

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1312 OF 2005

Ashok Pal Singh & Ors.

..... Appellants

Vs.

UP Judicial Services Association & Ors.

..... Respondents

With

Civil Appeal No. 1313 of 2005

And

CA 7927/2010 (@ SLP(C) No. 11476/2005)

J U D G M E N T

R. V. RAVEENDRAN J.

Leave granted in SLP (C) No.11476 of 2005. These appeals arise out of yet another round of litigation in the dispute between direct recruits and promotees in the Uttar Pradesh Higher Judicial Service, having its genesis in two decisions of this Court in the earlier rounds.

2. The recruitment and appointment to the Uttar Pradesh Higher Judicial Service consisting of a single cadre comprising the posts of District and Sessions Judges and Additional District and Sessions Judges are governed and regulated by the U.P. Higher Judicial Services Rules, 1975, ('Rules' for short) framed under Article 309 read with Article 233 of the Constitution of India. The said Rules were amended by the UP Higher Judicial Services (Fourth Amendment) Rules, 1996, with effect from 15.3.1996. For convenience, the Rules before amendment will be referred to as the 'Unamended Rules' and the Rules after the 1996 amendment will be referred to as the 'Amended Rules'. As we are concerned with the recruitments for the years 1988, 1990, 1992-1994 and 1998-2000, it may be necessary to refer to the unamended Rules in regard to the recruitments relating to 1988, 1990 and 1992-1994, and the amended rules with reference to the 1998-2000 recruitment. Rules 5, 6, 8, 20, 22 and 26 are relevant and they are extracted below :

"5. Source of recruitment - The recruitment to the Service shall be made -

(a) by direct recruitment of pleaders and advocate of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published :

(b) by promotion of confirmed members of the Uttar Pradesh Nyayik Sewa (hereinafter referred to as the Nyayik Sewa, who have put in not less than seven years service to be computed on the first day of January next following the year in which the notice inviting applications is published:

Provided that for so long as suitable officers are available from out of the dying cadre of the Judicial Magistrate, confirmed officers who have put in not less than seven years service to be computed as aforesaid shall be eligible for appointment as Additional Sessions Judges in the Service.

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6. Quota - Subject to the provisions of rule 8, the quota for various source of recruitment shall be-

(i)	Direct recruitment from the Bar	: 15%	} of the
(ii)	Uttar Pradesh Nyayik Sewa	: 70%	
vacancies.			
(iii)	Uttar Pradesh Judicial Officers Service (Judicial Magistrates)	: 15%	

Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one:

Provided further that when the strength in the cadre of the Judicial Magistrate gradually gets depleted or is completely exhausted and suitable candidates are not available in requisite numbers or no candidate remains available at all, the shortfall in the number of vacancies required to be filled from amongst Judicial Magistrates and in the long run all the vacancies, shall be filled by promotion from amongst the members of the Nyayik Sewa and their quota shall, in due course, become 85 per cent.

8. Number of appointments to be made - (1) The Court, shall, from time to time, but not later than three years from the last recruitment, fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years.

Note : The limitation of three years mentioned in this sub-rule shall not apply to the first recruitment held after the enforcement of these rules.

(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa:

Provided that the number of vacancies filled in as aforesaid under this sub rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly; so, however, that the percentage of direct recruits in the Service does not in any case exceed 15 per cent of the total **permanent** strength of the service.

Provided further that all the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date, if and when they are converted into permanent posts, shall be filled by promotion from amongst the members of the Nyayik Sewa; and only the remaining vacancies shall be shared between the three sources under these rules;

Provided also that the number of vacancies equal to 15 per cent of the vacancies referred to in the last preceding proviso shall be worked out for being allocated in future to the Judicial magistrates in addition to their quota of 15 per cent prescribed in rule 6, and thereupon, future recruitment (after the promotion from amongst the members of the Nyayik Sewa against vacancies referred to in the last preceding proviso) shall be so arranged that for so long as the additional 15 per cent vacancies worked out as above have not been filled up from out of the Judicial magistrates, the allocation of vacancies shall be as follows :

- (i) 15% by direct recruitment.
- (ii) 30% from out of the Judicial Magistrates;
- (iii) 55% from out of the members of the Nyayik Sewa

[Note : The first proviso to sub-Rule (2) of Rule 8 was amended by the Amendment Rules of 1996 omitting the crucial word "permanent" when referring to "15% of the total permanent strength of the service". The first proviso as amended, reads thus :

Provided that the number of vacancies filled in as aforesaid under this sub rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly; so, however, that the percentage of direct recruits in the Service does not in any case exceed 15 per cent of the total strength of the service.]

20. Promotion of members of Nyayik Sewa :

(1) Recruitment by promotion of the members of the Nyayik Sewa shall be made by selection on the principle of seniority-cum-merit.

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(4) The Selection Committee shall forward the list of the candidates chosen at the preliminary selection to the Chief Justice along with the names of the officers who, if any, in the opinion of the Committee have been passed over for promotion to the service.

(5) The Court shall examine the recommendations of the Selection Committee and make a final selection for promotion and prepare a list in order of seniority of the candidates who are considered fit for promotion and forward the same to the Governor.

The list shall remain operative only till the next recruitment.

22. Appointment- (1) Subject to the provisions of sub-rules (2) and (3), the Governor shall on receipt from the Court of the list mentioned in Rules 18, 20, and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates from the lists in the order in which they stand in the respective lists.

(2) Appointments to the service shall be made on the rotational system, the first vacancy shall be filled from the list of officers of the Nyayik Sewa, the second vacancy shall be filled from the list of direct recruits (and so on), the remaining vacancies shall thereafter be filled by promotion from the list of the officers of the Nyayik Sewa.

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrates, appointments to the service shall be made in such a way that the second fifth and eighth (and so on), vacancy shall be filled from the list of Judicial Magistrates.

(3) Appointment for temporary vacancies or in officiating capacity shall be made by the Governor in consultation with the Court from amongst the members of the Nyayik Sewa.

Provided that for so long as suitable officers are available from the cadre of the Judicial magistrate, appointments on temporary vacancies or in officiating capacity shall be made in consultation with the Court from amongst the Judicial Magistrate according to the quota fixed for that source under these rules:

Provided further that for so long as such members of the Judicial Service as are considered suitable for appointments on temporary vacancies or in officiating capacity, are not available in sufficient number, the Governor in consultation with the Court may fill in not more than 50 per cent of such vacancies from amongst the officers of the cadre of Judicial Magistrates.

(4) The appointments shall be made on rotational system, the first vacancy shall be filled from the list of officers of the Nyayik Sewa, the second vacancy shall be filled from the list of Judicial Magistrates (and so on).

[Note : Sub-Rule (3) and its two provisos of Rule 22 were substituted by the following by the Amendment Rules of 1996 :

(3) In the eventuality of delay in making appointment under sub-rule (1) and further if exigency of service so requires, the Governor may, in consultation with the Court, make short term appointment as a stop-gap arrangement from amongst the members of Nyayik Sewa in the vacancy in these services within the quota fixed by the Court till the appointments are made under sub- rules (1) and (2) :

Provided that the period of service spent by the member of Nyayik Sewa on short term appointment to the service as a stop-gap arrangement shall not be computed for seniority under Rule 26.]

26. Seniority – (1) Except as provided in sub-rule (1), seniority of members of the service shall be determined as follows :

(a) Seniority of the officers-promoted from the Nyayik Sewa vis-à-vis the officers recruited from the Bar shall be determined from the date of continuous officiation in the service in the case of promoted officers and from the date of their joining the service in the case of direct recruits. Where the date of continuous officiation in the case of an officer promoted from the Nyayik Sewa and the date of joining the service in the case of a direct recruit is the same, the promoted officer shall be treated as senior

Provided that in the case of a promoted officer the maximum period of continuous officiation in the service shall not, for the purpose of determining seniority exceed three years immediately preceding the date of confirmation;

Provided that where any officer is not found fit for confirmation and is not confirmed in his turn, the officiating period or the probationary period, as the case may be, prior to the date of decision taken by the High Court in this behalf shall not be taken into account for purposes of computing the

period of continuous officiation or for purposes of working out the date of joining of the service, as the case may be;

(b) Seniority inter se of the officers appointed from out of the Judicial Magistrates shall be determined from the date of continuous officiation, provided that in the case of officers appointed on the basis of one selection, their seniority shall be determined according to their seniority in the Uttar Pradesh Judicial Officers Service:

Provided further that where an officer is not found fit for confirmation and is not confirmed in his turn, the officiating period prior to the date of decision taken by the High Court in this behalf shall not be taken into account for computing the period of continuous officiation.

(2) Seniority of members of the service who have been confirmed in the service prior to the commencement of these rules shall be as has been determined by the order of Government as amended from time to time.

[Note : Rule 26 of 1975 Rules was substituted in entirety by the following by the Amendment Rules of 1996 :

26. Seniority - (1) *Seniority of the officers appointed in the service shall be determined in accordance with the order of appointment in the Service under sub-rules (1) and (2) of Rule 22 of these rules.*

(2) *Seniority of members of the service who have been confirmed in the service prior to the commencement of these rules shall be as has been determined by the order of the Government as amended from time to time.]*

3. The dispute between the promotees and direct recruits in regard to their *inter-se* seniority in the Uttar Pradesh Higher Judicial Services came up before this Court at the instance of promotees in *P.K. Dixit vs. State of Uttar Pradesh* – 1987 (4) SCC 621. This Court allowed the petitions and directed preparation of fresh seniority list in accordance with the following directions:

“(i) So far as the posts available on a particular dated i.e. May 10, 1974 are concerned the High Court will have to look into the matter afresh and decide the seniority in the light of the above position. But after the 1975 Rules came into force, the appointments to the Higher Judicial Service either on the basis of direct recruitment or on the basis of promotion must have been in accordance with these rules and it is expected that the probation, confirmation and seniority must have been looked into by the High Court strictly in accordance with these Rules.

(ii) Under Rule 22(3) appointment to temporary vacancies shall be made only from the Nyayik Sewa and as and when a substantive vacancy arises and the procedure for selection is to be followed, the officers who were appointed to fill in the temporary posts should be considered first and appointed on probation, if found fit. When appointment under Rule 22 is contemplated in the service of substantive vacancies, it may be both temporary or permanent but the vacancy must be in the cadre. A person could only be confirmed when a permanent post is available for him.

(iii) If a person is appointed to officiate in the Higher Judicial Service his case for confirmation normally will be considered within three years and either he will be confirmed or will be reverted. The High Court must examine the case of a promotee officer within three years and decide whether the officer deserves to be confirmed or deserves to be reverted. It is with this view that Rule 23 provides that period of probation shall not ordinarily exceed three years and Rule 26 provides that in case of promotee officer's continuous officiation even if it is for more than three years, only three years will be counted for purpose of seniority. This itself contemplates that such an occasion shall not arise when a person may be officiating for more than three years and still his case has not been considered for confirmation.”

4. Pursuant to the judgment in *P.K. Dixit*, the High Court issued a tentative seniority list on 11.2.1988 and objections were invited. The promotees were satisfied that the said list was drawn in conformity with the judgment in *P.K.Dixit* and unobjectionable. The High Court constituted a Five-Judge Committee to finalise the list. On the basis of the report of the committee, final seniority list was issued on 25.8.1988. Aggrieved by the

final seniority list, the promotees (O.P. Garg and four others) filed a writ petition. The petitioners *P.K. Dixit* filed an application in the said petition seeking clarification and supporting the case of the promotees. The direct recruits filed a writ petition challenging the final seniority list issued by the High Court. Both sides contended, for different reasons, that the final seniority list dated 25.8.1988 was contrary to the decision in *P.K. Dixit*. This court found that the High Court, the direct recruits and promotees were interpreting the directions and observations in *P.K. Dixit* differently. Therefore this court in its judgment dated 23.4.1991, reported in *O.P. Garg v. State of U.P. & Ors. - 1991 (Supp) 2 SCC 51*, decided to take a fresh look into the matter in regard to aspects which were not dealt with and decided by *P.K. Dixit*. This court, therefore, posed the following three questions for consideration :

1. What is the scope and interpretation of second proviso to Rule 8(2) of the 1975 rules? Whether the Additional District and Sessions Judges, holding the posts on April 5, 1975, can claim that by operation of the 1974 Rules they stood appointed to the service and as such consumed all the posts which were available on April 5, 1975 or they were only entitled to vacancies under the second proviso to Rule 8(2) of the 1975 rules?
2. Whether the period of continuous officiation in case of a promotee, for determining seniority, is to be counted in terms of First proviso to Rule 26(1)(a) of the 1975 Rules or in accordance with the principle adopted by the High Court. Isn't it

the requirement of law that a promotee is entitled to seniority in the service from the date when vacancy in his quota became available?

3. Seniority and appointment in the service being inter-linked a further question which necessarily arises for our consideration is whether Rules 22(3) and 22(4) of the 1975 rules, which provide appointments to temporary posts in the service from two sources of promotees excluding the direct recruits, can be legally sustained?

On consideration of the issues, this Court quashed the final seniority list dated 25.8.1988 with a direction to the High Court to prepare, circulate, invite objections and then finalize the seniority list keeping in view the following directions, declarations and findings:

“(i) All the 236 promotee officers working against 236 posts (229 permanent plus 7 temporary) as Additional District and Sessions Judges on April 5, 1975 shall be deemed to be existing members of the Service as constituted under the Rules with a direction that they shall en bloc rank senior to all other officers appointed to the service thereafter from three sources in accordance with their quota under the Rules.

(ii) The first proviso to Rule 26(1)(a) of the Rules was struck down with a direction that the continuous officiation/service by a promotee appointed under the Rules shall be counted for determining his seniority from the date when a substantive vacancy in permanent or temporary post is made available in his quota under the Rules.

(iii) Sub-rules (3) and (4) of Rule 22 were struck down with the saving that the appointments already made under the said Sub-rules shall not be invalidated.

(iv) While selecting candidates under Rule 18 of the said rules, the committee shall prepare a merit list of candidates twice the number of vacancies and the said list shall remain operative till the next recruitment; and the appointments under Rules 22(1) and 22(2) of the Rules shall be

made to permanent as well as to temporary posts from all the three sources in accordance with the quota provided under the said rules.

5. In pursuance of the decision in *O.P. Garg*, the High Court calculated the vacancies under different quotas for recruitment/promotion for different periods. The dispute centering around the method of calculation made by the High Court in regard to the ratio between direct recruits and promotees in a given year, again came up before this court in one more round between promotees and direct recruitees in *Srikant Tripathi & Ors. v. State of U.P. & Ors.* [2001 (10) SCC 237], wherein this Court issued the following directions :

“1. Appointments already made to the Higher Judicial Service, whether by direct recruitment or by promotion, need not be annulled and shall be continued.

2. With effect from 1988 recruitment and in all subsequent recruitments which are the subject matter of challenge before us, the High Court shall determine the number of vacancies available as on the relevant year of recruitment in terms of Rule 8, as already explained by us and then, allocate the percentage to different sources of recruitment, contained in Rule 6, and after such determination is made, then find out whether the appointments of direct recruits already made for that recruitment year are in excess of the quota or within the quota. If it is found that any appointment has been made in excess of the quota, then the said appointee would be allowed to continue, but his or her seniority will have to be reckoned only when he or she is adjusted in the next recruitment.

3. If in each recruitment year, posts were available in the quota of promotees and promotion has not been made, even though selection had been made under Rule 20, then the legitimate right of the promotees cannot be denied and promotion must be made with effect from the date they should have been appointed.

4. This exercise has to be made for the recruitment of 1988 as well as for each subsequent recruitment that has been made.

5. Since the determination under Rule 8 is being made now, pursuant to the directions of this Court, in respect of past recruitment years for which recruitment has been made, the expression "vacancies likely to occur" loses its importance and determination has to be made, on the basis of the actual vacancies available in any of such recruitment year.

6. So far as the recruitment of 1998 is concerned, advertisements having been issued for 38 vacancies being filled up by direct recruitment and the process of selection being already over, but no appointment having been made, we think it appropriate to direct that the appointment of the selected candidates may be made against the quota available to direct recruits calculated in accordance with the Rules in the light of our decision.

7. For all future appointments, the High Court must take steps to fill the vacancies of every recruitment year during that year itself. The High Court must determine the vacancies not only on the basis of the actual vacancies on the date of such determination but also take into account probable vacancies by reason of superannuation of officers in the next two years from that date. Once the vacancies are so determined, the percentage of the vacancies available for recruitment by direct recruitment and by promotion must be fixed and steps taken for filling up the same expeditiously. The number of vacancies available for the direct recruits quota must be advertised without any variation clause. The Select List prepared both for direct recruits as well as for promotees prepared by the High Court will be operative only till the next recruitment commences with the fixation of the vacancies for the next recruitment year.

6. On 30.11.2001 the Chief Justice of the High Court placed the matter before the Administrative Committee of the High Court, for implementation of the directions in *Srikant Tripathi*. On 5.12.2001, the Administrative Committee in turn constituted a Three Member Sub-Committee to examine and submit a report. The Sub-Committee examined the matter and submitted

a report dated 24.8.2002, determining the actual number of vacancies available for the 1988, 1990, 1992-1994 and the 1998 (initiated in 2000) and the actual recruitments made, with other details. We extract below the operative portion of the said report:

“The office on re-examination of record has found that 13 vacancies were left out inadvertently from being incorporated in the existing Gradation List. The details of those vacancies have been given on page no.13 of the appendix attached herewith.

Before the process of 1988 recruitment could commence, 5 direct recruits were appointed in the U.P. Higher Judicial Service Cadre on different dates under the order of Hon’ble Supreme Court. Since no vacancies have been allocated to them in the existing Gradation List, we have allocated 5 vacancies out of 13 left out vacancies to these direct recruits, the details of which have been shown on page no.14.

As per direction no.5 referred to above, we have determined the vacancies after taking into account the vacancies which existed before 1.1.1988 and also the vacancies which actually occurred or accrued during the recruitment period and not on the basis of the expression ‘likely to occur’. On re-calculation, we find that in all there were 314 actual vacancies available for 1988 recruitment, as shown below and whose details are indicated on page 16 of the appendix.

(A) Vacancies which remained unfilled prior to 1.1.1988

Remaining vacancies out of 13 vacancies which were left out inadvertently in the Gradation List	08
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Vacancies which occurred or accrued between-

24.5.1984 to 31.12.1984	23
1.1.1985 to 31.12.1985	34
1.1.1986 to 31.12.1986	40
1.1.1987 to 31.12.1987	129

Total	234
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(B) <u>Vacancies which actually occurred or accrued between –</u> 1.1.1988 to 31.12.1990	<u>80</u>
Total number of vacancies available for recruitment	<u>314</u>

Though as per quota Rule, 47 direct recruits could be appointed out of 314 vacancies but because of the ceiling imposed under the Rules, only 42 direct recruits could be appointed as their number could not at any point of time exceed 15% of the Cadre strength. Instead of 42, only 24 direct recruits were recruited from the Bar and 3 vacancies within their quota were kept reserved for SC/ST candidates which were carried forward to the next recruitment. We thus find that the appointment of the direct recruits made in 1988 recruitment was not in excess of their quota. The Apex Court observed as under:

“If it is found that any appointment has been made in excess of the quota, then the said appointee would be allowed to continue but his or her seniority will have to be reckoned only when he or she is adjusted in the next recruitment.”

Since from the chart prepared on page 16 it is apparent that there has been no appointment in excess of the quota of direct recruits in 1988 recruitment, no question thus arises for the seniority of the direct recruits being adjusted in the next recruitment.

On the same basis, similar exercise was made in relation to subsequent recruitments of 1990 and 1992-94 batches. The position of the actual vacancies available for these recruitments has been exhibited in the charts on pages 38 and 48 respectively.

For the latest recruitment of 2000, the court has fixed the number of direct recruits to be recruited as 38. We have worked out the total number of vacancies available for this recruitment and they have been indicated in the chart shown on page 69. From this chart it would appear that maximum number of direct recruits who could be appointed under the Rules comes to 38. Advertisement has also been made for making 38

appointments within the quota of direct recruits. In this view of the matter 38 appointments within the quota of direct recruits has to be made in the 2000 recruitment. We have been told that examination has already been held but its result is awaited as vacancies were to be calculated afresh in the light of the directions of the Apex Court in the case of Shri Kant Tripathi. Direction no. 6 was in the following term:

So far as the recruitment of 1998 is concerned advertisements having been issued for 38 vacancies being filled up by direct recruitment and the process of selection being already over, but no appointment having been made, we think it appropriate to direct that the appointment of the selected candidates may be made against the quota available to direct recruits calculated in accordance with the Rules in the light of our decision.

As a matter of fact no recruitment was made in 1998, instead the court has initiated the recruitment process for 2000 recruitment.

On re-calculation, we have already found above that 38 vacancies are available in the quota of direct recruits for their appointment in 2000 recruitment. Advertisement was also made for the same number of posts. Therefore, 38 appointments may be made from the members of the Bar in accordance with the Rules. Similarly 334 promoted officers, if available and found suitable, be also recruited for appointment to service in accordance with rule 22(1) read with rule 22(2).

For future recruitment, office is directed to take steps in accordance with direction no.7. Office shall immediately calculate the actual number of vacancies as are found existing on the date of such determination. It shall also work out the probable vacancies likely to occur in the next two years from that date by reason of superannuation. This figure shall be added to the number of existing vacancies and thereafter the percentage of vacancies available for both the sources shall be fixed and steps shall be taken for filling up the same expeditiously. The vacancies which are worked out in the direct recruits quota shall be advertised without any variation clause.

We may add that we have not gone into the question of *inter se seniority* between the promoted officers and the direct recruits because for that purpose a separate Committee has been constituted by the Chief Justice.”

The factual position as worked out in the annexures to the said report is as under :

Description	1988 (with expected vacancies upto 31.12.1990)	1990 (with expected vacancies upto 31.12.1992)	1992-94 (with expected vacancies upto 31.12.1997)	1998 (with expected vacancies upto 2000)
<u>Total vacancies</u>				
Carried forward	8	96	117	196
Vacancies during the period	306	44	261	176
Total	<u>314</u>	<u>140</u>	<u>378</u>	<u>372</u>
<u>Allotment of vacancies</u>				
Promotees	267	119	321	316
Direct recruits	47	21	57	56
<u>Cadre strength</u>				
Permanent	376	511	572	572
Temporary	219	85	169	226
Total	<u>595</u>	<u>596</u>	<u>741</u>	<u>798</u>
15% of cadre strength (maximum number of direct recruits permissible with reference to cadre strength)	89	89	111	120
Actual number of direct recruits working	47	73	66	82

Maximum number of direct recruits who could be appointed	42	16	45	38
<u>Actual recruitment</u>				
Promotees	191	17	161 (48+113)	Permissible:334
Direct recruits	24	5		Permissible : 38
Vacancies kept reserved for SC/ST	3	1		
Unfilled to be carried forward	96	117	196	

The said report was approved by the Administrative Committee on 4.9.2002 and was approved by the Full Court of the High Court on 1.2.2004.

7. The promotees were aggrieved by the acceptance of the Report by the Full Court. They contended that calculations made by the Sub-Committee and the conclusion arrived by it that that the actual number of direct recruitment made for the said years was not in excess of the quota available for direct recruits, were erroneous. According to them, the posts available in the quota of promotees (Nyayik Sewa Officers) was 475 for 1998 recruitment and not 334. They also disputed the finding that 38 vacancies were available for direct recruitment in 1998. Their cause was espoused by the UP Higher Judicial Service Association by filing a writ petition (WP No.316 of 2004) seeking the following reliefs :

(i) a direction to the State and the High Court not to make any appointment by direct recruitment in the UP Higher Judicial Service until the posts available for promotion of members of the UP Nyayik Sewa with effect from 1988 recruitment are calculated and filled up in accordance with the Rules as directed by this Court in *S.K. Tripathi*;

(i) a direction to the State and the High Court to appoint to the UP Higher Judicial Service, the members of the said Association against the 222 existing vacancies in the quota of promotees; and

(iii) quashing the decision of the Full Court of the High Court dated 1.2.2004 accepting the recommendations of the three-member Committee dated 24.8.2004.

8. A Division Bench of the High Court allowed the said writ petition by the impugned order dated 25.8.2004. It quashed the resolution of the Full Court dated 1.2.2004 accepting the recommendations of the three-member Committee dated 24.8.2002 and directed a fresh exercise to be carried out in the light of *Srikant Tripathi* to determine the vacancies and their distribution between the three sources of recruitment as per their quota under the Rules, for the recruitment years 1988 to 1998 in accordance with the following guidelines :

(1) The number of the officers of Nyayik Sewa and Judicial Service who were already promoted and appointed against temporary posts under Rule 22(3) or 22(4) of the Rules and whose appointments have been protected in *O P Garg* would be taken into consideration and the number of vacancies equal to the number of such officers shall be excluded from computation.

(2) While applying the ratio of judgment in *O P Garg* and distributing temporary as well as permanent vacancies, allocation of 15% vacancies of the quota of direct recruits under rule 6 of the Rules, has further to be subject

to ceiling of 15% of the permanent strength of service, till the amendment in the rules came into effect i.e. 25th February, 1996.

(3) While making an exercise to find out (in accordance with direction no.2) as to whether the direct recruits taken into service are in excess of the quota or not, simultaneous exercise has to be done for compliance of direction no.3 in *S.K. Tripathi* and vacancies of the quota of promotees shall be deemed to have been filled up from the date they are entitled to promotion.

(4) Thirty one posts of the service which have been transferred to Uttaranchal with effect from 30.9.2001 shall be excluded while determining the strength of the service in order to work out 15% of the quota of direct recruits.

(5) Out of 13 unnoticed vacancies, found by the office in the year 1988 only two vacancies equal to 15% of the quota of direct recruits be given to them instead of adjusting five appointments *en bloc* and again giving one out of eight vacancies to them applying 15% quota rule.

(6) The second proviso to Rule 6 be also given effect to as and when the occasion arises.

The Division Bench issued a consequential direction that the State Government and the High Court cannot be permitted to appoint thirty eight direct recruits for the 1998 recruitment year and permitted the State and the High Court to proceed with the appointment of direct recruits for 1998 not exceeding twenty four and also fill up 334 posts by promotion subject to the final determination of vacancies in accordance with the directions contained therein. The said order is challenged in these civil appeals.

9. Judicial Officers belonging to U.P. Higher Judicial Service appointed in the direct recruits quota, in the years 1988, 1990, 1992 and 1994, who were not parties before the High Court and whose seniority is adversely affected by the order of the division bench of the High Court are the appellants in C.A. No.1312/2005.

The High Court of Allahabad which was the second respondent in the writ petition filed by the U.P. Judicial Service Association, is the appellant in C.A.No.1313/2005.

The candidates who participated in the U.P. Higher Judicial Service Examination, 2000 for direct recruitment and whose names are found in the select list but who are not appointed in view of the directions in the impugned order (to restrict the appointments to only 24 instead of 38), have filed the last appeal.

10. The appellants (direct recruits, the High Court administration and the prospective direct recruits) in their respective appeals, have contended that directions (1), (2), and (3) issued by the Division Bench as also the consequential direction to conduct a fresh exercise in the light of *Srikant*

Tripathi are erroneous and require interference. Their contentions in brief are:

(a) The direction by the division bench of the High Court that the vacancies occupied by promotees in excess of their quota whose appointments were protected by the Supreme Court, shall be excluded from the computation of the respective quotas for direct recruitments and promotion, is contrary to the decision in *Srikant Tripathi*, but also inconsistent with the settled legal position vide *A. K. Subraman vs. Union of India* – (1975) 1 SCC 319 and *P.S. Mahal vs. Union of India* – (1984) 4 SCC 545.

(b) The interpretation of the first proviso to Rule 8(2) is contrary to the decision in *O.P. Garg* and inconsistent with the views of this Court in *OP Singla & Anr. vs. Union of India & Ors.* – (1984) 4 SCC 450.

(c) The direction that the ceiling of 15% of permanent strength of the service should be given effect, till the amended Rules came into effect (15.3.1996), instead of treating 15% of the cadre strength as quota for direct recruits, is contrary to the decision in *O.P. Garg*, holding that “all temporary posts created under Rule 4 (4) of the 1975 Rules are additions to the permanent strength of the cadre and as such form part of the cadre.”

11. On the contentions raised, the following questions arise for our consideration :

(i) Whether the vacancies occupied by judicial officers promoted and appointed against temporary posts under Sub-Rules (3) or (4) of Rule 22 should be excluded when computing the respective quotas for promotees and direct recruits?

(ii) Whether the direct recruits are entitled to 15% of the vacancies as a fixed quota or whether the said percentage is a ceiling imposed in regard to direct recruitment meaning that the vacant posts shall not be filled up more than 15% by the direct recruits?

(iii) Whether the words “15% of the total *permanent* strength of the service” occurring in first proviso to sub-Rule (2) of Rule 8 of the unamended Rules (as contrasted from “15% of the strength of the service” after the amendment), shall be given effect in computing the respective quotas of promotees and direct recruits till the amendment of Rules (effective from 15.3.1996) deleting the word “permanent” in the said first proviso?

(iv) Whether the procedure of carrying forward vacancies adopted by the full court of the High Court is erroneous having regard to the specific provisions of Rule 8(2) and direction no.3 issued by this Court in *Srikant Tripathi*?

The answers to these questions would to a large extent depend upon the interpretation of the earlier decisions of this Court in *O.P. Garg* and *Srikant Tripathi*.

Re : Question (i)

12. In *O. P. Garg*, this Court struck down Rules 22(3) and 22(4) which confined the appointment to temporary posts to only promotees (Nyayik Sewa and Judicial Magistrates) held that when temporary posts under Rule 4(4) of the 1975 Rules are created as addition to the cadre, the direct recruits could not be denied their share of the quota as provided under Rule 6 of the said Rules; and as the services were comprised of three sources including the direct recruitment, there was no justification to deprive the direct recruits of their share in the temporary posts in the service. This court also struck down the first proviso to Rule 26(1)(a). As a result this Court directed :

“We also strike down Rules 22(3) and 22(4) of the 1975 Rules but the appointments already made under these rules shall not be invalidated. We further direct that while selecting candidates under Rule 18 of the said Rules the Committee shall prepare a merit of candidates twice the number of vacancies and the said list shall remain operative till the next recruitment. We further direct that the appointments under Rules 22(1) and 22(2) of the 1975 rules shall be made to permanent as well as to temporary posts from all the three sources in accordance with the quota provided under the said rules.”

Since the recruitment to the service is from three sources, the existence of a vacancy either permanent or temporary is the *sine qua non* for claiming benefit of continuous length of service towards seniority. The period of officiation/service which is not against a substantive vacancy (permanent or temporary) cannot be counted towards seniority. While striking down first proviso to Rule 26(1)(a) of the 1975 Rules, we hold that the continuous officiation/service by a promotee shall be counted for determining his seniority only from the date when a substantive vacancy against a permanent or temporary post is made available in his quota under the 1975 Rules.”

13. As a consequence of striking down of the sub-rules(3) and (4) of Rule 22, the appointments already made by applying those rules had to be

invalidated to the extent of 15% which was the quota of direct recruits, resulting in the reversion of those who were promoted to vacancies to which direct recruits were entitled and filling those vacancies by direct recruitment. But, this Court did not want any of the appointments already made under the sub-rules 22(3) and (4) to be invalidated. It, therefore, extended limited protection to those appointments of promotees already made to the higher temporary posts which ought to have gone to the direct recruits quota by directing that appointments already made under Rules 22(3) and 22(4) shall not be invalidated. This saved such promotees from reversion. What was saved was only their appointments and not the seniority by reason of the illegal appointments. The effect of saving the promotee from invalidation of the promotion is that he would be allowed to continue, but his seniority will be reckoned only when he is adjusted against a promotee vacancy in the next recruitment. Therefore all the consequences of striking down Rules 22(3) and 22(4) followed, the only consequence that was excluded was the invalidation of appointments already made by applying the said sub-rules 22(3) and 22(4). Such protection cannot be widened or extended, to deny the quota of direct recruits in the temporary vacancies and thereby nullify the striking of the said sub-rules. Nor can the protection against invalidation of promotion be used to exclude the number of vacancies equal to the

number of officers who were given protection, while computing the vacancies to be filled by different sources. Consequently, in spite of the protection against invalidation and reversion, all the appointments of promotees to temporary vacancies will have to be counted and adjusted against the substantive vacancies under promotee quota under the Rules. In short, the direct recruits should be given quota in the temporary posts also. Therefore, the first direction in the impugned judgment of the High Court (that vacancies occupied by promotees in excess of their quota shall be excluded from computation of respective quotas for direct recruitment and promotion) is contrary to the decision in *O. P. Garg*, and cannot be sustained.

Re : Question No.(ii)

14. Rule 6 relates to quota for various sources of recruitment and provides the quota for direct recruitment from the Bar *shall be 15% of the vacancies subject to the provision of Rule 8*. Sub-Rule (2) of Rule 8 provides that if at any selection, the number of selected direct recruits available for appointment is less than the number of recruits decided by the High Court to be taken from that source, the court may increase accordingly the number of recruits to be taken by promotion from the Nyayik Sewa. The first proviso to

the said sub-rule provides that the number of vacancies filled in as aforesaid under the Sub-Rule (2) of Rule 8 shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment and the quota for direct recruits may be raised accordingly and in so doing, the percentage of direct recruits in the service does not in any case exceed 15% of the **total permanent** strength of the service. By the 1996 amendment to the Rules, with effect from 15.3.1996, the word **total permanent** was deleted and as a result the last part of the first proviso to Rule 8(2) from 15.3.1996 reads thus : “so, however, that the percentage of direct recruits in the service does not in any case exceed 15% of the strength of the service”.

15. The promotees contend that having regard to the wording of Rule 8(2) and its first proviso, there is a ceiling of 15% of the total permanent strength for direct recruits. They contend that while the appointments by direct recruitment could not exceed 15% of the strength of the service, the appointment by promotion can exceed the quota of 85%. On the other hand, the direct recruits contend that their quota is 15% of the strength of the service. They point out that even if any shortfall in the number of selected direct recruits is filled by increasing the number of promotees, at the next

recruitment, the shortfall has to be made good while fixing the number of vacancies to be filled by direct recruits and by promotion and this showed that their quota was 15%.

16. Both sides relied upon the decision of this Court in *O.P. Singla vs. Union of India* – (1984) 4 SCC 450, in support of their respective contentions. While the promotees relied upon para 16 of *O.P. Singla* to contend that the Rules refer to the 15% as a ceiling for appointment of direct recruits and there is no obligation to fill 15% of the vacancies with direct recruits, direct recruits relied upon para 17 of *O.P. Singla*, to contend that the Rules prescribe a quota of 15% for direct recruits. We extract below the relevant observations from *O.P. Singla* :

“16. Logically, we must begin this inquiry with the question as to the interpretation of the proviso to Rule 7. Does that proviso prescribe a quota or does it merely provide for a ceiling ? In other words, does the proviso require that, at any given point of time, 1/3rd of the substantive posts in the Service shall be reserved for direct recruits or does it only stipulate that the posts held by direct recruits shall not be more than 1/3rd of the total number of substantive posts in the Service ? *The proviso reads thus:*

Provided that not more than 1/3rd of the substantive posts in the Service shall be held by direct recruits.

This language is more consistent with the contention of the promotees that the proviso merely prescribes, by way of imposing a ceiling, that the direct recruits shall not hold more than 1/3rd of the substantive posts. *Experience shows that any provision which is intended to prescribe a quota, generally provides that, for example, "1/3rd of the substantive posts shall be filled in by direct recruitment."* A quota provision does not

use the negative language, as the proviso in the instant case does, that "not more than" one-third of the substantive posts in the Service shall be held by direct recruits.

17. If the matter were to rest with the proviso, its interpretation would have to be that it does not prescribe a quota for direct recruits : it only enables the appointment of direct recruits to substantive posts so that, they shall not hold more than 1/3rd of the total number of substantive posts in the Service. *However, it is well recognised that, when a rule or a section is a part of an integral scheme, it should not be considered or construed in isolation.* One must have regard to the scheme of the fasciculus of the relevant rules or sections in order to determine the true meaning of any one or more of them. An isolated consideration of a provision leads to the risk of some other inter-related provision becoming otiose or devoid of meaning. That makes it necessary to call attention to the very next rule, namely, Rule 8. It provides by Clause 2 that :

The seniority of direct recruits vis-a-vis promotees shall be determined *in the order of rotation of vacancies* between the direct recruits and promotees *based on the quotas of vacancies reserved for both categories by Rule 7* provided that the first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on.

This provision leaves no doubt that the overall scheme of the rules and the true intendment of the proviso to Rule 7 is that 1/3rd of the substantive posts in the Service must be reserved for direct recruits. Otherwise, there would neither be any occasion nor any justification for rotating vacancies between direct recruits and promotees. Rule 8(2), which deals with fixation of seniority amongst the members of the Service, provides, as it were, a key to the interpretation of the proviso to Rule 7 by saying that the proviso prescribes "quotas" and reserves vacancies for both categories. The language of the proviso to Rule 7 is certainly not felicitous and is unconventional if its intention was to prescribe a quota for direct recruits. But the proviso, as I have stated earlier, must be read along with Rule 8(2) since the two provisions are inter-related. Their combined reading yields but one result, that the proviso prescribes a quota of 1/3rd for direct recruits."

(emphasis supplied)

17. Whether the Rules provide for a specific fixed quota for the direct recruits or whether they merely indicate the ceiling for the appointment by

direct recruitment would therefore depend on the wording of the Rules. Rule 6 provides a specific quota of 15% of the vacancies for direct recruits. But as rule 6 provides that the same shall be subject to the provision of Rule 8, the question is whether rule 8 modifies the quota of direct recruits from '15% of the vacancies' to 'not more than 15% of the vacancies'. Rules 6 and 8 were interpreted in *Srikant Tripathi* thus :

“The recruitment to the service has to be made, both by direct recruitment and by promotion and promotion could be made from amongst the confirmed members of Uttar Pradesh Nyayik Sewa, who have put in, not less than seven years of service and also from out of the dying cadre of the U.P. Judicial Officers Service. Rule 6 which is subject to Rule 8 and provides for the quota for various sources of recruitment, *unequivocally indicates that 15% of the vacancies would be, by direct recruitment from the Bar, 70% of the vacancies from the Uttar Pradesh Nyayik Sewa and 15% from Uttar Pradesh Judicial Officers Service.* Under the second proviso to Rule 6, when the strength in the cadre of Judicial Magistrate gets completely exhausted and no officer from that cadre is available, then the vacancies in the cadre of Higher Judicial Service have to be filled up by 15% from the direct recruitment from the Bar and 85% from Uttar Pradesh Nyayik Sewa.

On fixation of the number of officers to be taken at the recruitment under sub-rule (1) of Rule 8 from different sources and after taking recourse to the procedure contained in Part IV for making direct recruitment to the service in respect of the vacancies advertised, if selected direct recruits for appointment become less than the number decided by the Court to be recruited, then it would be open for the Court to correspondingly increase the number of recruits to be taken by promotion from Nyayik Sewa. But under the proviso, while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment under sub-rule (1) of Rule 8, the quota has to be raised to the extent the number was not available in the earlier recruitment. But that raising of number would in no case exceed 15 percent of the strength of the service. *It may be noted that while the rules prohibit that under no situation, the number of direct recruits would exceed 15 percent of the cadre strength, there is no prohibition so far as promotees are concerned and, therefore, in a given*

situation, the rule contemplates of having promotees more than the quota fixed for them viz. 85 per cent. As we have stated earlier, this issue has not cropped up in the present batch of cases and as such, we need not further probe into the matter. But it must be remembered that the rules only provide the embargo that under no circumstances the Direct Recruits would exceed the 15% of cadre strength. But that does not compel the High Court to recruit 15% of the vacancies by direct recruitment at every recruitment."

(Emphasis supplied)

18. Though the Rules do not compel the High Court to recruit 15% of the vacancies by direct recruitment at every recruitment, they require the High Court to take note of any shortfall in the number of direct recruits at recruitment, during the next recruitment by raising the quota correspondingly. Thus when the first proviso to Rule 8(2) uses the words that the "percentage of direct recruits in the services does not in any case exceed 15%", the intention is to ensure that the direct recruits maintain their quota of 15%, that is, while doing adjustments in fixing the number of vacancies to be filled by direct recruitment at a subsequent recruitment to make good the shortfall at a previous recruitment to maintain 15%, the quota of direct recruit be exceeded. This means that the quota of direct recruits is 15% of the strength of the service. The entire purpose of the exercise is to maintain the 15% quota of the direct recruits. To conclude, the following clear indicators show that the quota of direct recruits is '15%' and not "upto 15%" :

(a) Rule 6 uses the words “15% of the vacancies” as the quota of direct recruits and does not use the words “not more than 15% of the vacancies”.

(b) The purpose and intent of Rule 8(2) is not to dilute or change the quota of direct recruits. Its object is to ensure that no vacancy remains unfilled for want of adequate number of direct recruits under their 15% quota. This is because there are reasonable chances of adequate number of candidates being not available for direct recruitment, whereas usually sufficient number of candidates will be available for promotion. The first proviso to Rule 8(2) ensures that the shortfall in 15% quota for direct recruits in any recruitment does not get permanently converted to promotee quota, by providing that the shortfall shall be made good at the next recruitment. The words “does not in any case exceed 15%” are used to further ensure that while making good the shortfall of direct recruits at the next recruitment, the direct recruits do not encroach upon the quota of promotees.

(c) The provision for appointment to the service by rotational system (that is Rule 22(2) providing that the first vacancy to be filled from the list of

Nyayik Sewa Officers and the second vacancy to be filled from the list of direct recruits and so on), makes it clear that the overall scheme of the Rules is to provide a clear 15% quota for direct recruits.

19. Let us illustrate with a case where the quota of direct recruits at a recruitment with reference to available vacancies, was 20 and only 10 direct recruits were available. Having regard to the Rule 8(2), the remaining 10 vacancies need not be kept unfilled. They can be filled by promotion. However, the High Court while determining the quota of direct recruits at the next recruitment, will take note of the shortfall of 10 in direct recruitment, at the earlier recruitment and correspondingly increase the quota of direct recruits. This means while fixing the vacancies to be filled by direct recruits at a recruitment, the fact that lesser number of direct recruits were appointed at the last recruitment has to be taken note of and the vacancies to be filled by direct recruits is to be increased to cover the previous shortfall. But such adjustment should be done in such a manner, that the total direct recruits in the service do not exceed 15% of the strength of the service. This is conveniently done by calculating the total entitlement of direct recruits (that is 15% out to the total strength), finding out the actual posts occupied by direct recruits and calculating the difference which will be

the entitlement of direct recruits. As a result, the shortfall is made up by increasing the posts to be filled by direct recruitment. Therefore when there has been a shortfall in direct recruits in an earlier recruitment, the number fixed for direct recruits at a subsequent recruitment will necessarily exceed 15% of the vacancies for which the subsequent recruitment is being held, by reason of the fact that the earlier shortfall is required to be filled.

20. Rule 8 clarifies that direct recruits are entitled to 15% quota not only in the vacancies to be filled, but also 15% in the strength of the service. The Rules also make it clear that when a shortfall in a particular recruitment is made up at the next recruitment, there is no question of the direct recruits appointed to the shortfall vacancies claiming seniority over the promotees who filled the shortfall post of direct recruits at the previous recruitment. Though the shortfall is made good at the next recruitment, the question of seniority will be governed by Rule 26. No direct recruit at a subsequent recruitment can claim that as he is being appointed against a direct recruitment vacancy of previous recruitment, his seniority should be reckoned from any date earlier to the date of his joining the service.

21. Thus though the quota of direct recruits is fixed, there is flexibility in fixing the vacancies to be filled by direct recruitment and vacancies to be filled by promotion. The High Court can make adjustments in fixing the number of officers to be appointed by promotion and direct recruitment as shown in Rule 8(2) and the provisos thereto ensuring that the number of direct recruits does not exceed 15% of the total strength of the service.

Re : Question No.(iii)

22. The Division Bench of the High Court has accepted the contention of the promotees that while applying the ratio of the judgment in *O.P. Garg* and distributing the permanent and temporary vacancies, the allocation of 15% vacancies of the direct recruits quota should be further subjected to the ceiling of 15% of the *permanent* strength of service, till the 1996 amendment to the Rules came into effect (on 15.3.1996). The promotees further contend that Rule 6 provides for quota for direct recruits as 15% of the vacancies subject to the provisions of Rule 8; that Rule 8 provided that the percentage of direct recruits should not exceed 15% of the *permanent* strength of the service; and that therefore the quota of direct recruits could

not exceed 15% of the permanent strength of the service (excluding temporary posts) till 15.3.1996.

23. In *O.P.Garg*, this court held as follows in regard to entitlement of direct recruits for a quota in the temporary posts :

“24. We agree with the above findings and accept the position that the service consists of permanent as well as temporary posts. The substantive vacancy has not been defined under the 1975 Rules but as held by this Court in *Dixit* case there can also be a substantive vacancy in a temporary post which is part of the cadre. All temporary posts created under Rule 4(4) of the 1975 Rules are additions to the permanent strength of the cadre and as such form part of the cadre. Appointments under Rule 22 of the 1975 Rules can be made to a permanent post as well as to a temporary post. So long as the temporary post has an independent existence and is a part of the cadre strength the appointment against the said post has to be treated as substantive appointment.”

“29. Recruitment to the service under the 1976 Rules is from three sources and is based on quota as provided therein. The cadre consists of permanent as well as temporary posts. We have already interpreted the seniority rule to mean that the seniority of the direct recruit is to be determined from the date of his joining the service and that of promotee on the basis of continuous officiation/service from the date when a vacancy whether permanent or temporary, becomes available in his quota. With these characteristics of the service it is obligatory that there should be equality of opportunity to enter the service for all the three sources of recruitment. The seniority in the service is consequential and dependent on appointment. If the recruitment rule gives unjustifiable preference to one source of recruitment the seniority rule is bound to become unworkable. The object of having recruitment from different sources is to have a blended service to create healthy competition and in the process achieve efficiency. If one of the sources of recruitment is dealt with unevenly under the Service Rules the said objective cannot be fulfilled. The 1975 Rules permit appointment to temporary vacancies in the service by promotion and from the judicial service. No direct recruitment to the temporary vacancies is provided under the said rules.....”

....We see no justification in not applying the quota rule to the temporary posts in the service and confining appointments to said posts to the two sources of promotees. This Court in *A.K. Subraman vs. Union of India* – 1975 (1) SCC 319, held as under :

‘The quota rule will be enforced with reference to vacancies in all posts, whether permanent or temporary, included in the sanctioned strength of the cadre (except such vacancies as are purely of a fortuitous or adventitious nature)....’

31. This Court in *P.S. Mahal vs. Union of India* – 1984 (4) SCC 545, held as under :

‘It is therefore obvious that if a vacancy arises on account of an incumbent going on leave or for training or on deputation for a short period, it would be a fortuitous or adventitious vacancy and the quota rule would not be attracted in case of such a vacancy. But where a vacancy arises on account of the incumbent going on deputation for a reasonably long period and there is no reasonable likelihood of the person promoted to fill such vacancy having to revert, the vacancy would be subject to the quota rule It is, therefore, apparent that what has to be considered for the applicability of the quota rule is a vacancy in a post included in the sanctioned strength of the cadre.....’

“32. When temporary posts under Rule 4(4) of the 1975 Rules are created as addition to the cadre we see no justification to deny the direct recruits their share of the quota as provided under Rule 6 of the said rules. Rule 5 of the 1975 Rules specifically lays down that recruitment to the service shall be made from three sources including the direct recruits. Rule 6 fixes the quota for various sources of recruitment to the service and allocates 15 per cent of the posts in the service to the direct recruits. Rules 5 and 6 read with Rule 22(2) provide for appointments to the service in accordance with quota. These rules have to be read homogeneously and as a part of the same scheme. The service having comprised of three sources including the direct recruitment there is no justification to deprive the direct recruits of their share in the temporary posts in the service. Unless the direct recruits are given their due quota in the temporary posts the seniority rule cannot operate equitably. We see no justification whatsoever in having Rules 22(3) and 22(4) of the 1975 Rules which deprive one of the sources of recruitment the benefit of appointment to the temporary posts. The rules on the face of it are discriminatory. There is no nexus with the object sought to be achieved by framing the abovesaid rules. We, therefore, strike

down Rules 22(3) and 22(4) of the 1975 Rules being discriminatory and violative of Articles 14 and 16 of the Constitution of India. We, however, direct that the appointments already made under these rules [Rules 22(3) and 22(4)] shall not be invalidated on this ground. We further direct that while selecting candidates under Rule 18 the Committee shall prepare a merit list of candidates twice the number of vacancies and the said list shall remain operative till the next recruitment. We further direct that the appointments under Rules 22(1) and 22(2) of the Rules shall be made to permanent as well as temporary posts from all the three sources in accordance with the quota provided under the 1975 Rules.”

24. The division bench of the High Court has accepted the contention of the promotees that while applying the ratio of the judgment in *O.P.Garg* and distributing temporary as well as permanent vacancies, the allocation of 15% vacancies as the quota of direct recruits under Rule 6 of the Rules has to be subjected to a ceiling of 15% of the permanent strength of the service till the amendment in the Rules came into effect (on 15.3.1996). In *O.P.Garg* this court held that the various rules will have to be homogenized as parts of the same scheme; that as the service was comprised of three sources including direct recruitment, there is no justification to deprive the direct recruits of their share of temporary posts in the service; that unless the direct recruits are given their due quota in the temporary posts, the seniority rule cannot operate equitably; that Rules 22(3) and 22(4) providing that appointment for temporary vacancies shall be made only from among the members of Nyayik Sewa/Judicial Magistrates were discriminatory and appointments under Rules 22(1) and 22(2) shall have to be made to permanent as well as temporary posts from all the three

sources in accordance with the quota provided under the Rules. In spite of the said decision by the three Judge Bench of this court, the promotees have been contending that the percentage of direct recruits in the service should not exceed 15% of the permanent strength of the service till the amendment to the Rules with effect from 15.3.1996, in view of the fact that this court in *O.P.Garg* while striking Rules 22(3) and 22(4) did not strike down the word “permanent” occurring in the first proviso of Rule 8(2) which provided: “so, however that the percentage of direct recruits in the service does not in any case exceed 15% of the total permanent strength of the service.” The words “total permanent” were omitted from the first proviso to Rule 8(2) only by the amendment Rules of 1996 with effect from 15.3.1996.

25. If Rule 8(2) is to be read in the manner suggested by the promotees, it would nullify the decision in *O.P.Garg* which held that the direct recruits were entitled to 15% quota not only in the permanent strength of the service but also in the temporary posts. This court in *O.P.Garg*, apparently did not strike down the word “permanent” in the latter part of the first proviso to Rule 8(2) while striking down Rule 22(3) and 22(4) as it apparently assumed that rule 8(2) and the first proviso thereto were applicable only in a contingency referred to in Rule 8(2). The rule making authority rightly understood the decision and

proceeded on the basis that if sub-rules (3) and (4) of Rule 22 were invalid and the direct recruits were entitled to 15% quota even in the temporary posts, then the word “permanent” should be deleted in the first proviso to Rule 8(2). That is why the rule making authority while substituting Rule 22 in the rules in 1996 in pursuance of the decision in *O.P.Garg* striking down sub-rules (3) and (4) of Rule 22, simultaneously deleted the words “total permanent” from the words “total permanent strength of service” in the first proviso to Rule 8(2). The amendment to the first proviso to Rule 8(2) omitting the words ‘total permanent’ is clearly a clarification/reiteration of the position which prevailed as a result of the decision in *O.P. Garg*.

26. The Division Bench of the High Court has proceeded on the basis that this Court in *O.P.Garg* had no occasion to consider, nor considered the first proviso to Rule 8(2) which provided the ceiling for direct recruitment; and therefore the ceiling was 15% of the “permanent strength of the service” and not cadre strength of the service till the amendment to the Rules with effect from 15.3.1996. The said interpretation put forth by the promotees which found favour with the division bench of the High Court, is untenable as it would amount to ignoring the law laid down in *O.P. Garg* and nullifying the directions in *O.P.Garg* holding that direct recruits are entitled to 15% quota even in temporary posts. The proviso to Rule 8(2) should be read in the

context of the quashing of Sub-Rules (3) and (4) of Rule 22. If so read, it would be clear that when Sub-Rules (3) and (4) of Rule 22 were struck down holding that direct recruits were entitled to a quota in temporary posts also, the word “permanent” in the first proviso to Rule 8(2) is deemed to have been impliedly struck down or omitted by the decision in *O.P. Garg*. As the quota of direct recruits is 15% of the strength of the service, the number of appointments of direct recruits might have never exceeded their quota. Therefore, the second direction of the Division Bench in the impugned judgment cannot be sustained.

Re : Question No. (iv)

27. Direction No.3 in *Srikant Tripathi* is to the effect that if in each recruitment year posts were available in the quota of promotees and promotions were not made even though selections had been made under Rule 20 then the legitimate right of the promotees cannot be denied and promotions must be made with effect from the date they should have been appointed. On the other hand, the third direction of the Division Bench of the High Court in the impugned order is that while undertaking an exercise as per its second direction as to whether direct recruits taken into service or in excess of the quota or not, a simultaneous exercise has to be done in

compliance with direction No.3 in *Srikant Tripathi* and vacancies of the quota of promotees shall be deemed to have been filled up from the date they were entitled to promotion.

28. The first part of the third direction in the impugned order depends upon the result of the exercise undertaken in pursuance of its second direction. We have held that directions 1 and 2 in the impugned order of the High Court are contrary to the decision in *O.P.Garg*. In view of it, the question of undertaking any exercise as per the second direction of the impugned order does not arise. All that therefore remains out of the third direction in the impugned order is reiteration of direction No.3 of *Srikant Tripathi*. The third direction in the impugned judgment to the extent it reiterates direction No.3 in *Srikant Tripathi* has to be upheld. There is no question of unfilled vacancies being carried forward for the purpose of fixing the number of officers to be taken at the next recruitment. The total vacancies to be filled at a recruitment shall have to be filled by applying sub-rules (1) and (2) of Rule 8 and its provisos. In that sense all vacancies, which are not filled by direct recruitment, get filled by promotion and there will be no carry over. There is only a limited 'carry over' of unfilled direct

recruitment vacancies in the manner stated in the Rule 8(2) and the first proviso thereto.

29. We may illustrate the effect of the directions in *Srikant Tripathi* with reference to the figures arrived at in the Report of the Sub-Committee, abstract of which is given in the Table in paragraph 6 above (by assuming that the figures specified are correct). For 1988 recruitment, the vacancies are shown as 314, the actual recruitment is shown as 24+3 by direct recruitment and 191 by promotion and the carried forward unfilled vacancies as 96. If there were 314 vacancies and what is filled by direct recruitment was 27, the remaining 287 vacancies should be filled up by promotions instead of 191 having regard to Rule 8(2). There is no question of any vacancies being carried forward for 1990 recruitment, unless sufficient numbers of candidates are not available for filling the posts even by promotion also. Therefore the vacancies to be filled in 1990 (with the expected vacancies up to 31.12.1992) should be treated as only 44 of which promotees' share would be 37 and share of direct recruits would be 7. As only 5 were appointed by direct recruitment, the remaining 39 ought to be filled by promotion. In regard to 1998 recruitment, if 15% of strength of the service is 120 and the number of direct recruits actually working were only

82, there is nothing wrong in directly recruiting 38 out of the actual vacancies of 176. We have given these examples with reference to the figures given by the Sub-Committee in its Report and it should not be assumed that the figures given by the sub-committee have been accepted by us to be correct. In fact the figures may have to be re-worked with reference to the other directions of the High Court which have been upheld by us. Be that as it may.

Conclusion

30. The 1975 Rules are vague and complicated. The four rounds of litigation are the result of absence of clear and simple Rules. The High Court administration had the difficult task of harmonizing the Rules, the directions of this Court in *O.P. Garg* and the directions of this court in *Srikant Tripathi*. The High Court Sub-Committee apparently made a sincere effort to implement the Rules and the directions. Unless the exercise by the High Court through its Sub-Committee (approved by the Full Court of the High Court), is arbitrary or is in non-compliance with any specific direction of this Court, it will not be open to question. Be that as it may.

31. In view of our aforesaid findings, we allow these appeals in part as follows :

- (i) Direction Nos. (1) and (2) in para 55 of the impugned order dated 25.8.2004 are set aside;
- (ii) Direction No.(3) in para 55 of the impugned order dated 25.8.2004 is restricted to reiteration of direction No.3 issued in *Srikant Tripathi* (2001 (10) SCC 237); and
- (iii) Direction Nos. (4), (5) and (6) in the impugned order dated 25.8.2004 are upheld.
- (iv) The consequential exercise directed by the High Court should be restricted to the directions which have been upheld.
- (v) None of the appointments already made to the Higher Judicial Service, whether by direct recruitment or by promotion, shall be annulled, but shall be continued, even if the appointment is found to be in excess of the quota, subject to the condition that the seniority of such excess appointee will be reckoned from the date on which he becomes entitled to be adjusted at the subsequent recruitment/s. Any elevation to the High Court on the basis of seniority already given shall also not be affected.

We request the High Court to give a quietus to the long-drawn dispute, by giving effect to direction nos.(4) to (6) of the impugned order and direction no.(3) in *Srikant Tripathi*, without any delay.

All pending applications stand disposed of.

.....J.
(R V Raveendran)

New Delhi;

.....J.

September 13, 2010.

(Markandey Katju)