

PETITIONER:
H.S. VERMA & ORS.

Vs.

RESPONDENT:
SECRETARY, MINISTRY OF SHIPPING & TRANSPORT AND ORS. ETC., ET

DATE OF JUDGMENT 07/08/1979

BENCH:
CHANDRACHUD, Y.V. ((CJ))
BENCH:
CHANDRACHUD, Y.V. ((CJ))
FAZALALI, SYED MURTAZA
VENKATARAMIAH, E.S. (J)

CITATION:
1980 AIR 2086 1981 SCR (1) 209
1979 SCC (4) 415

ACT:

Constitution of India 1950, Art. 14-Central Engineering Service Rules 1959-Two different modes of appointment of engineers-By examination and by interview High Court holding interview appointee, not part of the service but to ex-cadre posts-Engineers placed in two categories-Central Engineering Service (Roads), Group A for examination appointees and Central Engineering Pool Group A for interview method appointees-Validity of.

HEADNOTE:

The Central Engineering Service (Roads) of the Ministry of Transport and Communications, Department of Transport (Roads Wing) Class-I Recruitment Rules 1959 provided that recruitment to the service shall be made by competitive examination, by promotion and by transfer as provided for in Parts III, IV, V of the Rules. The Rules provided that no appointment shall be made to the service or to any post borne on the cadre of the service by any method, not specified in Rule 3. The Rules empowered the Government to determine the methods of recruitment for filling any particular vacancy in the service.

An amendment introduced on August 2, 1966 to Rule 3 of the 1959 Rules provided an additional method of recruitment viz. direct recruitment through the UPSC in accordance with Part VI of the Rules. This Part provided that in special circumstances recruitment by selection of candidates to the posts mentioned in Appendix IV shall be made by the Commission by open advertisement, notwithstanding anything contained in the Rules.

Right from the inception selection of officers for Class-I posts was made by an examination conducted by the UPSC. After the introduction of r. 3(d) in the 1959 Rules in August 1966, 951 persons were recruited by the UPSC by way of interviews without written examination.

Some of the respondents who were officers selected by written examination impugned the appointment of the 51 officers including the petitioners who were working as Assistant Executive Engineers or Executive Engineers in the same wing on the ground that the appointment of these 51 officers was contrary to the Recruitment Rules in that they

were appointed in contravention of the 1959 Rules or in the alternative they contended that they should be treated to have been appointed to ex-cadre posts and for this reason they were not eligible for promotion to the posts of Executive Engineers, until the respondents were first appointed to those posts. Lastly the respondents contended that they were entitled to be confirmed in preference to the petitioners. A similar writ petition was filed by three Executive Engineers (among the present respondents) alleging that their recruitment by the method of examination was in accordance with the Recruitment Rules but that the petitioners were appointed by

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mere interviews, a method not permissible under the Rules and therefore those who were appointed by interview method could neither be confirmed nor promoted unless they were brought into the cadre and appointed to the regular cadre posts.

The High Court held that the Rules of 1966 had no retrospective operation and that therefore an appointment made in contravention of the rules could not be regularised by making a rule under the proviso to Art. 309. It also held that the petitioners were appointed to temporary posts without any right to become permanent but since the temporary appointments were outside the service and against ex-cadre posts, Rule 3 of the 1959 Rules had no application and for that reason their appointments could not be said to be illegal.

While the writ petitions were being argued orders were issued on August 28, 1973 by which persons who were appointed as Assistant Executive Engineers by way of interview were deemed to have been inducted into the Engineering Service as Assistant Executive Engineers with retrospective effect from August 2, 1966 i.e. the date of induction of r. 3(d) into the 1959 Rules. Provisional seniority list was separately made for the different categories of officers. This order of August 28, 1973 was not however questioned before the High Court.

In view of the decision of the High Court the Government withdrew and cancelled the provisional inter se seniority list dated August 28, 1973 and at the same time it issued a Notification to the effect that the officers appointed by the interview method would be deemed to have been inducted into the Central Engineering Service (Roads) Class-T Service as temporary officers in the grade with effect from August 2, 1966.

On March 1, 1976 the Government issued a notification stating that it had decided to set up two services called the Central Engineering Service (Roads) Group 'A' comprising of officers appointed by the method of examination/promotion and the other Central Engineering Pool, Group 'A' comprising of officers appointed by the method of interview. Rules in respect of both the services were published and the inter-se seniority list of officers of the two services were circulated to the concerned officers.

The Central Engineering Service Rules constituted a new service called the Central Engineering Service (Roads) Group 'A' consisting of (a) persons who were holding posts in the various grades included in the Central Engineering Service (Roads) Class I immediately before the commencement of the 1959 Rules; (b) persons who were appointed to the old service on or after the date of commencement of the 1959 Rules, except those who have been appointed to the Pool Service; and (c) persons who may be appointed to the new service after the commencement of the new Rules

The Central Engineering Pool Group 'A' consisted of persons appointed to the Roads Wing by competitive examination by the method of interview through the UPSC before the commencement of the Pool Rules. A note appended to r. 3 contained a clarification that the regular tenure service of the officers in the respective grade prior to their appointment to the Pool would count for the purposes of qualifying service for promotion and confirmation in the Pool in the different grades. Rule 5 authorised Government to

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keep in abeyance certain posts and operate them as Isolated Posts outside the Pool. Promotions to higher posts in Pool were to be made on the recommendations of the Departmental Promotion Committee.

In their writ petitions the petitioners contended that though they were appointed to the posts long before the respondents they were ranked much below the latter in the list of seniority and that consequently they would be denied promotional opportunities to the higher posts, that their segregation into a separate class called the Pool is totally unscientific and was in violation of Articles 14 and 16 of the Constitution; and that the classification made between the Pool officers and Service officers is discriminatory and bore no nexus with the object sought to be achieved by it.

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HELD: 1. Out of 40 posts of Superintending Engineers the Pool officers were occupying 27 posts whereas Service officers held only 13 posts. There is a historical reason for this state of affairs. Recruitment on a very large scale was made by the interview method in 1962, 1964 and 1965 for execution of certain urgent works. Most of the petitioners had a longer standing though not in a regular cadre, and naturally they were occupying even the two posts in the isolated category which were meant for officers belonging to the regular cadre. [224D-E]

2. The so called Pool created by the 1976 Rules consisted of stagnant water. There is to be no fresh recruitment to the Pool pos(s) and, therefore, allocations to the Pool would always be shared by a definite and predictable number of officers. On the other hand, the other wing was a living and growing service to which recruitment continued to be made in subsequent years. Allocations to that wing would have to be in proportion to the total number of officers working therein but in the very nature of things there were budgetary constraints on the creation of additional posts. [224 F-G]

3. It cannot be said that persons holding similar posts and having similar responsibilities to discharge could be classified into different categories for the mere reason that some of them were recruited directly by the interview method and some were recruited directly on the result of a competitive examination. Were it permissible to make such classification, ingenuity may suggest the nature of curriculum in different years as the basis of classification. If subjection to different kinds of tests as a condition of eligibility produces qualitative difference in the ability of persons recruited to similar posts, it may perhaps become necessary to limit the promotional opportunities, in regard to the relatively higher posts to those whose abilities are remarkably higher. The Government had made no grievance that the petitioners who were appointed by the interview method were in any way inferior in ability, efficiency or educational qualifications to those who were appointed after a written competitive

examination. In the matter of experience too, the petitioners were in no way inferior to the respondents. [224H-225C]

4. Though classification which proceeds merely on the basis that certain persons were recruited after going through one test and certain others after going through another test would be unscientific, it cannot be said on the facts of the case that there could be no valid basis or justification for classifying the various officers of the Roads Wing into separate categories. The appointments

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of some of the petitioners and some of the respondents were made in violation of the Rules which were in force at the relevant time. It is in respect of that class of persons that the High Court held that they must be deemed to have been appointed to ex-cadre posts. Persons for whose appointments the necessary legal sanction was wanting, were liable to be put out of employment but in order to prevent any such harsh consequence, the High Court came to record the finding that they must be held to have been appointed to ex-cadre post. That finding must be taken to have been affirmed in these proceedings, with the result that no action would lie hereafter for a declaration or any similar relief asking that their appointments were illegal. [225G-226B]

5. The fact remains that persons who were appointed contrary to the Rules, but to ex-cadre posts, were taken initially for purposes of certain projects. Their precarious tenure was continued from time to time but that would not furnish justification for treating them on the same footing as others whose appointments were made strictly in accordance with Rules and who were appointed to posts borne on the cadre of the Central Engineering Service. A division of these two classes of officers into separate categories would remove possible injustice to those who were appointed to cadre posts in that, their promotional opportunities would not be blocked or hindered by ex-cadre officers who were recruited on a large scale to meet an urgent necessity. Such a classification would also minimise the injustice which would otherwise have been caused to those who were appointed to ex-cadre posts. [226 C-E]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 159 of 1977
(Under Article 32 of the Constitution)

AND

CIVIL APPEAL No. 1275 of 1975

Appeal by special leave from the Judgment and order dated 28-9-1973 of the Delhi High Court in Civil Writ No. 536/70.

AND

WRIT PETITION NOS. 1211 of 1977 and 3795 of 1978
(Under Article 32 of the Constitution)

Dr. Y. S. Chitale, P. H. Parekh and C. B. Singh for the Petitioners in W.P. 159/77 and appellants in C.A. 1275/75.

M. K. Ramamurthi, Janardhan Sharma and Jitendra Sharma for the Petitioners in W.P. 1211/77.

J. M. Khanna for the Petitioners in W.P. 3795/78 and RR 6, 12, 13 and 16 in the Appeal.

U. R. Lalit, E. C. Agrawala and Miss A. Subhashini for R. 1 in W.P. 159/77, 3795/78.

M. Mudgal for RR 12, 14 and 18 in W.P. 159/77.

H. B. Datar and B. P. Singh for RR 2-5 in CA 1275/75,

RR 27-
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(Chandrachud, C. J.)

30, 38-40, 42, 44, 47, 49-52 in W.P. 159/77 and R. 4 in W.P. 3795/78.

C. N. Murthy and R. Vasudevan for RR 19-21 and 24 in CA. 1275/75, RR 42, 44, 118 and 150 in WP No. 1211/77.

In person (R. 53 in W. P. 159/77).

COUNSEL FOR THE PARTIES APPEARING PURSUANT To NOTICE:

O. P. Sharma, J. M. Khanna, A. Subba Rao and B. P. Singh in Writ Petition No. 159/77.

C. N. Murthy and R. Vasudevan in W.P. No. 1211/77 and RR at
Sl. Nos. 42-44 and 115-118 of published Notice in W.P. No. 159/77.

Jitendra Sharma in W. P. No. 1211/77

The Judgment of the Court was delivered by

CHANDRACHUD, C. J.-This is a group of Writ Petitions and an Appeal involving the questions, mainly,

(i) whether the petitioners and the appellants recruited directly as Assistant Executive Engineers, Executive Engineers, Superintending Engineers and, may be, as Chief Engineers were appointed to regular cadres in the Ministry of Shipping and Transport (Roads Wing), Government of India, or whether they were appointed to ex-cadre posts; and

(ii) whether they can be put into a separate class for the purpose of regulating their seniority and promotional opportunities in relation to others who were appointed to similar posts on the basis of the result of the Combined Engineering Services Examination.

The petitioners and the appellants (whom we will refer to as the 'petitioners') were appointed after a viva voce test only, or to use the language of the current controversy, they were appointed after being successfully interviewed by the Union Public Service Commission. The latter mode of expression helps to highlight that no "examination" as such was involved in their selection and appointment as in the case of those others who now figure in the array of respondents.

Some of the respondents herein, who were then working as Assistant Executive Engineers in the Ministry of Shipping and Transport II (Roads Wing), filed a Writ Petition (C.W. 536 of 1970) in the Delhi High Court against 51 officers, including the present petitioners, who

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were working either as Assistant Executive Engineers or as Executive Engineers in the same Wing. Their contention was that the appointment of these 51 officers being contrary to the recruitment rules was illegal or alternatively, that they were appointed to ex-cadre posts and not to the 'Central Engineering Service'. It was therefore claimed that none of those officers was eligible for promotion to the post of Executive Engineer until the respondents were first appointed to those posts and that the respondents were entitled to be confirmed with immediate effect with preference to those officers immediately on the availability of permanent vacancies.

A similar Writ Petition (C.W. 537 of 1970) was filed in the Delhi High Court by three Executive Engineers, who are amongst the present respondents, contending that whereas their appointment after passing a competitive examination held by the U.P.S.C. was in accordance with the recruitment

rules, the present petitioners were appointed to ex-cadre posts after a mere interview, that such a method of recruitment was not permissible under the rules, that the petitioners herein were appointed for the limited purpose of assisting in the execution of certain projects and that those who were appointed in accordance with the rules were entitled to be treated as senior to those who were not. It was for these reasons contended that Executive Engineers who were appointed by the interview method can neither be confirmed nor promoted unless and until they were brought into the cadre and appointed to the regular cadre posts.

The Rules which are alleged to have been breached by the appointment of the petitioners were made by the President under the proviso to article 309 of the Constitution. They were notified on October 16, 1959 and were called 'the Central Engineering Service (Roads) of the Ministry of Transport and Communication . Department of Transport (Roads Wing), Class T, Recruitment Rules, 1959'. The Rules, evidently, did not provide for appointment to the Central Engineering Service after a mere interview of a candidate by the Union Public Service Commission. But they were amended by a notification dated August 2 1966 issued by the President under the proviso to article 309 of the Constitution. By the amendment, clause (d) was added to rule 3 as a result of which appointments could be made to the Central Engineering Service by direct recruitment through the Commission in accordance with Part VI of the Rules. Part VI of the amended Rules called 'Direct recruitment by selection through the Commission provided that in special circumstances direct recruitment by selection of suitable candidates, with such qualifications, with in such age limits, and satisfying such other conditions as are considered necessary at any time in the interest of the service,

to the posts mentioned in Appendix IV, shall be made by the Commission by open advertisement notwithstanding anything contained in the rules. Certain other consequential amendments were made to the 1959 Rules by the 1966 Amendment.

The question which arose for decision of the Delhi High Court in the two writ petitions was whether the appointments of the petitioners herein, who were appointed prior to August 2, 1966 were illegal and if not, whether they were appointed to cadre posts or ex-cadre posts. on behalf of the Government of India a counter affidavit was filed in the High Court by Shri Harbans Singh, Under Secretary in the Ministry of Transport (Roads Wing), denying that the petitioners were appointed to ex-cadre posts or that they were treated by the Ministry as being outside the regular cadre of Engineering Service. Counsel for the Union of India submitted in the High Court that all posts of junior Class-I Assistant Engineers Consultant (as the Assistant Executive Engineers were then called) created in the Ministry of Transport, Roads Wing, were posts in the service properly so-called whether the appointments were made on a permanent basis or temporary basis. Counsel for some of the petitioners contended in the High Court that the amendment made in 1966 to the 1959 Rules was retrospective and therefore the appointments of the petitioners could be considered to have been made in accordance with the rules to the posts borne on the cadre of the Engineering Service.

The Delhi High Court was faced with a problem of priorities. If it were to accept the Government of India's contention that the petitioners were appointed to cadre posts, their appointments might have been required to be

treated as illegal since appointments to posts borne in the cadre could not be made by the interview method under the 1959 Rules. Any finding or indication to such effect would have paved the way for a challenge to the very legality of the petitioners' appointments and eventually to their exit from the Engineering Department altogether. On the other hand, accepting the respondents' contention that all of them had to be confirmed and promoted in preference to the petitioners would, while legalising the petitioner's appointments? virtually amount to denial of promotions to them in higher posts.

By its judgment dated September 28, 1973 a Division Bench of the Delhi High Court held that the Rules of 1966 had no retrospective operation. Relying upon a decision of this Court in R. N. Nanjundappa v. T. Thimmaiah and Anr. the High Court further held

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that in any case, an illegal appointment could not be regularised by making a rule under the proviso to Article 309 of the Constitution. But in order to save the petitioners' appointments from the challenge of illegality, the High Court rejected the Government's contention that they were appointed to cadre posts in the Central Engineering Service. It held that the petitioners were appointed to temporary posts without any right to become permanent, for the purposes of projects like the International Development Association Loan Programme, Emergency Road and Bridge Works Programme and Lateral Road Project and Strategic Roads Work. Since the temporary appointments of the petitioners were outside the service and against ex-cadre posts, rule 3 of the 1959 Rules was regarded as having no application and therefore, the petitioners' appointments could not in any way be said to be illegal. The High Court relied upon a decision of this Court in Champaklal Chimanlal Shah v. The Union of India and held that the Government has to employ temporary servants to satisfy the needs of urgent contingencies and such appointments are perfectly legitimate. So long as such temporary servants work against ex-cadre posts and are even promoted to higher ex-cadre posts, no member of the Service, according to the High Court, could have a justifiable grievance.

While the writ petitions were being argued in the High Court, orders expressed in the name of the President were issued on August 28, 1973 by which persons appointed as Assistant Executive Engineers on the basis of interviews held by the U.P.S.C. were to be 'deemed to have been inducted' into the Engineering Service as Assistant Executive Engineers with effect from August 2, 1966. On the same date, provisional joint-seniority lists were issued separately for different categories of Class I Technical Gazetted officers in the Roads Wing of The Ministry and representations from the concerned officers were invited within a period of one month. The parties requested the High Court to dispose of the writ petitions without taking into consideration the effect and legality of the Presidential order dated August 28, 1973 and the provisional seniority lists circulated on that date. Accordingly, the High Court did not pronounce upon the same.

In C.W. 536 of 1970 filed by 4 Assistant Executive Engineers who were appointed by competitive examination, against 4 Executive Engineers and 47 Assistant Executive Engineers who were appointed by the interview method, the High Court passed the following order: -

"To summarise the position, it may be stated that

respondents 2 to 52 were not appointed to the Service or to

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any posts borne on the cadre of the Service. Their appointments were to ex-cadre posts and outside the Service and those appointments were valid. The orders by which respondents 2 to 6 were promoted as Executive Engineers are not liable to be quashed as it could not be shown that the promotions were made to the posts borne on the cadre of the Service or that as a result of those promotions the respondents came to be appointed to the Service. Their initial appointments as well as promotions have been outside the service and not to any posts borne on the cadre of the Service. There is also no question of giving any directions for not promoting any of the respondents to the posts of Executive Engineers so long as the promotions are not to posts borne on the cadre of the Service. As respondents 2 to 52 were not appointed to the Service or to any posts borne on the cadre of the Service, the only relief to which the petitioners are entitled is that the Union of India shall not, so long as the said respondents are not legally appointed to the Service or to any posts borne on the cadre of the Service, treat them as having been appointed to the Service or promote them to any posts that may be included in the cadre of the Service."

C.W. 537 of 1970 was filed by 3 Executive Engineers against 1(3 Executive Engineers, 2 of whom were promoted as Superintending Engineers. All the three petitioners in that writ petition were appointed by competitive examination, two in 1957 and one in 1958, that is to say, before the making of the 1959 Rules. Respondents 2 to 11 to that writ petition were appointed by the interview method. The question whether the petitioners in that writ petition, having been appointed prior to 1959 Rules, could be deemed to have been appointed to the regular cadre of the Central Engineering Service was not considered by the High Court since the legality of their appointment was not in issue. While dismissing the writ petition the High Court held.

"As respondents 2 to 11 were not appointed to the service and no posts have so far been declared to be posts borne on the cadre of the Service it follows that they are holders of ex-cadre posts outside the Service. The promotion of any one of them to the higher post of Planning officer or Superintending Engineer cannot legally be objected to by the petitioners. Even if somehow the petitioners can be regarded to have been

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appointed to the Service, as was asserted on their behalf, still respondents 2 to 11 having been directly selected as Executive Engineers against ex-cadre posts can in their turn aspire for promotion to higher ex-cadre posts.. .. The appointments of respondents 2 to 11 to ex-cadre posts, were in no way invalid."

In both the writ petitions the High Court made a significant observation, to which events leading to the present proceedings may perhaps be traced, that if it was desired by the Government of India, that persons who were appointed against ex-cadre posts should also become members of the regular Service, the service shall have to be reconstituted by providing, amongst other matters, for the initial constitution of the Service, future recruitment and determination of inter se seniority.

On May 31, 1974 the Government of India in the Ministry of Shipping and Transport (Roads Wing) issued a Memorandum saying that in view of the judgments of the High Court in the two writ petitions, the provisional inter se Seniority Lists dated August 28, 1973 of all Class I Technical Gazetted officers appointed to the various grades in the Roads Wing were being withdrawn and cancelled.

On the same date, that is, on May 31, 1974 the President issued a Memorandum in each individual case cancelling the orders issued under an earlier Memorandum dated August 28, 1973. By the latter Memorandum orders were issued in each individual case that officers appointed by the interview method will be deemed to have been inducted into Central Engineering Service (Roads) Class I Service as temporary officers in the particular grade with effect from August 2, 1966 being the date on which the 1959 Rules were amended so as to provide for appointment by the interview method. The Memorandum of May 31, 1974 contains a recital to the effect that it had become necessary to issue it in view of the judgment of the Delhi High Court in Writ Petition No. 536 of 1970 holding that the Assistant Executive Engineers could not be treated as having been appointed to any post borne on the cadre of the Central Engineering Service.

On March 1, 1976 the Government of India issued a Notification saying that having regard to the judgments of the High Court in Civil Writ Petitions 536 and 537 of 1970, the Government after a most careful consideration had decided to set up 2 Services for Technical Class I officers of the Roads Wing, one to be called the Central Engineering Service (Roads), Group A, comprising of officers appointed by the method of examination/promotion, and the other, to be called the

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Central Engineering Pool, Group A, comprising of officers appointed by the method of interview. The recruitment Rules for the two Services were published in the issue of the Gazette of India, dated February 28, 1976. Two Lists, one showing the names of officers appointed to the two Services on the date of the commencement of the new Rules and the other showing the inter se seniority of the officers of the two Services, were circulated to the officers concerned with a request to bring to the notice of the Government any factual errors or omissions and to submit representations, if so advised, against the proposed Seniority Lists within one month.

We will notice the relevant rules before proceeding to consider the validity of the petitioners' contentions.

On October 16, 1959, the President in the exercise of powers conferred by the proviso to article 309 of the Constitution made rules called 'the Central Engineering Service (Roads) of the Ministry of Transport & Communications, Department of Transport (Roads Wing) Class I, Recruitment Rules, 1959'. At the time of promulgation of these Rules, Assistant Executive Engineers used to be called Assistant V Engineers Consultant and Executive Engineers as Divisional Engineers Consultant. Part II of the Rules containing rules 3 to 5 dealt with the method of recruitment to the Central Engineering Service (Roads). Rule 3 provided that Recruitment to the Service shall be made by any of the following three methods: (a) By competitive examination in accordance with Part III of the Rules; (b) by promotion in accordance with Part IV of the Rules; and (c) by transfer of an officer in Government service in accordance with Part V of the Rules. Rule 4 (b) provided that no appointment shall be made to the Service or to any post borne on the cadre of

the Service by any method not specified in rule 3. By rule 4(c) Government was given the power to determine, subject to the provisions of sub-rule (3), the methods of recruitment to be employed for the purpose of filling any particular vacancy in the Service or such vacancies therein as may be required to be filled during any particular period and the number of candidates to be recruited by such method. Rule 4(d) provided for reservation in the ratio of 2/3: 1/3 to Assistant Engineers Consultant and Assistant Engineers, Grade I (Class II) respectively in the matter of promotion to or for selection for the post of Divisional Engineer Consultant. Rule 4(d) contained an important qualification to the effect that if sufficient number of suitable candidates were not available for promotion from the grade of Assistant Engineer Consultant and Assistant Engineer Grade I to the grade of Divisional Engineer Consultant, the remaining vacancies in the grade of Divisional Engineer Consultant were to be filled by transfer in accordance with Part V of the Rules.

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Part III of the Rules containing rules 6 to 18 dealt with recruitment to the Service by competitive examination. Part IV containing rule 19 dealt with recruitment by promotion to the grade of Divisional Engineer Consultant, Class I. Sub-rule (2) of rule 19 provided that if sufficient number of officers were not available to fill the quota of either of the two categories mentioned in rule 19 (1) (i) the remaining vacancies in each category were to be filled either in accordance with Part V of the Rules or through the Commission.

Part V of the Rules which dealt with recruitment by transfer of an officer in Government service provided that the Government may, in special cases and after consulting the Commission where such consultation was necessary under the Union Public Service Commission (Exemption from Consultation) Regulations, transfer or take on deputation an officer in Government service in India to a post borne on the cadre of the Service.

On August 2, 1966 the Rules of 1959 were amended in exercise of powers conferred by the proviso to article 309 of the Constitution. The first significant amendment made in 1966 was the addition of clause (d) to rule 3 of the 1959 Rules. By that clause an additional method of recruitment was provided, namely, 'By direct recruitment through the Commission in accordance with Part VI' of the Rules. Consequential amendments were made to clauses (c) and (d) of rule 4 of the 1959 Rules. By rule 4 of the Amendment Rules, the concluding words "or through the Commission" of rule 19(2) of the 1959 rules were omitted. Lastly, a new part, Part VI, was added to the 1959 Rules under the heading "Direct recruitment by selection through the Commission". The newly added Part VI provided that-

In special circumstances, direct recruitment by selection of suitable candidates, with such qualifications, within such age limits, and satisfying such other conditions as are considered necessary at any time in the interest of the service, to the posts mentioned in Appendix IV, shall be made by the Commission by open advertisement notwithstanding anything contained in these rules.

The Central Engineering Pool Group 'A' of the Ministry of Shipping and Transport (Roads Wing) Rules, 1976 and the Central Engineering Service (Roads) Group 'A' of the Ministry of Shipping and Transport (Roads Wing) Rules, 1976 made under the proviso to article 309 of the Constitution

were notified on February 24, 1976. We will refer to the former as the 'Pool Rules' and to the latter as the 'CES Rules'.

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Turning first to the Pool Rules, rule 2(a) defines "Pool" as the "Central Engineering Pool, Group 'A', constituted under rule 3". Rule '(e) provides that "Regular continuous Service" means service rendered on a continuous basis after regular appointment to a grade on the recommendations of the Departmental Promotion Committee, or in consultation with the Commission, as the case may be.

Part II of the Pool Rules which deals with the constitution of the Central Engineering Service Group 'A' provides that there shall be constituted a pool, to be known as the "Central Engineering Pool Group 'A' ", consisting of persons appointed to the Roads Wing by the competitive selections by the method of interview through the Commission before the commencement of the Pool rules. The note appended to rule 3 contains a clarification to the effect that the regular continuous service of the officers in the respective grade in the Ministry of Shipping and Transport (Roads Wing) prior to their appointment to the Pool will count for the purposes of qualifying service for promotion and confirmation in the Pool in the grade of Assistant Executive Engineers, Executive Engineers, Superintending Engineers and, Chief Engineers (Level I and Level II posts). By rule 5, the authorised strength of the various grades of posts in the pool shall be such as may be determined and notified by the Government from time to time, provided that the Government may, for reasons to be recorded in writing and in consultation with the Commission, keep in abeyance such number of posts in such grades as are included in the table below rule 4 and operate them as "isolated posts" outside the Pool. Appointments to the "isolated posts" are to be made by selection- or promotion, as the case may be, on the recommendation of a duly constituted Departmental Promotion Committee, from an integrated list of officers working in the next lower grade in the Pool and in the Central Engineering Service (Roads), Group 'A'. The list is to be drawn up on the basis of the length of their regular continuous service in their respective grades. The qualifying service for promotion is the same as laid down in Part III. By rule 6, recruitment to the grades of Executive Engineer, Superintending Engineer and Chief Engineer (Level II and Level I) in the Pool shall be made by promotion in accordance with Part III, provided that a vacancy in these grades, whenever it occurs, shall first be filled by transfer of an officer of the Pool holding a corresponding post in the "isolated category of posts" in accordance with the proviso to rule 5.

Part III of the Pool Rules deals with recruitment by promotion to the grades of Executive Engineer, Superintending Engineer and Chief

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Engineer. These promotions are required to be made on the recommendations of the Departmental Promotion Committee

The CES Rules contain provisions governing appointments to the Central Engineering Service as contrasted with appointments to the posts in the Pool. By rule 3 of the CES Rules a new Service called the "Central Engineering Service (Roads), Group 'A' " is constituted of (a) persons who were holding posts in the various grades included in the Central Engineering Service (Roads) Class I immediately before the commencement of the 1959 Rules, (b) persons who were appointed to the old Service on or after the date of

commencement of the 1959 Rules, except those who have been appointed to the Pool Service and (c) persons who may be appointed to the new Service after the commencement of the new Rules. Rule 3 (3) contains a proviso regarding isolated posts which is similar to the proviso to rule 5 of the Pool Rules. By rule 3 (4), recruitment to the Service after the initial constitution thereof has to be made either by competitive examination or by promotion or by selection or by transfer or deputation of an officer in Government service or by direct recruitment through the Commission. The proviso to this sub-rule says that a vacancy in the grades of Executive Engineer, Superintending Engineer and Chief Engineer (Level II and Level I), whenever it occurs, shall first be filled by the appointment of an officer of the Service holding a corresponding post in the "isolated category of posts" in accordance with the proviso to sub-rule (3).

The validity of these rules is assailed before us in these Writ Petitions and the Appeal. The main grievance of the petitioners is that though they were appointed to their posts long before the contesting respondents, they will rank much below the latter in the list of seniority and will consequently be denied promotional opportunities to the higher posts. It is contended on behalf of the petitioners that their segregation into a separate class called the Pool is totally unscientific and is in violation of the provisions of articles 14 and 16 of the Constitution. The petitioners made no grievance against the creation of the category of 'isolated posts' but their contention is that the classification made between the Pool officers and the Service officers is discriminatory and bears nexus with the object to be achieved by it. If the object of the classification is to ensure higher efficiency in the Central Engineering Service, it is contended that the petitioners, who have rendered meritorious service for the past many years and for longer periods than the contesting respondents, cannot be put into a separate class thereby denying to them an equal opportunity for promotion to higher posts along with those junior officers who are put into the class of Service

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Officers. Shri Chitale, who led the argument on behalf of the petitioners, demonstrated to us by a comparative examination of the allocation of posts made by the Government to the two categories in the exercise of the power conferred upon it by the 1976 Rules, that whereas, 15 posts of Superintending Engineers are available for 19 Executive Engineers in the Service Class, in so far as the Pool officers are concerned only 17 posts in the grade of Superintending Engineer have been allocated for as many as 69 Executive Engineers. Out of 15 posts of Superintending Engineers available for the Service category, 13 are put in the Service class and 2 in the isolated category. Out of 17 posts of Superintending Engineers available for Pool officers, 8 are put in the Pool and 9 in the isolated category. This broadly is the grievance of the petitioners.

As against this, Shri Lalit appearing on behalf of the Union of India contends that the judgment rendered by the Delhi High Court in the two writ petitions left no option to the Government save to classify the petitioners in a separate category. Counsel says that in spite of the contention of the Government that the petitioners were appointed to cadre posts in the regular Service, the Delhi High Court held in the writ petitions that petitioners were appointed to ex-cadre posts and that if their appointments

were to be treated as having been made to cadre posts, the appointments would be illegal, being in contravention of the rules then in force. The High Court having held that the petitioners were appointed to ex-cadre posts, there is a valid basis for classifying the petitioners in a separate category qua others whose appointments were made in accordance with the rules. It is denied on behalf of the Government that any substantial prejudice is likely to result to the petitioners on account of the classification made by the 1976 Rules. In fact, Shri Lalit urged as one of his strongest points that granting everything in favour of the petitioners, the classification did not bring about such hostile discrimination against the petitioners that this Court should take notice of it. It is argued that it is not the 1976 Rules which have created two distinct classes but such classes existed independently of the rules, by reason of the fact that persons like the petitioners were appointed contrary to the rules while the contesting respondents were appointed in conformity with the rules. There is no obligation on the Government, it is contended, to integrate two distinct and different classes of employees in order to bring about equality between them.

Shri H. B. Datar appearing for some of the contesting respondents supported the arguments advanced on behalf of the Government of India and contended that since the appointments of the petitioners who

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were appointed by the interview method were at any rate under a cloud the Government was driven to classify them separately in order to protect their tenure which was essentially precarious and insecure. The object of classifying the petitioners separately, far from being to subject them to hostile discrimination, is to confer upon them a status which could easily and justifiably be denied to them. The Government, according to Shri Datar, has been more than fair to the petitioners firstly, by condoning the illegality which had crept into their appointments and secondly, by allocating to them a sufficient number of posts of promotion. No grievance could be made by the petitioners that the Government is generous but not generous enough.

We are not disposed to accept Shri Chitale's contention in its entirety that any great prejudice has been occasioned to the petitioners as a result of the classification made by the 1976 Rules. Out of 4 posts of Superintending Engineers, the Pool officers are occupying 27 whereas the Service officers hold 13 only. The break-up is as follows. Out of these 40, 19 are placed in the isolated category. These 19 posts and 8 posts of Superintending Engineers in the Pool are occupied by the Pool officers. There is a historic reason for this state of affairs. Recruitment on a very large scale was made by the interview method in 1962, 1964 and 1965 for the execution of the International Development Association programme, Emergency road and bridge works programme, Lateral Road Project and Strategic Road works in Gujarat and Rajasthan. Most of the petitioners have a longer standing, though not in the regular cadre, and naturally they are occupying even the two posts in the isolated category which are meant for officers belonging to the regular cadre.

It is also necessary to remember, while assessing the strength of the petitioners' grievance of hostile discrimination that the so called Pool created by the 1976 Rules consists of stagnant water. There is going to be no fresh recruitment to the Pool posts and therefore, allocations to the Pool will always be shared by a definite

and predictable number of officers. On the other hand, the other wing is a living and growing service to which recruitment will continue to be made in years to come. Allocations to that wing will of course have to be in proportion to the total number of officers working therein but in the very nature of things there are budgetary constraints on the creation of additional posts.

Even though this is so, we are unable to accept the contention that persons holding similar posts and having similar responsibilities to discharge can be classified into different categories for the mere reason that some of them were recruited directly by the interview method and some were recruited directly on the result of a com-

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petitive examination. Were it permissible to make such classifications, ingenuity may suggest the nature of curriculum in different years as the basis of classification. If subjection to different kinds of tests as a condition of eligibility produces qualitative difference in the ability of persons recruited to similar posts, it may perhaps become necessary to limit the promotional opportunities, in regard to the relatively higher posts, to those whose abilities are remarkably higher. But, it is nobody's case and the Government has made no grievance that the petitioners who were appointed by the interview method are in any way inferior in ability, efficiency or educational qualifications to those who were appointed after a written competitive examination. In the matter of experience too, the petitioners are in no way inferior to the contesting respondents.

Both the sides urged, though for different reasons, that at least some of the Executive Engineers can be justifiably treated differently. On behalf of the Government Shri Lalit urged that 10 out of 69 Executive Engineers from the 1962 batch were parties to the Delhi High Court judgment in Writ Petition 536 of 1970 (out of which Civil Appeal 1275 of 1975 arises). The Delhi High Court having held that their appointments are to ex-cadre posts, no grievance, it is urged, can be made by them at any rate, if they are treated differently. On the other hand, Shri Chitale contended that the appointment of those Executive Engineers was in accordance with rule 19(2) of the 1959 Rules since they were appointed because no one was available from the Department for being promoted as Executive Engineer.

We do not want to add to the confusion in which these matters, like most of the service matters abound, by putting our seal of approval on a sub-classification amongst Executive Engineers depending on whether their appointments were within or without the scope of rule 19(2). It is in the interest of all concerned to evolve a uniform pattern which will, in so far as is reasonably possible, cause injustice to none.

Though classification which proceeds merely on the basis that G: certain persons were recruited after going through one test and certain others after going through another test would be unscientific, it cannot be said on the facts of the instant case that there can be no valid basis or justification for classifying the various officers of the Roads Wing into separate categories. As we have stated earlier, the appointments of some of the petitioners and some of the respondents were made in violation of the rules which were in force at the relevant time. It is in respect of that class of person that the Delhi High

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Court was driven to hold that they must be deemed to have

been appointed to ex-cadre posts. Persons for whose appointments the necessary legal sanction was wanting, were liable to be put out of employment but in order to prevent any such harsh consequence, the Delhi High Court came to record the finding that they must be held to have been appointed to ex-cadre posts. That finding must be taken to have been affirmed in these proceedings, with the result that no action will lie hereafter for a declaration or any similar relief asking that their appointments are illegal.

But, the fact remains that persons who were appointed contrary to the rules but to ex-cadre posts were taken initially for purposes of certain projects to which we have already referred. Their precarious tenure was continued from time to time but that will not furnish justification for treating them on the same footing as others whose appointments were made strictly in accordance with the rules and who were appointed to posts borne on the cadre of the Central Engineering Service. A division of these two classes of officers into separate categories will remove possible injustice to those who were appointed to cadre posts in that, their promotional opportunities will not be blocked or hindered by ex-cadre officers who were recruited on a large scale to meet an urgent necessity. Such a classification will also minimise the injustice which would otherwise have been caused to those who were appointed to ex-cadre posts.

Taking all relevant aspects of the matter into consideration we propose to pass the following order which, it must be stated, was discussed by us quite at some length with all the learned counsel appearing in the case. In fairness to them we must say that the order which we propose to pass does not proceed from their consent though they have helped to shape it.

- (1) All persons appointed in accordance with any of the modes of appointment prescribed by rule 3 or rule 19(2) of the 1959 Rules must be taken to have been appointed to the regular cadre of the Central Engineering Service. It will not be permissible to classify them separately as 'pool' officers or other wise.
- (2) Those whose appointments are not in accordance with any of the modes of appointment prescribed by rule 3 or rule 19(2) of the 1959 Rules, shall be taken to have been appointed to ex-cadre

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posts. Such persons may be classified into a separate category from those referred to in clause (1) above

- (3) The Central Government will scrutinise the cases of all persons involved in the present proceedings, who have been placed in the 'pool'. The Government shall, upon such scrutiny, decide whether the appointment in each particular case was made in conformity with rule 3 or rule 19(2) of the 1959 Rules. All persons concerned may, if they so desire, submit their representations to the authorities concerned before 1st October, 1979. On consideration of the representations and upon examination of the relevant material, the Central Government shall make a declaration before 1st January, 1980 whether any and which appointment was in accordance with rule 3 or rule 19(2) of the 1959 Rules

and which was against the same. The classification of the officers concerned under clauses (1) and (2) above will depend upon and be governed by the declaration to be made by the Government.

- (4) Cases of all persons, who according to the declaration to be made by the Government are wrongly placed in the 'pool', shall be reviewed by the Government or by the appropriate authority as the case may be. However, all promotions made prior to 31-5-1974 will remain undisturbed. Promotions made after that date shall be reviewed by the appropriate authority, as expeditiously as possible, in the light of the declarations made by the Government so as to give to such officers the promotions which are due to them.

This order takes note of the grievance of those persons also who have been placed in the 'pool' but who contend that they have been wrongly included therein, since their appointments were in accordance with the 1959 Rules as they stood at the time of their recruitment.

The Writ Petitions and the Appeal shall stand disposed of in, terms of this order. There will be no order as to costs.

N.V.K.

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