' service after the date of confirmation. [795 B-E]

(e) It must necessarily follow that "promotion" with the latter part of r. 8(i) relating to future recruitment speaks of means promotion as an officiating Deputy Engineer from the Select List prepared under r. 8(ii). A person thus promoted from the Select List as an officiating Deputy Engineer is as full and complete a member of the Class II cadre as a person directly appointed as a Deputy Engineer. In this view of the matter, the prescription contained in the closing sentence of r. 8(i) that "the number of such promotions shall be about 1/3rd the number of direct recruits appointed in that year" would apply to initial appointments and cannot govern the confirmation of those who have already been appointed to Class II cadre. In other words, direct recruits and promotees have to be appointed in the proportion of 75: 25 to Class II cadre, the former as, Deputy Engineers and the latter as officiating Deputy Engineers, but once that is done, the quota rule would cease to apply with the result that confirmations in the post of Deputy Engineers are not required to be made in the propor-

tion in which the initial appointments had to be made. Thus r. 8(i) only requires that for every three direct recruits appointed as Deputy Engineers only one promotee can be appointed as officiating Deputy Engineer. The rule cannot be construed to mean that for every three confirmations of Deputy Engineers not more than one promotee can be confirmed as Deputy Engineer. [795 F-H, 796 A]

A. K. Subraman v. Union of India [1975] 2 S.C.R. 979 followed.

(f) Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. Yet clause (iii) of r. 8 provides that probationers recruited during any year shall in a bunch be treated as senior to promotees confirmed in that year. This formula gives to the direct recruit even the benefit of his one year's period of training and another year's period of probation for the purposes of seniority and denies to promotees the benefit of their long and valuable experience. If there was some intelligible ground for this differentiation bearing nexus with efficiency in public services, it might perhaps have been possible to sustain such a

classification. Instead of adopting an intelligible differentia, r. 8 (iii) leaves seniority to be determined on the sole touchstone of confirmation. Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies.

In the instant case officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. [796 C-G]

(g) There is no substance in the plea that direct recruits must be given weightage on the ground that the engineering services require the infusion of new blood since it is a highly specialised service. Were it so, the Government would not have itself reduced the proportional representation gradually so as to tilt the scales in favour of promotees. Besides, the plea that engineering service is a specialised service is made not by the Government but by recruits who are interested in so contending. Nor is the apprehension justified that the higher echelons of engineering service will in course of time be manned predominantly by promotees. Those recruited directly as Assistant Engineers in Class I can, under the rules, officiate as Executive Engineers after four years' service and are eligible for confirmation as Executive Engineers after a total service of 9 years. Promotees can hardly ever match with that class in terms of seniority. [797 A-C]

B.S. Gupta v. Union of India [1975] 1 S.C.R. 104 and V.B. Badami v. State of Mysore [1976] 1 S.C.R. 815 distinguished.

In the instant case rule 8(ii) adopts seniority-cum-merit test for preparing the state-wise Select List of seniority and yet cl. (iii) rejects the test of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That under Arts. 14 and 16, is impermissible and, therefore, r. 8(iii) must be struck down as unconstitutional. [797 G-H]

4. The High Court was right in rejecting the contention of the promotees that the 1963 rules superseded the 1960 rules by implication and, that, therefore, the State Government

had no power or authority to apply the criterion of seniority fixed under the 1960 rules, after their repeal by 1963 rules. The quota system was the very essence of 1960 rules and if it was desired to abrogate that system it is unlikely that the 1963 rules will not even refer to those of 1960. The rules of 1941 having been expressly superseded by 1963 rules, it is difficult to accept that along with the 1941 rules the resolution of 1963 would not have referred to the 1960 rules also. Secondly, the resolution of 1970 of the Government of Maharashtra expressly superseded the 1960 rules which shows that the latter were in force until 1970 and were not superseded by the 1963 rules. The resolution of 1970 refers to all previous resolutions except the resolution of 1963 which shows that the latter was not applicable to engineering services. [798 C-E]

5. Rules 33 of the 1970 rules in so far as it makes seniority dependent upon the fortuitous circumstance of confirmation, is open to the same objection as r. 8(iii) of the 1960 rules and must be struck down for identical reasons. [800 A-B]

6. The circulars dated January 12, 1961, March 15, 1963 and October 18, 1968 which the promotees want to be enforced were issued by the Finance Department and being in the nature of inter-departmental communications they cannot confer any right on the promotees. [800 A-B]

7. The High Courts were right on the view that the rules under consideration do not in any manner violate the provisions of the Bombay Reorganisation Act. 11 of 1966. [800-B]

8. The argument in the Gujarat Writ Petitions that though originally the 1960 rules were in the nature of executive instructions they have acquired a statutory force and character by reason of their amendment by the rules of 1965

was rightly rejected by the High Court, because all that was done by the 1965 rules was to introduce a new rule, r. 10, in the 1960 rules. The rules of 1960 were neither reiterated nor reenacted by the rules of 1965; and the new rule introduced into the rules of 1960 is not of such a character as to compel the inference that the rule-making authority had applied its mind to the rules of 1960 with a view to adopting them. [798 G-H, 799 A]

Bachan Singh v. Union of India, A.I.R. 1973 S.C. 441 inapplicable.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: C.A. No. 1113 of 1974.

(From the Judgment and Order dated the 15/16/17-1-1974 of the Bombay High Court in S.C.A. No. 815 of 1972)

AND

CA No. 242 of 1974

(From the Judgment and order dated the 14-7-1973 of the Gujarat High Court in S.C.A. No. 1418 of 1971).

C. As. Nos. 285-287 of 1974.

(From the Judgment and Order dated the 14-7-1973 of the Gujarat High Court in S.C.A. No. 1418/71, 422/70 & 1099/69 respectively).

K. K. Singhvi in CA 1113/74, ,4. K. Garg, S.C. Agarwal and V.J. Francis for the appellants in CAs 1113/and 242/74 & for respondents Nos. 2, 3, 5, 6-13 in CA No. 285, Rr. 2-18 in CA 286 and for Rr. 3, 7, 16-23, 28 and 33, 35-39, 41-43 and 45 in CA 287/74.

M.C. Bhandare and M.N. Shroff, for respondent's 1 and 2 in

CA 1113/74.

M.V. Paranjpe, M.K. Joshi, K. Rajendra Choudhary and Mrs. Veena Devi, for respondent No. 3 in CA No. 1113/74.

M.K. Ramamurthi, Vimal Dave and Miss Kailash Mehta, for the appellants in CAs 285 to 287/74 and for the respondents No. 2 and 3 in CA 242/74.

D.V. Patel, in CA 285 to 287/74, P.H. Parekh and M.N. Shroff for the respondent No. 1 in CAs Nos. 242/74 and 285 to 287 of 1974.

The Judgment of the Court was delivered by

CHANDRACHUD, J.--This is a group of five appeals, one from Maharashtra and four from Gujarat. They involve substantially identical questions and since the appeal from the judgment of the Bombay High Court was argued as the main appeal, we will refer 'to the facts of that appeal and indicate at appropriate places if there is any material difference between those facts and the facts leading to the Gujarat appeals. Civil Appeal No. 1113 of 1974 from Maharashtra is by certificate granted by the High Court of Bombay under Art. 133(1) (a) & (b) of the Constitution. Civil Appeals Nos. 242 and 285-287 of 1974 from Gujarat are also by certificate granted by the Gujarat High Court under art. 133(1) of the Constitution.

Special Civil Application No. 815 of 1972 which has given rise to Civil Appeal No. 1113 of 1974 was disposed of by a Division Bench of the Bombay High Court by its judgment dated 15th, 16th and 17th January, 1974. The four Gujarat appeals arise out of

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Special Civil Applications Nos. 1099 of 1969, 422 of 1970 and 1418 of 1971 which were disposed of by a Full Bench of the Gujarat High Court by its judgment dated July 14, 1973.

The complexity of the questions involved in these appeals has been expressed by the Bombay High Court by saying that the writ petitions before it involved "ticklish and complicated questions" and by the Gujarat High Court by saying that though it had many occasions to consider complex problems pertaining to service laws, there was "no case comparable" to the writ petitions filed before it in the instant case. The learned Chief Justice (Bhagwati, J.) who delivered the judgment of the Full Bench observes that these questions of "unrivalled complexity" had caused considerable anxiety to the Court in reaching a satisfactory conclusion. We share this anxiety which is further heightened by the diametrically opposite and entirely inconsistent stands taken by the State governments from time to time. Evidently, the State governments did not know their own mind and being unable to take up a firm and consistent stand, they defended the various writ petitions filed against them by their employees according to the mood of the passing moment. That must be deprecated.

The appeals raise the familiar question of seniority in service, the competing groups being promotees on the one hand and direct recruits on the other, to the posts of Deputy Engineers. The writ petitions were filed and defended by the rival groups in a representative capacity so that, our decision will bind not only the parties thereto but all others whom, under the relevant provisions of the Code of Civil Procedure, they were permitted to represent.

Taking the facts of the Maharashtra case, the two appellants therein were initially recruited as Overseers in 1953 and were promoted temporarily as Deputy Engineers, in January 1959 and October 1957 respectively. They were confirmed as Deputy Engineers after the coming into force

of certain rules framed on February 19, 1970. The 1st respondent to the appeal is the State of Maharashtra. The 2nd and 3rd respondents were appointed directly on probation as Deputy Engineers. They are Engineering Graduates but so are the appellants. Respondents 2 and 3 qualified for direct appointment after passing a competitive examination in 1963 and 1959 respectively. They were confirmed two years later, in 1965 and 1961 respectively.

The grievance of the appellants is that notwithstanding the length of their continuous service as Deputy Engineers since 1959 and 1957, respondents 2 and 3 were shown as senior to them in the Cadre of Deputy Engineers though they were appointed later in 1963 and 1959 respectively. The appellants claim that their seniority should have been fixed under the rules framed by the then Government of Bombay on November 21, 1941 as clarified by the Chief Secretary to that Government by his letter dated January 11, 1949. According to them, the rules framed by the Maharashtra Government on April 29, 1960 cannot take away the right which had accrued to them under the rules existing at the time of their promotion in 1959 and 1957. They challenge the validity of rule 8(iii) of the 1960 rules and of rule 33 of the 1970 rules as being violative of Arts. 14 and 16 of the

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Constitution. They also challenge the 1970 rules on the ground that they lack approval of the Central Government, thereby violating the proviso to s.81 (6) of the Bombay State Reorganisation Act of 1960. According to the appellants, the 1960 rules were superseded by the rules dated July 29, 1963 and still the State Government continued to apply the defunct rules of 1960. On these grounds, broadly, the appellants filed a writ petition in the Bombay High Court on behalf of themselves and all those promoted as Deputy Engineers in Class II of the Maharashtra Engineering Service.

Putting it as briefly as one may, the, sum and substance of the stand taken by respondents 2 and 3 is that neither the 1941 rules nor the 1963 rules are applicable to employees in Maharashtra Engineering Service. The posts of Deputy Engineers, according to them and according to the State of Maharashtra, were required to be filled in by direct recruits and promotees in the ratio of 75 : 25 under the 1960 rules which had superseded the earlier rules of 1939. Therefore, according to them, the question of seniority of the appellants could not possibly arise until they were confirmed, and seniority has to be fixed from the respective dates of confirmation in terms of rule 8(iii) of the 1960 rules. The Government of Maharashtra contended that the confirmation of appellants depended necessarily on the availability of vacancies allotable to them within the quota of 25% of the total vacancies, and delay in passing orders of confirmation was inevitably caused by the fact that the number of officiating Deputy Engineers was much too large. In order to rectify the somewhat unsatisfactory position, the State Government, according to its contention, framed the 1970 rules, altering the ratio of direct recruits and promotees from 75: 25 to 34: 66, as a result of which several promotees were confirmed. Even prior to that, according to the State Government, whenever vacancies occurred in the substantive posts which were required to be filled in according to the prescribed ratio, those vacancies were duly filled in from amongst the officiating Deputy Engineers and they were given anterior dates of, confirmation with effect

from the dates when the vacancies had actually occurred. The respondents disputed that rule 8(iii) of the 1960 rules and rule 33 of 1970 rules were unconstitutional or otherwise invalid.

Before examining the merits of these contentions it would be necessary, for a proper understanding of the issues involved in the case, to set out briefly the history of the Engineering Service and the background in which the various rules came to be framed.

The Engineering Service in the then province of Bombay consisted, prior to 1937, of (i) the Indian Engineering Service which was an All India Service, (ii) the Bombay Subordinate Service of Engineers, (iii) Supervisors, both permanent and temporary, and (iv) temporary Engineers, appointed annually. The Bombay Subordinate Service of Engineers consisted of non-gazetted Class III employees, in which 2 posts used to be filled in annually by direct recruitment on the basis of the results of the examination held for Diploma in Civil Engineering. The remaining posts used to be filled in by promotion from the

rank of temporary Overseers. On March 22, 1937 the Government of Bombay in the Public Works Department passed a resolution reorganizing the Engineering Service. This resolution contemplated the creation of two new Provincial Engineering Services to be designated as Bombay Engineering Service Class I and Bombay Engineering Service Class II. The cadre strength of Class I Service was fixed initially at 36 while that of Class II Service was fixed at 80. Class I Service comprised the apex posts of Chief Engineer, Superintending Engineer and Executive Engineer, and the junior posts of Assistant Engineers. Class II Service consisted of Deputy Engineers only.

On September 21, 1939 the Government of Bombay passed a resolution adopting rules for regulating the methods of recruitment to the posts of Assistant Engineers and Executive Engineers in Class I Service and the posts of Deputy Engineers in Class II Service. These rules were made by the Governor of Bombay in exercise of the powers conferred by s. 241(2) (b) of the Government of India Act 1935 and were called: "Recruitment Rules of the Bombay Service of Engineers (Class I and Class II)." The rules appear at Item 53 is Section V of A endix C to the Bombay Civil Services Classification and Recruitment Rules under the heading "Bombay Service of Engineers."

Rule 2 of the 1939 Rules laid down the method of recruitment to the Bombay Service of Engineers, Class I, by providing that such recruitment was to be made either (a) by nomination under the guarantee given to the College of Engineering, Poona, or (b) by promotion from the existing Bombay Service of Engineers or from the Bombay Service of Engineers Class II. Rule 3 provided that as regards the recruitment from source (a), such number of appointments as may be fixed by the Government from time to time would be made from amongst the students of the College of Engineering, Poona, who had passed the examination for the Degree of B.E. (Civil) in First Class. The candidates so recruited by nomination were to be appointed in the first instance as Assistant Engineers on probation for two years and on completion of the probationary period, they were to be confirmed as Assistant Engineers.

Rule 10 of the 1939 Rules prescribed the method of recruitment to the Bombay Service of Engineers Class II. It provided that recruitment of Class II service shall be made either (a) by nomination under rule 11 under the guar-

antee given to the College of Engineering, Poona, or (b) by promotion from any of the three prescribed sources. Those sources were (1) the Bombay Subordinate Engineering Service, (2) Permanent or temporary Supervisors and (3) Temporary Engineers appointed on annual sanction. Rule 11 provided that such number of appointments as may be fixed by the Government from time to time shall be made annually from amongst the students of the College of Engineering, Poona, who have passed the examination for the Degree of B.E. (Civil). Every such candidate recruited by nomination was required by rule 14 to serve initially as a "candidate" for one year on the expiry of which period he would be appointed as a Deputy Engineer on probation for one year. On the satisfactory completion of the probationary period, the candidate would be eligible for confirmation as a Deputy Engineer.

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The guarantee envisaged by rules 2(a) and 10(a) of the 1939 rules was given by the Government to the students of the College of Engineering, Poona, under a resolution dated July 12, 1940. The guarantee operated in different measures until it was finally withdrawn by a resolution dated May 27, 1947. The last batch of students who obtained the benefit of the guarantee were those that passed the examination for the Degree of B.E. (Civil) in 1949.

By a resolution dated November 25, 1950 the Government of Bombay appointed a Committee under the Chairmanship of Shri Gurjar to examine the question of future recruitment to Engineering Services, Classes I and II. That Committee submitted its recommendations to the Government after prolonged deliberations but since the implementation of the recommendations had to be deferred, the Government started making appointments to both classes of services by direct recruitment through the Public Service Commission. Such appointments were made from the year 1950. As stated earlier, the cadre strength of Class I and Class II Services was fixed initially at 36 and 80 permanent posts respectively. But with the launching of new development projects, the strength of both cadres had to be expanded from time to time by addition to the permanent posts. In fact, for an early and effective achievement of the target it became necessary to make appointments of several temporary Executive Engineers and Deputy Engineers. On November 1, 1956 there were 360 temporary posts of Deputy Engineers as against 200 permanent posts. By April 29, 1960 these numbers had risen respectively to 600 and 400. One of the bones of contention between the parties is whether these temporary posts of Deputy Engineers were additions to Class II cadre, even if temporary, or whether the temporary posts were wholly outside the cadre of Class II Service. It is necessary to mention at this stage that appointments as officiating Deputy Engineers to such temporary posts were made by promotion from amongst the members of the Bombay Subordinate Service of Engineers as also from amongst permanent and temporary Supervisors. But no direct appointments were made by the Government to these temporary posts of officiating Deputy Engineers. The direct appointments were made only to permanent posts because such appointees were promised confirmation after two years from the date of appointment, during which period they were expected to complete their probation.

On April 29, 1960 the Government of Bombay in the Public Works Department passed a resolution embodying rules of recruitment to Bombay Service of Engineers Class I and Class II. These rules continued the existing division of

Engineering Services into Class I and Class II and they provided that appointments to both classes of service should be made by nomination as well as by promotion. As regards appointments by nomination it was provided that they should be made through competitive examination held by the Public Service Commission and that for both the classes of service there should be a common examination. Candidates recruited directly were to be confirmed after two years in their respective cadres, if otherwise found fit. The resolution of 1960 was signed by Under Secretary to the Government, "By order and in the name of the 'Governor of Bombay.'" 785

The rules regarding recruitment to Class I and Class II Engineering Service were set out in the Appendix to the 1960 Resolution. Rule 1 of those rules provided that appointments to both classes of services shall be made either by nomination after a competitive examination held by the Public Service Commission or by promotion from amongst the members of the lower cadres concerned, provided however that the ratio of appointments by nomination and promotion shall, as far as practicable, be 75: 25. By rule 2, candidates appointed to either of the services by nomination were to be on probation for two years. They were to serve, in the first instance, as Trainees for a period not exceeding one year and thereafter they were to be placed in a probationary capacity in charge of a sub-division for a period of not less than one year. On the expiry of the aforesaid period of two years they were to be confirmed as Assistant Engineers in Class I or as Deputy Engineers in Class II, as the case may be, if favourably reported upon by their superiors. Rule 2 further provided that Assistant Engineer would be confirmed as Executive Engineer after 9 years' service unless the period was extended by the Government. Under rule 3, candidates securing higher places in the competitive examinations were to be appointed in Class I service according to the number of vacancies declared for such recruitment in that cadre while candidates securing the next higher places were to be offered appointments to Class II service. Rule 6 of the 1960 Rules read thus:

"6. (i) The number of posts to be filled in the Bombay Service of Engineers, Class I, by promotion of officers from the Bombay Service of Engineers Class II shall be about 25 per cent of the total number of superior posts, in the Bombay Service of Engineers, Class I cadre. This percentage 'should be aimed at for confirmations made after 1st November, 1956, subject of course, to Class II officers of the requisite fitness and length. of service being available.

(ii) For absorption into Class I, a Class II officer must be in the permanent Bombay Service of Engineers, Class II cadre, should have at least 15 years' service to his credit in Class II in temporary and permanent capacities, and should be holding an officiating divisional rank, at the time of such absorption. On such absorption, the Class II officer shall be confirmed as an Executive Engineer.

(iii) The seniority of the Class II promotees shall be fixed below the bunch of the Assistant Engineers, any one of whom is due for confirmation as Executive Engineer during the calendar year, provided that an Class II

promotee shall be placed senior to a direct recruit to Class I Assistant Engineer who has been officiating as Executive Engineer from a date earlier than the class II promotee. In the latter case, the Class II promotee though holding a post and lien as a confirmed Executive Engineer shall be

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shown both under Permanent Executive Engineers and also along with the directly recruited Class I Assistant Engineers, with a suitable remark under the permanent Executive Engineers list. This is also subject to further conditions as in paragraph 7 below."

In spite of the provisions contained in rules 2 and 6, sufficient number of direct recruits to Class I service were not available, which caused the apprehension that for the next few years it may not be possible to fill 75% of the superior posts from amongst direct recruits to Class I. In order to meet this situation, it was provided by rule 7 that, as far as possible, promotions as officiating Executive Engineers shall be so made that the promotee under consideration from Class II has to his credit at least 6 years' longer service than a promotee under consideration from Class I, subject, generally, to the condition that a Class I officer shall not hold a divisional rank at less than 4, and a Class II officer at less than 7 years' service. Clause (iii) of rule 7 emphasised that if any promotions were made from Class II to Class I service to the confirmed posts of Executive Engineers beyond the quota available to Class II service personnel, there would have to be a consequent reduction in the promotion of Class II employees to Class I appointments in the following years in order to work up the overall percentage of 75:25. Clause (iv) of rule 7 provided that if any confirmation is made from the bunch of temporary Executive Engineers who had no lien on any cadre, such confirmation shall be counted against the quota of 25% which was meant for the non-direct recruits to Class I service.

Since the challenge to the vires of rule 8(iii) has occupied the best part of the arguments and since the High Court of Bombay and Gujarat have differed on that question it would be necessary to set out the whole of rule 8.

"8. (i) The Sub-Divisional posts in the Department are at present manned by direct recruits to Bombay Service of Engineers, Class II cadre, Deputy Engineers confirmed from subordinate Service of Engineers, the temporary Deputy Engineers recruited by the Bombay Public Service Commission, Officiating Deputy Engineers and similar other categories.. These various categories are being compiled into two lists only, viz. Bombay Service of Engineers Class II cadre of permanent Deputy Engineers and a list of officiating Deputy Engineers. The future recruitment to Bombay Service of Engineers, Class II cadre, shall be made by nomination of candidates recruited direct by competitive examination, held by the Commission and by promotion from the list of officiating Deputy Engineers. The number of such promotions shall be about one third the number of direct recruits appointed in that year.

(ii) All direct recruitment, of temporary

Deputy Engineers having been stopped, further officiating vacancies will be

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manned from the ranks of the subordinate Service of Engineers. For this purpose, a State wide Select Seniority list will be maintained of members of the Subordinate Service of Engineers cadre, considered fit to hold sub-divisional charges. The list shall be compiled as on 30th June each year.

For inclusion in this list, a graduate shall have to, his credit not less than 3, a Diploma holder not less than 8, and a non-qualified person not less than 13 years' service as Overseer.

For confirmation as a Deputy Engineer, the officer would be expected to have put in not less than 3 years' service as officiating Deputy Engineer.

(iii). The probationers recruited directly to the Bombay Service of Engineers, Class II cadre in any year shall, in a bunch, be placed senior to promotees confirmed during that year."

The Rules of 1960 were made by the Government of Bombay on April 29, 1960 and within two days thereafter, that is, on May 1, 1960 State of Bombay was bifurcated into the States of Maharashtra and Gujarat. With a view to avoiding any administrative difficulty, the Government of Gujarat passed a resolution on May 1, 1960 providing that all rules, regulations, circulars, etc. prevailing in the former State of Bombay will continue to operate in the new State of Gujarat until changed or modified by that Government. The Rules of 1960 were amended by the Government of Gujarat by a notification dated August 21, 1965 issued in the exercise of powers conferred by the proviso to art. 309 of the Constitution. By that notification, the Government of Gujarat introduced a new clause, clause 10, in the Rules of 1960 providing that candidates selected through the competitive examination and appointed to posts in the Gujarat Service of Engineers, Class I and Class II, shall if so required, be liable to serve in any Defence Service or post connected with the defence of India, provided that such a candidate shall not be required to serve as aforesaid after the expiry of ten years from the date of his appointment or after attaining the age of 40 years. The terms of this Gujarat amendment are not the subject of controversy but it became necessary to refer to the amendment since it is argued that even if the Rules of 1960, being in the nature of executive instructions, did not have statutory force, those rules acquired a statutory character by being recognised and amended by the notification of August 21, 1965 which was issued under the proviso to art. 309 of the Constitution.

On the bifurcation of the State of Bombay, 181 permanent and 220 temporary posts of Deputy Engineers were allocated to the state of Gujarat. In practice however, 99 permanent posts of Deputy Engineers were vacant in the State of Gujarat against which confirmation had to be made by that Government. Some of the Deputy Engineers who were promoted to those posts from lower ranks were also allocated to the State of Gujarat and several of them having

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completed three years' qualifying service had become eligible for confirmation under rule 8(ii) of the 1960 Rules.

But they were denied confirmation in spite of their long service and in spite of the existence of clear vacancies in substantive posts of Deputy Engineers. Since the quantum of pension also depended in those days on the average substantive pay, the denial of confirmations to the promotee Deputy Engineers led to great dissatisfaction amongst them. Some, who had officiated in those appointments for several years, had to retire without being confirmed. On March 28, 1961 the Government of Gujarat passed an order provisionally confirming 37 officiating Deputy Engineers with effect from May 1, 1960. On August 7 1968 it confirmed another batch of 26 officiating Deputy Engineers with retrospective effect from May 1, 1960 and directed that the order of provisional confirmation dated March 28, 1961 shall be treated as final.

In so far as the Gujarat appeals are concerned there are no further rules or resolutions to be considered. But the Government of Maharashtra issued two resolutions after the bifurcation of the State of Bombay. On July 29, 1963 it passed a resolution laying down principles of seniority and on December 19, 1970 it passed a resolution superseding the resolution passed by the Government of Bombay on April 29, 1960. Rule 33 of the 1970 rules provides:

"Seniority

33. There shall be two parts of the seniority list in each cadre in Class I and Class II viz. Part A of confirmed officers and Part B of those who are not confirmed.

(a) In Part A the names shall be arranged with reference to the year of confirmation.

(b) The confirmed officers shall be treated as senior to the unconfirmed Officers in the respective cadre.

(c) In Part B of the seniority list of any cadre, the names shall be arranged with reference to the date of continuous officiation except where a promotion in an officiating capacity was by way of purely temporary or local arrangement."

In Gujarat, there are no resolutions corresponding to, those of 1963 and 1970 issued by the Maharashtra Government.

Civil Appeal No. 1113 of 1974 by the promotees arises out of the judgment dated January 17, 1974 of the Bombay High Court dismissing Special Civil Application No. 815, of 1972 filed by them against the State and the direct recruits. Four Special Civil Applications were filed in the Gujarat High Court which were disposed of by it by a common judgment dated July 14, 1973. S.C. As. Nos. 1099 of 1969, 422 of 1970 and 957 of 1970 were filed by the direct recruits while S.C.A. No. 1480 of 1971 was filed by the promotees. The promotees failed in the Bombay High Court but succeeded in the Gujarat High Court. Both the High Courts have granted certificates of fitness for filing appeals in this Court.

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Before us, Mr. K.K. Singhvi and Mr. R.K. Garg appeared for the promotees while Mr. M.V. Paranjpe and Mr. M.K. Ramamurti appeared for the direct recruits. Mr. M.C. Bhandare appeared for the State of Maharashtra and Mr. D.V. Patel for the State of Gujarat. Mr. Patel took a non-contentious attitude, which highlights how difficult it was for the State counsel to support any particular cause in view of the shifting stand taken up by both the State Governments from time to time.

Several points were raised before us and a large number of decisions were cited in support thereof, but the main

question for decision in these appeals is whether departmental promotees and direct recruits appointed as Deputy Engineers in the Engineering Services of the Governments of Maharashtra and Gujarat belong to the same class so that they must be treated with an even hand or whether they belong to different classes or categories and can justifiably be treated unequally. Concededly, they are being treated unequally in the matter of seniority because whereas, promotees rank for seniority from the date of their confirmation the seniority of direct recruits is reckoned from the date of their initial appointment. The disparity is indeed so glaring that though direct recruits have to successfully complete a two years' probationary period before confirmation, even that period is not excluded while counting their seniority. A promotee ranks below the direct recruit even if he has officiated continuously as Deputy Engineer for years before the appointment of the direct recruit is made and even if he, the promotee, could have been confirmed in an available substantive vacancy before the appointment of the direct recruit.

Learned counsel for the direct recruits have stoutly defended the preferential treatment accorded to them by contending, *inter alia*, that since the promotees do not belong to Class II service until they are confirmed, they have no right to rank for seniority along with the direct recruits who enter that class or cadre on the very date of their initial appointment. The fact that the Government did not confirm a particular promotee even though a substantive vacancy was available in which he could have been confirmed cannot, according to the direct recruits, make any difference to that position.

For facilitating a proper understanding of this problem it is necessary to take bird's eye-view of the various rules and resolutions which were passed by the two State Governments, most of which we have already noticed. In this behalf, attention has to be called particularly to: (1) The rules framed by the Government of Bombay on September 21, 1939 under s. 241 (2)(b) of the Government of India Act, 1935; (2) The rules framed by the Government of Bombay on November 21, 1941 regarding fixation of seniority (3) The letter dated January 11, 1949 written by the Chief Secretary, Government of Bombay, to the Honorary Secretary, Bombay Civil Service Association; (4) The Resolution of the Government of Bombay dated April 29, 1960 containing Rules regarding recruitment of Class I and Class II Engineering Services and regarding fixation of seniority; (5) The 790

Resolution of the Government of Maharashtra dated July 29, 1963 laying down principles of seniority; (6) The Notification dated August 21, 1965 issued by the Government of Gujarat under the proviso to art. 309 of the Constitution, introducing clause 10 in the Rules of 1960; (7) The Resolution of the Government of Maharashtra dated December 19, 1970 superseding the Resolution of April 29, 1950 and framing new rules of seniority; and (8) The Circulars dated January 12, 1961, March 15, 1963 and October 18, 1968 issued by the Government of Maharashtra, converting a certain number of temporary posts into permanent posts from time to time.

It is common ground that except the Bombay Rules dated September 21, 1939 and the Gujarat Notification dated August 21, 1965 the rest of the rules are in the nature of executive instructions. The Rules of 1941, 1960, 1963, 1965 and 1970 were not framed by the State Government concerned in the exercise of constitutional or statutory power. The

Rules of 1960 and 1970 were issued "By order and in the name of the Governor," but that does not lend support to the construction faintly suggested on behalf of the direct recruits that the two sets of rules must be deemed to have been made under art. 309 of the Constitution. All executive action of the Government of a State is required by art. 166 of the Constitution to be taken in the name of the Governor. The appeals have therefore to be disposed of on the basis that except for the Bombay rules dated September 21, 1939 and the Gujarat Notification dated August 21, 1965 the remaining rules, whether of recruitment or of seniority, are in the nature of executive instructions. These instructions, unlike rules regulating recruitment and conditions of service framed under the proviso to art. 309 of the Constitution or s. 241(2)(b) of the Government of India Act, 1936, cannot have any retrospective effect.

The 1939 rules called "Recruitment Rules of the Bombay Service of Engineers (Class I and Class II)" have constitutional authority but being rules made to regulate the methods of recruitment, they afford no assistance in finding a solution to the rival claims to seniority laid by the promotees and direct recruits. The rules neither fix a quota for recruitment from the two avenues nor do they provide, in any other manner, a guideline for fixation of seniority as between appointees recruited from different sources. Rule 10 on which the promotees rely as affording to them a guarantee in the matter of promotion is also beside the point because the crux of their grievance is not that they are denied opportunities of promotion but that they are discriminated against in the matter of seniority in comparison with the direct recruits.

By its resolution dated November 21, 1941 the Government of Bombay, Political and services Department, directed that in the case of direct recruits appointed substantively on probation, the seniority should be determined with reference to the date of appointment on probation while 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 their service prior to their confirmation in those vacancies. This Resolution expressly

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governed the seniority of direct recruits and promoted officers in all provincial services except the Bombay Service of Engineers, Class I. Since Deputy Engineers do not belong to Class I Service, their seniority was governed by the Resolution. The wording of the Resolution leaves no doubt that the Government of Bombay applied: two different standards for fixing inter se seniority of direct recruits and promotees appointed as Deputy Engineers. The former were entitled to reckon their seniority with effect from the date of their initial appointment on probation while the seniority of the latter had to be determined with reference to the date of their promotion to, substantive vacancies, subject to the further qualification that there was no break in their service prior to their confirmation in those vacancies. Thus, for purposes of seniority, the promotees had to depend firstly on the availability of substantive vacancies and secondly on the arbitrary discretion of the Government to confirm or not to confirm them in those vacancies. The fact that a substantive vacancy had arisen and was available did not, proprio vigore, confer any right on the promotee to be confirmed in that vacancy. The 1941 Rules contained the real germ of discrimination because the

promotees had to depend upon the unguided pleasure of the Government for orders of confirmation. In the pre-Constitution era, such hostile treatment had to be suffered silently as a necessary incident of government service.

It is curious that though the 1941 rules expressly recite that the principles contained therein should be observed in determining the seniority of direct recruits and promoted officers in the provincial Services except the Class I Bombay Service of Engineers, Shri L.M. Ajgaonkar, Deputy Secretary to the Government of Maharashtra says in his affidavit dated July 25, 1973 that in practice the Rules of 1941 were never applied to Class II officers in the Engineering Service and that their seniority used to be determined by the same rules by which the seniority of Class I officers was determined. It is difficult to accept this bare statement which is not even supported by a proper verification. Shri Ajgaonkar's affidavit contains an omnibus and rolled-up clause of verification at the end, which detracts from the weight of his assertion.

Turning next to the letter dated January 11, 1949 written by the Chief Secretary, Government of Bombay, to the Honorary Secretary, Bombay Civil Service Association, we find it difficult to uphold the claim of the promotees that the Rules of 1941 were modified by that letter. The letter was written in answer to, the representation dated July 28, 1948 made by the Bombay Civil Service Association to, the Government of Bombay regarding emergency recruitment to the Indian Administrative service and "other matters". Paragraph 2 of the letter says that promotees can have no grievance in the matter of seniority since the seniority of a direct recruit to the cadre of "Deputy Collectors" vis-a-vis a promoted officer is determined not according to the date of confirmation but according to the principles laid down in the Rules of 1941, i.e. with reference to the date of first appointment on probation in the case of direct recruits and of continuous officiation in the case of promoted officers. In the first place,

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this part of the letter on which the promotees rely deals expressly and exclusively with the case of Deputy Collectors which makes it difficult, without any further data, to extend the benefit of what is said therein to Deputy Engineers, working in an entirely different branch of government service. The Chief Secretary's letter is a reply to the Association's letter which the promotees did not produce. The Association had addressed its letter not to the Ministry which handled problems of Engineering Services but to the Ministry of Home and Revenue, the latter of which was concerned to consider the grievance of Deputy Collectors. Lastly the opening sentence of paragraph 2 of the Chief Secretary's reply shows that he was referring to a class of service in which a quota system was then operating. Admittedly, the quota system properly so-called, did not apply either under the 1939 or under the 1941 rules to Engineering Services. The Chief Secretary's reply cannot, therefore improve the promotees' case. But we disapprove that instead of explaining the circumstances in which the reply was sent, the State Government should merely say through Shri Ajgaonkar's affidavit that it craves "leave to refer" to the reply for its "true effect". The Government could surely have produced the letter of the Association which would have set this part of the controversy at rest.

That takes us to the 1960 Rules which are the meat of the matter. We have already extracted rules 6 and 8 fully but it will be necessary to recapitulate briefly the scheme

of the 1960 rules. Under these rules, the ratio of appointment by nomination and promotion of both Class I and Class II Engineering Services was fixed, as far as practicable, at 75: 25. Candidates appointed by nomination, i.e. direct recruits, were to be on probation for two years out of which, normally, one year was to be spent on training. On satisfactory completion of probation, the direct recruits were to be confirmed as Assistant Engineers in Class I or as Deputy Engineers in Class II, as the case may be. For absorption in Class I, a Class II officer had to be in the permanent Bombay Service of Engineers, Class II cadre. He was further required to have at least 15 years' service to his credit in Class II in temporary and permanent capacities. In addition to these qualifications, he has to be holding, at the time of his absorption in Class I, an officiating divisional rank. On such absorption the Class II officer was to be confirmed as an Executive Engineer. The Rules of 1960 show that the seniority of Class II promotees was to be fixed below the bunch of Assistant Engineers, any one of whom was due for confirmation as an Executive Engineer during the calendar year. But no Class II promotee could be placed above a direct recruit recruited to Class I, who was officiating as Executive Engineer from a date earlier than the Class II promotee,

Rule 8(1) says that the various categories which manned the Class I sub-divisional posts were being compiled into two lists: (i) One list of Bombay Service of Engineers Class II cadre of permanent Deputy Engineers and (ii) the other list of officiating Deputy Engineers. The future recruitment to Class II cadre was to be made by (a) nomination of candidates recruited directly by competitive examination and (b) promotion from the list of officiating Deputy Engineers, 793

in the ratio of 2/3rd and 1/3rd respectively. After reciting that direct recruitment of temporary Deputy Engineers was stopped, rule 8(ii) provides that further officiating vacancies would be manned from the ranks of the Subordinate Service of Engineers. For this purpose a statewise Select Seniority List was to be maintained of members to the Subordinate Service of Engineers, considered fit to hold subdivisional charge. For inclusion in this list graduates, diploma holders and non-qualified persons had to have to their credit Service of not less than 3, 8 and 13 years respectively. For confirmation as a Deputy Engineer the officer was expected to have put in not less than three years' service as officiating Deputy Engineer. Then comes the much-debated clause (iii) of rule 8:

"(iii) The probationers recruited directly to the Bombay Service of Engineers, Class II cadre in any year shall, in a bunch, be placed senior to promotees confirmed during that year.

It is patent that this clause is highly discriminatory against promotees and accords a preferential treatment to direct recruits. Its principal justification is said to be that persons who are promoted as officiating Deputy Engineers do not belong to Class II cadre so long as they are not confirmed as Deputy Engineers, whereas direct recruits appointed on probation as Deputy Engineers enter that class or cadre on the very date of their appointment since, on satisfactory completion of probation, confirmation is guaranteed to them. This contention needs careful examination.

There is no universal rule, either that a cadre cannot consist of both permanent and temporary employees or that it must consist of both.' That is primarily a matter of rules

and regulations governing the particular service in relation to which the question regarding the composition of a cadre arises. For example, in *Bishan Sarup Gupta v. Union of India*(1) the cadre of Income Tax officers Class I, Grade II was held by this Court to consist of both permanent and temporary posts. Similarly, in *A.K. Subraman v. Union of India*, (2) while holding that the cadre of Executive Engineers in Class I Central Engineering Service consisted both of permanent and temporary posts, it was pointed out by this Court that a cadre may consist of permanent posts only or "sometimes, as is quite common these days, also of temporary posts". Counsel for direct recruits relied upon a decision of this Court in *Ganga Ram & Others v. Union of India*(3) for showing that a cadre cannot consist of temporary posts but that decision rested on the finding, arising out of the rules contained in the Indian Railway Establishment Manual, that direct recruits and promotees constitute different classes. The question which we have to consider at this stage is not whether direct recruits and promotees appointed as Deputy Engineers in the Bombay and Gujarat service of Engineers belong to different classes but whether officiating Deputy Engineers belong to class II cadre at all.

(1) [1973] 3 S.C.C. 1

(2) [1975] 2 S.C.R. 979

(3) [1970] 3 S.C.R. 481

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On the state of the record in the Bombay and Gujarat appeals, such as it is, we find it difficult to hold that officiating Deputy Engineers do not belong to Class II cadre of the Bombay and Gujarat Service of Engineers. In the Maharashtra writ petition, 815 of 1972, as many as four affidavits were filed on behalf of the State Government by Shri L.M. Ajgaonkar. These are dated July 25, December 17, December 21, 1973 and January 17, 1974. The question whether officiating Deputy Engineers belong to Class II cadre was of the essence of the dispute in the High Court and was squarely raised by the promotees. Yet, in none of the affidavits did the State Government say that they did not belong to Class II cadre. The last affidavit dated January 17, 1974 was filed after the High Court had dictated its judgment in open Court for three days, and even then the affidavit is significantly silent on the question. The only explanation of this can be that according to the State Government, officiating Deputy Engineers belong to Class II cadre. The resolution dated November 8, 1962 issued by the Government of Maharashtra. Buildings and Communications Department, shows unmistakably that even temporary posts of Deputy Engineers were treated as temporary additions to Class II cadre. An additional Division with four subdivisions was sanctioned by that resolution for construction of a section of National Highway No. 8. Temporary posts had therefore to be created for that project for a period of one year. The resolution says that "The posts of Executive Engineers and Deputy Engineers should be treated as temporary additions to their respective cadres."

In so far as the Gujarat appeals are concerned, Shri N.S. Nagrani, Under Secretary to the Government of Gujarat, P.W.D., filed an affidavit dated April 28, 1970 in one of the writ petitions, 422 of 1970. He says in that affidavit that "temporary posts are to be treated as temporary additions to the respective cadres of B.S.E. Class I and Class II", that "permanent posts are not created anew but come into existence by the conversion of the existing temporary posts into permanent posts" and that "both the temporary posts and permanent posts are two categories of posts

belonging to the same cadre". To the similar effect is the affidavit dated June 22, 1970 made in another writ petition, 1099 of 1969, by Shri A.R. Bhatt, Under Secretary to, the Government of Gujarat, P.W.D. He says therein that "there are no separate categories of permanent and temporary posts of Deputy Engineers. Temporary post of Deputy Engineers are treated as temporary additions to the G.S.E. Class II cadre." Pleading on behalf of the Gujarat Government, Shri Bhatt stoutly resisted the claim of direct recruits that they had prior claim for consideration for promotion to the posts of Executive Engineers on the ground that they belong to the Class II cadre while the officiating Deputy Engineers do not.

We cannot ignore these sworn assertions made solemnly by officers of the Maharashtra and Gujarat Governments. The fact that the permanent strength of the cadre was determined on the basis of permanent posts at any given time, as for example when the Bombay

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Government passed resolutions on March 22, 1937 and April 13, 1945 cannot detract from the position that even temporary posts of Deputy Engineers were treated as additions, though temporary, to Class II cadre. The government officers who swore the affidavits knew of these resolutions and yet they were instructed to state, a position which they contended for more than once, that officiating Deputy Engineers belonged to Class II cadre.

The learned counsel for the direct recruits laid great emphasis on the lists referred to in clauses (i) and (ii) of rule 8 for showing that officiating Deputy Engineers do not belong to Class II cadre of Engineering Service. This contention has to be rejected since the point is concluded by a decision of this Court in P.Y. Joshi v. State of Maharashtra. (1) It was contended in that case on behalf of direct recruits that officiating Deputy Engineers could only be considered as promoted to the grade of Deputy Engineers on confirmation and therefore the 7 years' qualifying service which they had to put in before being promoted as officiating Executive Engineers must be reckoned from the date of their confirmation as Deputy Engineers in support of this contention reliance was placed in that case on clause (ii) of rule 8 and it was argued that no person could be "promoted" as a Deputy Engineer unless he was first put in the list of officiating Deputy Engineers. This argument was squarely dealt with and repelled by this Court by holding that the list referred to in clause (ii) of rule 8 is the same list which is referred to in the latter part of clause (i) of that rule which speaks of "future recruitment". Consequently, a promoted officiating Deputy Engineer, who belonged to Class II cadre, was held entitled to be considered for promotion under rule 7 to the post of officiating Executive Engineer if he had put in 7 years' qualifying service. The eligibility for promotion did not require that the officiating Deputy Engineer must have put in 7 years' service after the date of his confirmation.

It must necessarily follow that "promotion" which the latter part of rule 8(i) relating to future recruitment speaks of means promotion as an officiating Deputy Engineer from the Select List prepared under clause (ii) of rule 8. A person thus promoted from the Select List as an officiating Deputy Engineer is as full and complete a member of the Class II cadre as a person directly appointed as a Deputy Engineer. In tiffs view of the matter, the prescription contained in the closing sentence of rule 8(i) that "the number of such promotions shall be about 1/3rd the number of

direct recruits appointed in that year" would apply to initial appointments and cannot govern the confirmation of those who have already been appointed to Class II cadre. In other words, direct recruits and promotees have to be appointed in the proportion of 75: 25 to Class II cadre, the former as Deputy Engineers and the latter as officiating Deputy Engineers, but once that is done, the quota rule would cease to apply with the result that confirmations in the posts of Deputy Engineers are not required to be made in the proportion in which the initial appointments had

(1) [1970] 2 S.C.R. 615

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to be made. Thus rule 8(i) only requires that for every three direct recruits appointed as Deputy Engineers only one promotee can be appointed as officiating Deputy Engineer. The rule cannot be construed to mean that for every three confirmations, of Deputy Engineers, not more than one promotee can be confirmed as Deputy Engineer. In A. K. Subraman (supra) it was held by this Court, while interpreting rules relating to Central Engineering Service Class I, that though in cases where recruitment is made from different sources the quota system can be validly applied, the quota rule was to be enforced at the time of initial recruitment to the posts of officiating Executive Engineers and not at the time of their confirmation. The Court further observed that there was a well recognised distinction between promotion and confirmation and that the tests to be applied for the purposes of promotion are entirely different from those that had to be applied at the time of confirmation.

If officiating Deputy Engineers belong to Class II cadre as much as direct recruits do and if the quota system cannot operate upon their respective confirmation in that cadre, is there any valid basis for applying different standards to the members of the two group for determining their seniority? Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. And yet clause (iii) of rule 8 provides that probationers recruited during any year shall in a bunch be 'treated as senior to promotees confirmed in that year. The plain arithmetic of this formula is that a direct recruit appointed on probation say in 1966, is to be regarded as senior to a promotee who was appointed as an officiating Deputy Engineer, say in 1956, but was confirmed in 1966 after continuous officiation till then. This formula gives to the direct recruit even the benefit of his one year's period of training and another year's period of probation for the purposes of seniority and denies to promotees the benefit of their long and valuable experience. If there was some intelligible ground for this differentiation bearing nexus with efficiency in public services, it might perhaps have been possible to sustain such a classification. It is interesting that time and again the State Governments themselves found it difficult to justify the hostile treatment accorded to the promotees. In various affidavits filed on their behalf, entirely contradictory contentions were taken, sometimes in favour of the promotees and sometimes in favour of direct recruits. Instead of adopting an intelligible differentia, rule 8 (iii) leaves seniority to be determined on the sole touchstone of confirmation which seems to us indefensible. Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring in-

stance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government.

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There is no substance in the plea that direct recruits must be given weightage on the ground that the engineering services require the infusion of new blood since it is a highly specialised service. Were it so, the Government would not have itself reduced the proportional representation gradually so as to tilt the scales in favour of promotees. Besides, the plea that engineering service is a specialised service is made not by the Government but by direct recruits who, obviously, are interested in so contending. Nor indeed is the apprehension justified that the higher echelons of engineering services will in course of time be manned predominantly by promotees. Those recruited directly as Assistant Engineers in Class I can, under the rules, officiate as Executive Engineers after 4 years' service and are eligible for confirmation as Executive Engineers after a total service of 9 years. Promotees can hardly ever match with that class in terms of seniority.

Learned counsel for direct recruits relied on the decision of this Court in *B.S. Gupta v. Union of India*(1) where it was observed that when recruitment is made from several sources, it may be necessary in the public interest to depart from the normal rule of seniority and to provide that dates other than the dates of appointment will determine inter se seniority of officers. These observations have to be understood in the context which the Court itself clarified by saying that the problem before it was not of discrimination in the matter of promotion from an integrated service constituted from two sources but the problem was of integrating two sources in one service by adjusting inter se seniority (p. 115). Besides, the rule of seniority prescribed in that case was not shown to suffer from the infirmity from which rule 8 (iii), suffers.

Reliance was also placed by the direct recruits on another decision of this Court in *V.B. Badami v. State of Mysore*,(2) in which it was held that in cases where rules prescribe a quota between direct recruits and promotees, confirmations for substantive appointments can only be made in clear vacancies occurring in the permanent strength of the cadre and that confirmed persons have to be treated as senior to those who are officiating. This decision is distinguishable because it is based on the consideration that rule 9 of the Probation Rules of 1957 provided for confirmation of a probationer as a full member of the service in any substantive vacancy in the permanent cadre and that rule established the exclusion of temporary posts from the cadre (p.822). Since the cadre consisted of permanent posts only, confirmation in permanent posts necessarily determined the inter se seniority of officers.

Rule 8(ii) in the instant case adopts the seniority-cum-merit test for preparing the statewise Select List of seniority. And yet clause (iii) rejects the test of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That, under Arts. 14 and 16 of

the Constitution, is impermissible and therefore we must strike down rule g(iii) as being unconstitutional.

(1) [1975] 1 S.C.R. 104

(2) [1976] 1 S.C.R. 815

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On July 29, 1963 the Government of Maharashtra in its General Administration Department passed a resolution superseding the rules of November 21, 1941 and framing new rules for determining the inter se seniority of direct recruits and promotees. Paragraph A of the 1963 resolution provides that the seniority of direct recruits and promoted officers should be determined according to the date of appointment on probation in the case of direct recruits and according to the date of promotion to officiate continuously in the case of those appointed by promotion, irrespective of whether the appointments are made in temporary or in permanent vacancies. Paragraph B of the resolution says that a list of services in respect of which special orders for fixation of seniority are in force and to which the resolution will not apply would be issued in due course.

It is contended on behalf of the Maharashtra promotees that the rules of 1963 superseded the 1960 rules by necessary implication and therefore the State Government had no power or authority to apply the criterion of seniority fixed under the 1960 rules after their repeal by the 1963 rules. This contention has not only the merit of plausibility but is apparently supported by an observation in P. Y. Joshi (supra) case. We are however satisfied that the Bombay High Court was right in rejecting the contention. The quota system was the very essence of 1960 rules and if it was desired to abrogate that system it is unlikely that the 1963 rules will not even refer to those of 1960. The rules of 1941 having been expressly superseded by the 1963 rules, it is difficult to accept that along with the 1941 rules the resolution of 1963 would not have referred to the 1960 rules also. Secondly, the resolution dated December 19, 1970 of the Government of Maharashtra expressly superseded the 1960 rules which shows that the latter were in force until 1970 and were not superseded by the 1963 rules. In fact, the resolution of 1970 refers to all previous resolutions except the resolution of 1963 which shows that the latter was not applicable to engineering services. It is true that in P.Y. Joshi's case (supra) it was observed that the 1963 rules repealed those of 1960 but that is a mere passing observation. The question in regard to such repeal did not arise for decision in that case and it appears that no argument whatsoever was addressed to the Court on this question. None of the considerations mentioned by us were placed before the Court in that case. We therefore agree with the High Court that the 1960 rules were not superseded by those of 1963. We have already indicated that in Gujarat there is no resolution corresponding to that of 1963.

In the Gujarat writ petitions it was argued that the 1960 rules, though originally in the nature of executive instructions, acquired a statutory force and character by reason of their amendment by the rules of 1965 which were made by the Governor of Gujarat in exercise of the power under the proviso to Art. 309 of the Constitution. This argument was rightly rejected by the High Court because all that was done by the rules of 1965 was to introduce a new rule, rule 10, in the 1960 rules. The rules of 1960 were neither reiterated nor re-enacted by the rules of 1965 and the new rule introduced into the rules of 1960 is not of such a character as to compel the inference that the rule-making authority had applied its mind to be rules of 1960

with a view to
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adopting them. In *Bachan Singh v. Union of India*(1), on which the direct recruits rely, the amendment made vital changes in the main fabric of the original rules which led this Court to the conclusion that the original rules became statutory rules by incorporation. This question is not relevant in the Maharashtra appeal since there are no rules in Maharashtra corresponding to those of 1965 in Gujarat.

The challenge to rule 33 of the rules dated December 19, 1970 framed by the Government of Maharashtra is based on grounds identical with those on which the validity of rule 8(iii) of the 1960 rules was assailed. The rules of 1970, which supersede the rules of 1960, were framed in order (i) to alter the ratio between direct recruits and promotees which was "causing hardship" to promotees; (ii) to correct the manifest error resulting from the fact that "A large number of temporarily promoted officers both in Class I and Class II could not be confirmed in spite of permanent vacancies being available"; and (iii) to ensure the efficiency of the engineering services as a whole. Rule 6 provides briefly that officers who are confirmed in or who have a lien on a post will be members of the Maharashtra Service of Engineers Class I or Class II as the case may be. Those who do not have such a lien and who may be officiating in any one of the cadres of Class I or Class II will be treated as temporary members of their respective cadres. Rules 7 to 11 deal with direct appointments to the posts of Assistant Engineers Class I and Assistant Engineers Class II. By rule 11, such appointees are to be confirmed after a training of one year and a further probation for a period of not less than one year in their respective cadres. Rules 12 to 23 deal with appointments by promotion to Class II service. Rule 12(a) as amended by the Government resolution dated January 20, 1972 provides that the cadre of Deputy Engineers will consist of (i) all officers confirmed upto the date of commencement of the rules as Deputy Engineers, whether actually working in or only having a lien on the posts; (ii) all direct recruits who have been appointed upto the date of commencement of the rules on probation against permanent posts of Deputy Engineers (iii) all officers who were officiating as Deputy Engineers on 30th April, 1960, provided their promotions prior to 30th April, 1960 are not deemed to be fortuitous; and (iv) those who were not promoted prior to 30th April, 1960, but who have been included in the Select Lists for the period prior to 30th April 1960 of Overseers fit to be Deputy Engineers. Rule 12(c) fixes the ratio between direct recruits and promotees at 34: 66 instead of 75: 25 as under the 1960 rules. Rule 33 called "Seniority", which we have extracted already, provides that there shall be two parts of the seniority list in each cadre in Class I and Class II, part A of confirmed officers and part B of those who are not confirmed. In part A the names are to be arranged with reference to the year of confirmation. Confirmed officers are to be treated as senior to the unconfirmed officers in the respective cadres. In part B the names are to be arranged with reference to the date of continuous officiation except where promotion in an officiating capacity is by way of a purely temporary or local arrangement.

(1) A.I.R. [1973] S.C. 441
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Rule 33, in so far as it makes seniority dependent upon the fortuitous circumstance of confirmation, is open to the same objection as rule 8(iii) of the 1960 rules and must be

struck down for identical reasons.

The circulars dated January 12, 1961, March 15, 1963 and October 18, 1969 which the promotees want to be enforced are issued by the Finance Department and being in the nature of inter-departmental communications, they cannot confer any right on the promotees. The Bombay High Court was therefore right in not accepting this part of the promotees' case.

We also agree with the view taken by the High Courts of Bombay and Gujarat, for the reasons mentioned by them, that the rules under consideration do not in any manner violate the provisions of the Bombay Reorganisation Act, 11 of 1960. The proviso to s. 81 (6) of that Act says that the conditions of service applicable to any person allotted to the States of Maharashtra or Gujarat shall not be varied to his disadvantage except with the previous approval of the Central Government. Neither the rules of 1960 and much less the rules of 1970 alter the conditions of service of Deputy Engineers to their disadvantage within the meaning of the proviso.

We are not unmindful of the administrative difficulties in evolving a code of seniority which will satisfy all conflicting claims. But care ought to be taken to avoid a clear transgression of the equality clauses of the Constitution. The rules framed by the State Governments were constitutionally so vulnerable that the administration was compelled to adopt inconsistent postures from time to time leaving the employees no option save to resort to courts for vindication of their rights. In this process, courts, high and low, had to discharge functions which are best left to the expertise of the appropriate departments of the Government. Having struck down certain rules, we do not want to take upon ourselves the task of framing rules of seniority. That is not the function of this Court and frankly it lacks the expertise and the data to do so. We however hope that the Government will bear in mind the basic principle that if a cadre consists of both permanent and temporary employees, the accident of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees. All other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear similar responsibilities. Saying anything beyond this will be trespassing on a field which does not belong to the courts.

We would like to clarify that the list of seniority, for the period till November 1, 1956, prepared by the Maharashtra Government by its resolution dated April 10, 1970 has been approved by the Government of India. That list would therefore govern the seniority of direct recruits and promotees as on November 1, 1956. Secondly, it seems to us difficult to uphold the direction given by the Gujarat High Court that interim promotions made during the pendency of writ petitions should not be disturbed until the expiration of one month from the date of the seniority as finally fixed by the Government and intimated to the con-

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cerned parties. Interim promotions which do not comply with the constitutional requirements and which under the judgment of the Gujarat High Court are bad cannot be permitted to stand. We accordingly set aside that direction.

These then are our reasons in support of the order which we passed on January 31, 1977. That order reads thus:

"Civil Appeal No. 1113 of 1974 is filed by the promotees and it arises out of special Civil Application No. 815 of 1972 filed by them in the Bombay High Court. We set aside the judgment of the High Court and allow the appeal.

Civil Appeal No. 286 of 1974 is filed by direct recruits and it arises out of Special Civil Application No. 1099 of 1969 filed by them in the High Court of Gujarat. We confirm the judgment of the High Court and dismiss the appeal.

Civil Appeal No. 287 of 1974 is filed by direct recruits and it arises out of Special Civil Application No. 422 of 1970 filed by them in the High Court of Gujarat. We confirm the judgment of the High Court and dismiss the appeal.

Civil Appeal No. 242 of 1974 and Civil Appeal No. 285 of 1974 are cross appeals. Both of these appeals arise out of Special Civil Application No. 1418 of 1971 which was filed by the promotees in the High Court of Gujarat. Civil Appeal No. 242 of 1974 is filed by the promotees in this Court challenging the decision of the Gujarat High Court to the extent to which they failed. Civil Appeal No. 285 of 1974 is filed by the direct recruits challenging the aforesaid decision to the extent to which the High Court allowed the reliefs claimed by the promotees. We allow Civil Appeal No. 242 of 1974 partly and dismiss Civil Appeal No. 285 of 1974.

The reasons in support of the conclusions to which we have come in these appeals will be given later. The extent to which the appeals are allowed or dismissed will become clear from those reasons.

There will be no order as to costs in any of the appeals."

P.B.R.

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[1977] 3 S.C.R.