

PETITIONER:
O.P. GARG AND ORS. ETC. ETC.

Vs.

RESPONDENT:
STATE OF U.P. AND ORS.

DATE OF JUDGMENT 23/04/1991

BENCH:
KULDIP SINGH (J)
BENCH:
KULDIP SINGH (J)
KANIA, M.H.
SAWANT, P.B.

CITATION:
1991 AIR 1202 1991 SCR (2) 424
1991 SCC Supl. (2) 51 JT 1991 (2) 359
1991 SCALE (1) 768

ACT:

Uttar Pradesh Higher Judicial Service Rules 1975: Rules 5, 6, 8, 18, 22, 26-Promotees and direct recruits-Fixation of seniority-Validity of rules-Considered.

HEADNOTE:

The appellants as well as the respondents are members of the Uttar Pradesh Higher Judicial Service; while the appellants are the promotees, the respondents have been appointed direct to that service. This is their second round of litigation in this Court concerning their inter se seniority in the service.

The Higher Judicial Service was initially governed by statutory rules called the Uttar Pradesh Higher Judicial Service Rules, 1953. Recruitment to the service under the said rules was from sources, by promotion and by direct recruitment. This Court in Chandra Mohan v. State of Uttar Pradesh, [1967] 1 S.C.R. 77 struck down the 1953 Rules in so far as the said Rules provided for direct recruitment of the service. As a consequence, there was no direct recruitment to the service till 1975-76, and the service consisted of only promotees with the designation of Civil and Sessions Judges.

On May 8, 1974 the Uttar Pradesh Higher Judicial Service (abolition of Cadre of the Civil and Sessions Judges) Rules, 1974 came into force. Under Rules 2 and 3 of the 1974 Rules, the existing cadre of Civil and Sessions Judges stood abolished and a new cadre of Additional District and Sessions Judges came into existence, the Civil and Sessions Judges holding permanent or temporary posts in the Service were re-designated as Additional District and Sessions Judges with effect from the date when the 1974 Rules came into force. On that date, 271 officers were working as Additional District and Sessions Judges against 235 posts (153 permanent and 82 temporary) in the service.

The Service was reconstituted and given a fresh look by the rules framed under Article 309 read with Article 233 of the Constitution of India, called the Uttar Pradesh Higher Judicial Service Rules, 1975 which came into force on April 5, 1975. On that date 263 officers were

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working as Additional District and Sessions Judges, against 236 posts in the service.

Recruitment to the service under the 1975 Rules is from three sources and is based on quota as provided therein. The three sources of recruitment are (i) direct recruitment from the Bar, (ii) Uttar Pradesh Nyayik Sewa, and (iii) Uttar Pradesh Judicial Service (Judicial Magistrates).

In the first round of litigation P.K. Dixit and other promotee officers filed two writ petitions under Article 32 of the Constitution Challenging the seniority assigned to them under the 1975 Rules. This Court by its judgment dated October 8, 1987 in P.K. Dixit v. State of U.P., [1988] 1 S.C.R. 398 partly allowed the writ petitions and directed the High Court to frame the seniority list afresh keeping in view the observations made in that judgment.

In pursuance to the directions of this Court in Dixit case a five-Judge committee of the High Court finalised the seniority list on August 25, 1988. The High Court accepted the contention of direct recruits and gave 153 permanent posts existing on May 10, 1974 plus 31 posts, which became permanent subsequently, to the promotees. Consequently, out of the 263 Additional District and Sessions Judges who were holding the posts on April 5, 1975 only 84 (153 + 31) were taken to be the existing members of the Service and the remaining officers were asked to enter the service through the promotion quota under the 1975 rules.

In the second round, the promotees have filed writ petition challenging the final seniority list. P.K. Dixit and others, petitioners in the original Dixit-case have filed Civil Miscellaneous Petition seeking clarification of the said judgment. The direct recruits have filed writ petition under Article 32 impugning the final seniority list issued by the High Court.

Before this Court, the promotees, the direct recruits as well as the High Court have sought support from Dixit-case on the basis of their own interpretation of that judgment. The promotees claim that on April 5, 1975 when the 1975 rules came into force all the 236 posts in the Service had already been consumed by the existing members of the service who were working as Additional District and Sessions Judges; till that date the recruitment to the service was only by way of promotion and as such there was no question of allocating any post to the direct recruits who had not yet been born in the service.

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On the other, hand, the direct recruits contend that this court interpreting the second proviso to Rule 8(2) of the 1975 rules in Dixit-case had held that the promotees as on May 10, 1974 are entitled to all the permanent posts available on that date plus 31 temporary posts, and apart from that they cannot lay claim exclusively to the posts created thereafter. In this connection it was contended that temporary posts could not form part of the cadre of the Service, and service rendered in or against a temporary post was outside the pale of the 1975 rules and could not be counted for seniority and as much the continuous officiation immediately prior to the date of confirmation provided in the first proviso to rule 26(1)(a) of the 1975 rules could only be the officiation against a permanent post.

Allowing the Writ Petition and the Civil Miscellaneous Petition, quashing the seniority list and directing the High Court to prepare fresh seniority list, this Court,

HELD: (1) The interpretation given by the High Court to the second proviso to rule 8(2) of the 1975 Rules is not

correct. The proviso was not applicable to the Service as reconstituted under the 1974 Rules consisting of Additional District and Sessions Judges. Proviso 2 was enacted to meet a particular situation. The proviso was meant to deal with a situation which might have arisen in the event there had been more posts and less number of officers to occupy the said posts on the reconstitution of the Service under the 1974 Rules. But since the number of officers working in the service as on May 10, 1974 and April 5, 1975 was much more than the posts available in the service the situation envisaged by the proviso did not arise. The second proviso to rule 8(2) of the 1975 rules could not operate and since it was intended to meet one-time eventuality it has become redundant. [440D-441C]

(2) The Service as constituted under the 1974 Rules continued to operate till April 5, 1975 when the 1975 rules were enforced. On April 5, 1975 the Service comprised of 236 posts (229 permanent plus 7 temporary)> There were 263 officers working in the service on that date. The 236 posts comprising the service on April 5, 1975 have to be assigned and given to the 236 officers out of 263 who were working as Additional District and Sessions Judges and they are to be treated as existing member of the service as on April 5, 1975. It is further axiomatic that the 236 officers including those holding temporary posts would en bloc rank senior to all those who were appointed to the service after April 5, 1975, under the 1975 rules. [439H-440C]

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(3) The Additional District and Sessions Judges had not only the right to be appointed to the service but they were so appointed by the operation of 1974 rules. The second proviso to Rule 8(2) even though retrospective could not have taken away the vested rights of the officers who had already become members of the service. This could not be the intention of the framers of the 1975 rules. [441D]

(4) The substantive vacancy has not been defined under the 1975 rules but 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. [442F]

(5) 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. [442G]

(6) Recruitment to the service under the 1975 rules is from three sources and is based on quota as provided therein. The cadre consists of permanent as well as temporary posts. 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. If the recruitment rule gives unjustifiable preference to one source of recruitment the seniority rule is bound to become unworkable. [444E-F]

(7) When temporary posts under rule 4(4) of the 1975 rules are created as addition to the cadre there is no justification in not applying the quota rule to the temporary posts in the service and confining appointments to said posts in the service to the two sources of promotees. [448E]

A.K. Subraman v. Union of India, [1975] 2 S.C.R. 1979 referred to.

(8) There is 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

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of it are discriminatory. There is no nexus with the object sought to be achieved by framing these rules. [448G-H]

(9) Rules 22(3) and 22(4) of the 1975 rules are discriminatory and violative of Articles 14 and 16 of the Constitution and are accordingly struck down. However, the appointments already made under these rules 22(3) and 22(4) shall not be invalidated on this ground. Further, 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. Further, 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. [449H-450B]

(10) The findings and observations in Dixit-case to the extent those are contrary to this judgment shall be deemed to have been over-ruled. [449C]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 259 of 1990.

(Under Article 32 of the Constitution of India).

Yogeshwar Prasad, R.K. Jain, Satish Chandra, A.S. Pundir, Gopal Subramaniam, Mrs. S.D. Dikshit, Jitender Sharma, R. Venkataramani, Mrs. Rachna Gupta, M.P. Shorawala, D.K. Garg, Pramod Swarup, R.N. Keshwani, Mrs. Anil Katiyar, Anis Ahmed Khan and A.P. Mohanty for the Appearing parties.

The Judgment of the Court was delivered by

KULDIP SINGH, J. Before us are the members of Uttar Pradesh Higher Judicial Service (hereinafter called the 'Service') Promotees and the direct recruits, as usual, are in the fray. This is their second round of litigation in this court. Earlier in P.K. Dixit and Others v. State of U.P. and Others, [1988] 1 S.C.R. 398 this court directed the preparation of fresh seniority list in accordance with the observation made therein. The Allahabad High Court thereafter framed and circulated final seniority list of the service of August 25, 1988. Both promotees and direct recruits are not satisfied with the same. They have challenged the said seniority list, inter alia on the ground that it is not in conformity with the directions of this court in Dixit's case.

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We may briefly state the necessary facts. The service was initially governed by statutory rules called the Uttar Pradesh Higher Judicial Service Rules, 1953 (hereinafter called '1953 rules'). Recruitment to the service under the said rules was from two sources, by promotion and the direct recruitment. In Chandra Mohan v. State of Uttar Pradesh, [1967] 1 S.C.R. 77 this court struck-down the 1953 rules so far as the said rules provided direct recruitment of the service. As a consequence there was no direct recruitment to the Service till the year 1975-76. This members of the service promoted under the 1953 rules were designated as Civil and Sessions Judges.

On May 8, 1974 the Uttar Pradesh Higher Judicial

Service (abolition of cadre of the Civil and Sessions Judges) Rules, 1974 (hereinafter called '1974 rules') came into force. Under these rules the cadre of Civil and Sessions Judges was abolished. Rules 2 and 3 of 1974 rules, which are relevant, are reproduced hereafter:

2. Abolition of the Cadre of Civil and Sessions Judges. With effect from the date of commencement of these rules, the cadre of Civil and Sessions Judges shall stand abolished and the Uttar Pradesh Higher Judicial service shall, with effect from the said date, consist of the posts of District and Sessions Judges and Additional District and Sessions Judges only.

3. Creation of posts and confirmation .. (1) Upon the abolition of the cadre of Civil and Sessions Judges, permanent and temporary posts of Additional District and Sessions Judges equal in number of the permanent and temporary posts, respectively of Civil and Sessions Judges existing immediately before the date of commencement of these rules shall stand created with effect from the said date, and the officers holding the posts of Civil and Sessions Judges immediately before the said date shall become Additional District and Sessions Judges and be designated accordingly.

(2) An officer who is confirmed on the post of Civil and Sessions Judge before the commencement of these rules shall with effect from the date of such confirmation, be deemed to be confirmed on the post of Additional District and Sessions Judge.

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It is, thus, obvious that the cadre of Civil and Sessions Judges stood abolished and a new cadre of Additional District and Sessions Judges, consisting of permanent and temporary posts equal in number of the permanent and temporary posts respectively of Civil and Sessions Judges, came into existence under the 1974 rules. The Civil and Sessions Judges holding permanent or temporary posts in the Service were re-designated as Additional District and Sessions Judges with effect from May 8, 1974, the date when the 1974 rules were enforce. On that date 271 officers were working as Additional District and Sessions Judges against 235 posts (153 permanent and 82 temporary) in the Service.

The Service was reconstituted and given a freshlook by the rules framed under Article 309 read with Article 233 of the Constitution of India called the Uttar Pradesh Higher Judicial Service Rules, 1975 (hereinafter called 'the 1975 Rules'). These rules came into force with effect from April 5, 1975. The relevant rules, 5, 6, 8 and 26 are reproduced hereinafter:

5. Source of recruitment.-- The recruitment of 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 Magistrates, 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.

Explanation.-- When a person has been both a pleader and an advocate his total standing in both the capacities shall be taken into account in computing the period of seven years under clause (a).

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

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

8.-- Number of appointments to be made.-- (1) The Court, shall, from time to time, but not later than three years 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.

2. If at any selection the number of the 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

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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 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.

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-a-vis the officers recruited for 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

Statement of facts filed by the High Court shows that on April 5, 1975, when the 1975 rules came into force, there were 229 permanent and 7 temporary (total 236) posts in the service. This total included 31 temporary posts mention in second proviso to rule 8(2) of 1975 rules. By that date these posts had become permanent. The statement further shows that 263 officers were working as Additional District and Sessions Judges on the said date. We take it that it that there were 236 posts in the Service on the commencement of the 1975 rules.

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P.K. Dixit and 7 other promotee officers filed two writ petitions under Article 32 of the Constitution of India challenging the seniority assigned to them on two grounds. It was contended that all the posts, existing on April 5, 1975 when the 1975 rules came into force should be deemed to have been filled by the officers holding the designation of Additional District and Sessions Judges on that date. Secondly, it was contended that the promotees were entitled to the seniority from the date of their actual continuous officiation and not by limiting the said period to three years preceding the date of confirmation. This court by its judgment dated October 8, 1987 in Dixit's case (supra) partly allowed the writ petitions and directed the High Court to frame the seniority list afresh keeping in view the observations made in the judgment.

The promotes claim that the judgment in Dixit case is wholly in their favour on the first point. The direct recruits, however, contest the said claim and assert that the contention of the promotees was rejected and their claim was confined to the number of posts as provided in First Proviso to rule 8(2) of the 1975 Rules. Pursuant to the judgment in Dixit-case the High Court issued a tentative seniority list on February 11, 1988. The promotees were fully satisfied with the same as according to them the said list was drawn in conformity with the Judgment in Dixit-case. Objections were invited against the tentative seniority list and thereafter 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 August 25, 1988. O.P. Garg and 4 other promotees have filed writ petition No. 259 of 1989 challenging the final seniority list. P.K. Dixit and others, petitioners in the

original Dixit-case have filed Civil Miscellaneous Petition No. 3473 of 1989 seeking clarification of the said judgment and also supporting the case of the promotees. The direct recruits have filed writ petition No. 1304 of 1988 under Article 32 of the Constitution of India impugning the final seniority list issued by the High Court. It is interesting that both promotees and the direct recruits are relying on the judgment in Dixit-case and are contending that the final seniority list issued by the High Court is contrary to the said judgment.

The promotees, the direct recruits and the High Court have sought support from Dixit-case on the basis of their own interpretation of the judgment. Apparently there are diverse observations in Dixit-case which are being stretched by the parties in support of their rival contentions. The promotees strongly rely on the following paragraphs from Dixit-case to show that the First Point argued before the Bench was decided in their favour.

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"In the written affidavit filed by the High Court, it is not disputed that before these rules were brought into force, all the posts which were available on the date on which these rules came into force have to be filled in by promotion as till that date there was no rule requiring direct recruitment. But unfortunately, the High Court in their return have not mentioned the exact number of vacancies existing on that date also the number of officers who were officiating on the date as Civil and Sessions Judges or Additional District and Sessions Judges who were entitled to be included in that cadre of higher judicial service under these rules."

"It is not disputed that on the date on which these rules (1975 Rules) were brought into force, all the posts available were to go to the promoted officers and the only thing that the High Court is expected to do is to find out how many posts were available on that date and how many persons were officiating in the higher judicial service or equivalent posts on that date and their seniority ought to be fixed on the basis of their promotion to the posts except where an officer was not found fit or where officer concerned was reverted back to the judicial posts. The documents do not disclose that any one of these judicial officers who were promotees have been reverted. The documents also do not disclose that at any time the High Court considered the question of their confirmation and any one of them was not found fit for confirmation, or that it was decided to postpone the date of confirmation because the work of the officer was not upto the mark. The record produced by the High Court only shows the date from which these petitioners were promoted and started officiating as Additional District Judges and the date on which they were ultimately confirmed. During this period their case was considered at any time does not appear from the record produced in this case nor was the contention of the learned counsel appearing for the High Court. It, therefore, is not disputed that these petitioners who were promoted before these rules (1975 Rules) were brought into force were never found unfit for confirmation and in this view of the matter, therefore, it is clear that all

posts available on the date on which these new rules were brought into force will have to be filled in by these promoted

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officers who were working in the officiating capacity in the post of higher judicial service on the date on which these rules were brought into force. So far as the situation before these rules were brought into force is concerned even during the course of argument not much controversy appears to exist as it is clear that the question of direct recruitment and the quota of the direct recruits vis-a-vis promotees was not in existence."

Based on the above quoted findings in Dixit-case, the promotees plausibly claim that on April 5, 1975 when the 1975 rules came into force all the 236 posts in the Service had already been consumed by the existing members of the service who were working as Additional District and Sessions Judges. Till that date the recruitment to the service was only by way of promotion and as such there was no question of allocating any post to the direct recruits who had not yet born in the service.

The direct recruits, on the other hand, assert that the Dixit-case decides the controversy in their favour. Reliance in that respect is placed on the following observations in the judgment:

"This also appears to be the intention of the rules when they were framed in 1975 as is clear from the proviso to Rule 8. It reads:

"provided further that 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: It therefore is clear that even these rules provided that all the posts (permanent) available in the Higher Judicial Service existing on May 10, 1974 plus 31 temporary posts existing on that date which may become permanent later shall be filled by promotion from amongst the members of the Nyayik Sewa. It is therefore clear that all the posts in the Higher Judicial Service, lying vacant on May 10 1974 plus thirty one will have to be filled in from the officers of the Nyayik Sewa. May be that some of these posts may be occupied by promotee officers who were given promotions

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on ad hoc basis and working on those posts or that the posts may be lying vacant. Whatever may be the situation on the basis of what has been discussed above and also as has been clearly provided in these rules the matter will have to be gone into the High Court afresh and fill in all the posts in the Higher Judicial Service available on May 10, 1974 plus 31 posts from the officers of the Nyayik Sewa."

"It has therefore to be accepted that all those who were working as Civil and Sessions Judges on 8th May, 1974 automatically became Additional District and Sessions Judges and what was left was only a consideration of their cases of confirmation and in so doing in view of the conclusions arrived at by us and also as has been provided in the

proviso to Rule 8 quoted above all the posts available on 10th May, 1974 plus 31 posts (temporary) on that date will have to be filled in from the cadre of Nyayik Sewa by promotion."

"But in view of what we have discussed earlier about the appointments on the posts available before these Rules were brought into force and to fill in temporary posts, we feel that the matter will have to be examined afresh by the High Court. So far as posts available on 10th May, 1974 plus 31 posts are concerned they will have to be filled in only by promotees as we have discussed earlier and also in view of proviso to Rule 8 and after doing it examine the cases of promotion and direct recruitment after the coming into force of these Rules and the vacancies available and after consideration the cases in according with these Rules the High Court will prepare afresh the seniority list which may be notified so that if any objections are there, they may be placed for determination in according with the Rules and in the light of the discussions above."

The precise assertion of the direct recruits, therefore, is that this court interpreting the second proviso to Rule 8(2) of the 1975 rules in Dixit-case has held that the promotees as on May 10, 1974, are entitled to all the permanent posts available on that date plus 31 temporary posts and apart from that they cannot lay claim exclusively to the posts created thereafter.

The High Court accepted the contention of the direct recruits

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and gave 153 permanent posts existing on May 10, 1974 plus 31 posts, which became permanent subsequently to the promotees. Consequently out of the 263 Additional District and Sessions Judges who were holding the posts on April 5, 1975 only 184 (153+31) were taken to be the existing members of the Service and remaining officers were asked to enter the service through the promotion quota under the 1975 rules.

The second point in Dixit-case was regarding fixation of seniority of the promotees under the 1975 rules. Whether whole of the continuous officiation or part of it is to be counted towards seniority was the moot-point. Rule 26(1)(a) of the 1975 rules provides that seniority of the direct recruits is to be determined from the date of their joining the service whereas that of the promotees from the date of continuous officiation in the service. But the first proviso to the said rule further limits the period of continuous officiation of a promotee for determining seniority to a maximum of three years immediately preceding the date of confirmation. The promotees contended in Dixit-case that they were entitled to the counting of their total period of continuous officiation towards seniority. This court rejected the contention in the following words:

"Having gone through these Rules it appears that the contention advanced by the petitioners in respect of proviso to Rule 26 about seniority does not appear to be justified."

The High Court while framing the impugned seniority list did not follow the seniority rule. The High Court determined the seniority of the promotees by giving them benefit of three years continuous officiation immediately preceding the date of availability of permanent vacancy whereas the rule provides three years preceding the date of

confirmation.

Mr. Yogeshwar Prasad, learned senior advocate appearing for the promotees. Mr. Satish Chandra, learned senior advocate for the direct recruits and Mr. Gopal Subramaniam, learned advocate appearing for the High Court have addressed elaborate arguments before us. The learned counsel have read and re-read the judgment in Dixit-case in support of their respective contentions. The thrust of Mr. Yogeshwar Prasad's argument is twofold. He contended that the service consisting of Additional District and Sessions Judges was constituted under the 1974 Rules which continued till April 5, 1975 when the Service was reconstituted under the 1975 rules. According to him all

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the posts in service, permanent and temporary, available on April 5, 1975 would be deemed to have been filled from amongst the Additional District and Sessions Judges working on that date. Only the posts created thereafter could be filled from the three sources under the 1975 rules. The second contention of Mr. Prasad was that the benefit of continuous officiation towards seniority cannot be confined to three years and the promotees are entitled to the fixation of their seniority on the basis of continuous length of Service.

Mr. Satish Chandra on the other hand has argued that second proviso to Rule 8(2) of the 1975 rules which is retrospective in its application, limits the number of vacancies as on May 10, 1974 to be filled by promotion from amongst the members of Nyaik Sewa. According to him, under the said proviso, all the other posts created after May 10, 1974 are to be filled from the three sources in accordance with the 1975 rules. Mr. Satish Chandra further argued that the High Court acted illegally and in violation of first proviso to Rule 26(1) (a) of the 1975 rules in determining the seniority of the promotees by giving them the benefit of three years officiation immediately preceding the date of availability of permanent vacancy. According to him, such period under the above proviso can only be preceding the date of confirmation.

The judgment in Dixit-case, by and large, deals with the main points raised by the learned counsel for the parties before us. But in view of divergent view point taken by the promotees, the direct recruits and the High Court on the interpretation of the said judgment, we are of the view that it is necessary to have a fresh look into the matter to finally settle the long-drawn controversy between the parties. The service is a prestigious and sensitive service consisting of officers who form the back-bone of Uttar Pradesh Judiciary. The service is the feeder-cadre for appointment to High Court Judges. It is necessary to settle their rights in clear and unambiguous terms.

Taking an overall view of the arguments advance by Mr. Yogeshwar Prasad and Mr. Satish Chandra we pose the following three questions for our determination:

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

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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.

We may take-up the first point for consideration.

After the decision by this court in Chandra Mohan's case (supra), the Service consisted of only promotees with the designation of Civil and Sessions Judges. They were promoted from the lower cadre of U.P. Civil Services (Judicial Branch) called "Nyayik Sewa". Thereafter under the 1974 rules which came into force on May 8, 1974 the Civil and Sessions Judges, holding permanent or temporary posts, were redesignated as Additional District and Sessions Judges. By Operation of the 1974 Rules all the newly designated Additional District and Sessions Judges became members of the Service. Rule 2 of the 1974 Rules specifically provided that with effect from the date of commencement of those Rules "the Uttar Pradesh Higher Judicial Service shall consist of the posts of District and Sessions Judges and Additional District and Sessions Judges". It is thus obvious that the service was reconstituted under the 1974 Rules and all the Additional District and Sessions Judges, to the extent posts were available, became members of the said service by operation of law. There were 271 officers working in the Service on May 8, 1974 and there were 235 posts (153 permanent plus 82 temporary) available in the service. Therefore, 235 officers out of the 271 working on May 8, 1974 for whom the posts were available in the service would be deemed to be members of the service under the 1974 rules. The Service as constituted under the 1974 Rules continued to operate till April 5, 1975 when the 1975 rules were enforced. Till that date the only source of recruitment to the service was by way of promotion. On April 5, 1975

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the service comprised of 236 posts (229 permanent plus 7 temporary). They were 263 officers working in the service on that date. 235 posts were already occupied by the officers who had become members of the service under the 1974 rules and the one additional post available would go to the 236th officer holding the post on April 5, 1975. The 236 posts comprising the service on April 5, 1975 have to be assigned and given to the 236 officers out of 263 who were working as Additional District and Sessions Judges and they are to be treated as existing members of the service as on April 5, 1975. It is further axiomatic that the 236 officers including those holding temporary posts would en bloc rank senior to all those who were appointed to the service after April 5, 1975 under the 1975 rules. The view which we have taken is also in conformity with the observations in Dixit-case relied upon by the promotees which we approve.

Coming to the second proviso to rule 8(2) of the 1975 rules relied upon by the direct recruits, we are of the view

that the interpretation given to the proviso by the High Court is not correct. A bare reading of the proviso shows that it was not applicable to the Service as reconstituted under the 1974 Rules consisting of Additional District and Sessions Judges. The proviso states that "all the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date....., shall be filled by promotion from amongst the members of the Nyayik Sewa; and only the remaining vacancies shall be shares between the three sources under these rules." The Additional District and Sessions Judges working on May 10, 1974 were not members of the Nyayik Sewa, they had already become members of the Service on May 8, 1974 under the 1974 Rules. The proviso talks of "Nyayik Sewa" and "the three sources under the Rules", which obviously means it is visualising a situation which was to exist after the enforcement of the 1975 rules on April 5, 1975. Rule 8 of the 1975 rules is under the heading "number of appointments to be made" and various parts of the said Rule deal with different situation for making appointments from different sources at different times. Proviso 2 was enacted to meet a particular situation. The proviso talks of "existing vacancies" on May 10, 1974. On that date the posts held by the Additional District and Sessions Judges, who were members of the Service, could not be termed as "existing vacancies". The "existing vacancies on May 10, 1974" could only be those vacancies which were left-over after providing posts to all the officers who were redesignated as Additional district and Sessions Judges under the 1974 Rules. The proviso was meant to deal with a situation which might have arisen in the event, there had been more posts and less number of officers to occupy

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the said posts on the reconstitution of the Service under the 1974 Rules. In that situation the balance-vacancies could be the 'existing vacancies' falling within the mischief of the proviso. Since prior to April 5, 1975 the only source of recruitment to service was by way of promotion the proviso intended to fill all those posts created before that date and available on that as "existing vacancies (surplus posts), from amongst the members of 'Nyayik Sewa' in the first instance and thereafter operate the quota from three sources under the 1975 rules. The proviso was meant to carry the surplus vacancies as on May 10, 1974 to April 5, 1975 for the benefit of the promotees. But since the number of officers working in the service as on May 10, 1974 and April 5, 1975 was much more than the posts available in the service the situation envisaged by the proviso did not arise. The second proviso to rule 8(2) of the 1975 rules could not operate and since it was intended to meet one-time eventually it has become redundant. The interpretation placed on the proviso by the direct recruits and the High Court if accepted would expose the rule to an attack on the grounds of discrimination and arbitrariness. The Additional District and Sessions Judges had not only the right to be appointed to the service but they were so appointed by the operation of 1974 rules. The proviso, even though retrospective, could not have taken away the vested rights of the officers who had already become members of the service. This could not be the intention of the framers of the 1975 rules. We, therefore, reject the contention of Mr. Satish Chandra. Third proviso to Rule 8(2) which is dependent on second proviso must obviously meet the same fate. The net result is that on April, 5, 1975 all the 236 officers working against 236

posts (229 permanent+7 temporary) as Additional District and Sessions Judges in the Service, shall be deemed to be existing members of the Higher Judicial Service as constituted under the 1975 Rules and they shall en bloc rank senior to all other officers appointed to the service thereafter from the three sources in accordance with their quota under the Rules.

We may now take up the second point as to how the seniority of the promotees, who have rendered continuous officiating service, be fixed under the 1975 rules. Mr. Satish Chandra, learned counsel for the direct recruits has taken us through Rule 3(d) which defines "member of the service", 4(3), 13 and 19(2) of the 1953 Rules and has contended that temporary posts cannot form part of the cadre of the Service. According to him service rendered in or against a temporary post is outside the pale of the 1975 rules and cannot be counted for seniority. He has further relied upon clauses (13) and (19) of rule 9 of the U.P. Fundamental Rules which define "lien" and "officiate" and

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contended that an officiating appointment can only be made against a permanent post and as such the continuous officiation immediately prior to the date of confirmation provided in the first proviso to rule 26(1)(a) of the 1975 rules can only be the officiation against a permanent post. It is not necessary for us to go into this question because the point is not res integra. It is not disputed that the service consists of permanent and temporary posts. This Court in Dixit's case after taking into consideration the scheme of the 1975 rules held as under:

"In Rule 22 of phrase used is "to make appointment to the Service on the occurrence of substantive vacancies" and it was contended on the one side that substantive vacancies does not mean permanent vacancies whereas on the other hand it was contended that if only means permanent vacancies. The substantive vacancy has not been defined in the Rules but proviso to Rule 8 which has been quoted above speaks of permanent vacancies and temporary posts. In fact the scheme of the Rules clearly indicates that there are permanent posts and temporary also which are created to meet contingency and it may in due course be made permanent. It therefore could not be doubted that 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."

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 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.

There is no dispute that the seniority of a direct recruit, appointment to the post in service, has to be determined from the date of continuous officiation in the

service. The question for our determination is whether the seniority of a promoted officer is to be counted from the date of continuous officiation giving him benefit of full

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period of officiation as claimed by Mr. Yogeshwar Prasad or only for a maximum period of three preceding the date of confirmation as provided by first proviso to Rule 26(1)(a) as argued by Mr. Satish Chandra. The High Court has not followed either of the methods and has determined the seniority by giving benefit to a promotee of three years officiation preceding the date of availability of a permanent post.

We have given our thoughtful consideration to the arguments of the parties. This Court has time and again held that when an incumbent is appointed to a post in accordance with the Service Rules his seniority has to be counted on the basis of continuous length of service and not in reference to the date of confirmation. Even in present case the promotees have been confirmed long after the availability of permanent vacancies. This Court in *S.B. Patwardhan & Others etc. etc. v. State of Maharashtra & Others*, [1977] 3 SCR 775 observed that "confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies". A Constitution Bench of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others*, [1990] 2 SCC 715 approved Patwardhan's case and laid down the following propositions in this respect:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The Corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard

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they must ordinarily be followed strictly."

Keeping in view the scheme of the 1975 rules, we are of the view that first proviso to rule 26(1)(a) of the 1975 rules which links the seniority with the date of confirmation is on the face of it arbitrary and as such violative of Article 16 of the Constitution of India. Since the recruitment to the service is from three sources the existence of a vacancy either permanent or temporary is the sine quo 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.

Finally we take-up the third point.

Recruitment to the service under the 1975 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. Rule 18 of the 1975 rules provides procedure for selection of the direct recruits. Rule 20 lays down the procedure for recruitment by promotion and Rule 22 provides for appointment. These Rules are reproduced as under:

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"18. Procedure of selection- (1) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such examination, as it may consider necessary for judging the suitability of the candidates. The Committee may call for interview such of the applicants who in its opinion have qualified for interview after scrutiny and examination.

(2) In assessing the merits of a candidate the Selection Committee shall have due regard to his professional ability, character, personality and health.

(3) The Selection Committee shall make a preliminary selection and submit the record of all candidates to the Chief Justice and recommended the names of the candidates in order of merit who, in its opinion, are suitable for appointment to the service.

(4) The Court shall examine the recommendations of the Selection Committee and, having regard to the number of direct recruits to be taken, prepare a list of selected candidates in order of merit and forward the same to the Governor.

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

(2) The field of eligibility for recruitment by promotion shall be confined to four times the number of vacancies to be filled by promotion. The Selection Committee shall prepare a list in order of seniority of the officers eligible under Rule 5(b) of these rules.

(3) The Selection Committee shall, after examining the record of the officers included in the list prepared under sub-rule(2) of this rule make a preliminary selection of the officers who in its opinion are fit to be appointed on the basis of seniority-cum-merit. In assessing the merits of a candidate, the Selection Committee have due regard to his service record, ability, character and seniority. The list shall contain the names of officers twice the number of

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vacancies required to be filled by promotion of the members of the Nyayik Sewa.

(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 lists mentioned in Rules 18, 30 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 list.

(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 appoint-

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ments 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 or 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).

Is obvious from Rules 22(3) and 22(4) reproduced above that appointments to the temporary vacancies are to be made from amongst the members of the Nyayik Sewa and the Judicial Magistrates. Under Rule 20 the Selection Committee has to prepare a merit list in order of seniority of the officers of Nyayik Sewa twice the number of vacancies and the said list remains operative till the next recruitment. Similarly, a merit list of eligible officers from the Judicial Magistrates is prepared. Whenever temporary posts are created, appointments to the said posts under Rule 22(3) and 22(4) are made from out of the lists so prepared. Rule 18 on the contrary is silent about the preparation of a similar merit-list obviously because Rule 22 does not permit any appointment to the temporary posts from amongst the direct recruits. We see no justification is 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.Ks Subraman v. Union of India, [1975] 2 S.C.R. 979 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)"

This court in P.S. Mahal v. Union of India, [1984] 3 S.C.R. 847 held as under:

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"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 an 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....."

It is thus clear that the vacancies in the posts of Executive Engineer arising on account of deputation of Executive Engineers to other departments, organisations and public undertakings for a period of one or more years were long term vacancies and they could not be regarded as fortuitous or adventitious in character and hence they were subject to the quota rule".

When temporary posts under rule 4(4) of the 1975 Rule 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. Rules 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 rule 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

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discriminatory and violative of Articles 14 and 16 of the Constitution of India. We, however, direct that the appointments already made under these 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.

Before parting with the judgment we make it clear that the findings and observations in Dixit-case to the extent those are contrary to this judgment, shall be deemed to have been over-ruled.

We allow the writ petitions and the Civil Miscellaneous petition, quash the final seniority-list dated August 25, 1988 and direct the High Court to prepare, circulate, invite, objections and finalise the seniority list of the service in the light of the findings given and the observations made by us in this judgment. We reiterate our findings hereunder:

1. All the 236 promotee officers 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 1975 rules and they shall en bloc senior to all other officers appointed to the service thereafter from three sources in accordance with their quota under the 1975 rules.)

2. We strike-down (first proviso to rule 26(1) of the 1975 rules and direct 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 1975 rules.)

3. (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 Rule the committee shall prepare a

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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 temporary posts from all the three sources in

accordance with the quota provided under the said rules.)

There shall be no order as to costs.

R.S.S.

Petition allowed.

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JUDIS