

PETITIONER:
PRABRAKAR YESHWANT JOSHI & ORS.

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA AND ORS.

DATE OF JUDGMENT:
29/09/1969

BENCH:

ACT:
Seniority--Fixation of--Maharashtra Service of
Engineers--Seniority inter se of promotees and direct
recruits--If violative of Articles 14 and 16 of the
Constitution.

HEADNOTE:

The petitioners were direct recruits to the post of Deputy Engineers in Bombay Service of Engineers Class II. In petitions under Art. 32 of the Constitution they challenged the promotion, by the first respondent, of respondents 2 to 5 and others similarly situated to the posts of officiating Executive Engineers contrary to the principles of natural justice and in violation of Articles 14 and 16 of the Constitution. It was contended that under the rules in force the respondents were only officiating Deputy Engineers and they had to put in after confirmation as Deputy Engineers seven years of actual service before being eligible for promotion as officiating Executive Engineers; further, particularly in the case of employees from the erstwhile State of Hyderabad the first respondent had contrary to the rules relating to promotion, by a resolution in 1967 directed those employees to be treated as having been appointed in the reorganised Bombay State as temporary Deputy Engineers only for the purpose of fixation of their seniority in the grade of Deputy Engineers and for promotion to higher posts and therefore those employees did not satisfy the 7 year requirement. Dismissing the petitions, HELD : (i) There is nothing in rules 6 7 and 8 of the 1960 Resolution to militate against the interpretation that the service specified there can be the total service of any description whether provisional, temporary or permanent. If promotion from Class II as officiating Executive Engineer can only be made after 7 years of permanent service then there would be no meaning in including the temporary service in Class II for the purpose of absorption as Executive Engineers. If temporary service can be taken into account for confirmation as an Executive Engineer so can officiating service and if officiating service can be taken into consideration there is no impediment to a Deputy Engineer with 7 years' service whether officiating, temporary or permanent to be entitled for promotion as an Executive Engineer. The Resolution of 1963 makes it abundantly clear that the seniority of promotees should be considered as from the date of promotion to officiate continuously irrespective of whether the appointments were made in temporary or permanent vacancies. [626 G-627 E]
(ii) Those respondents who were from Hyderabad State were in fact selected by the Hyderabad Public Service Commission as

Assistant Engineers and would have been appointed as such but for the States Reorganisation Act which came into force from 1956. Had they been appointed earlier they would have had to be equated with the posts in Bombay. The allocation of persons after the reorganisation from one State to another was subject to the Reorganisation Act which dealt with matters pertaining to allocation, transfer, fixation of service conditions, seniority etc. The claims of the respondents who were allotted from the Hyderabad State arose earlier than the appointments of the petitioners and the Govern-

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ment of Bombay and subsequently the Maharashtra Government was entitled to consider these claims and to give redress. There is no statutory bar or rule which prohibits the Government of Maharashtra from deeming their appointment as from 31-3-1967 for the limited purpose of seniority and promotion. [628 E-629 C]

(iii) Further, when promotions are made on the basis of seniority-cum-merit all that can be required is that persons entitled to promotion should be considered 'and if having been considered they have been left out they would have no claim to promotion as a matter of right. The petitioners did not possess the required length of service in Class II for them to be entitled to promotion when the respondents were included in the List and promoted; as such they cannot challenge the appointments made as being in violation of Arts. 14 or 16. 629 D-E]

State of Mysore v. Syed Mahmood, [1968] 3 S.C.R. 363.

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petitions Nos. 112 to 114 of 1968.

Petition under Art. 32 of the Constitution of India for the enforcement of fundamental rights.

S. V. Gupte, M. J. Rana and B. R. Agarwala, for the petitioners.

M. C. Chagla, G. L. Sanghi and S. P. Nayar, for respondent No. 1.

S. Mohan Kumaramangalain, Y. S. Chitle, S. N. Prasad and

R. B. Datar, for respondents Nos. 2, 4, 6 to 23, 27 to 30 and 32 to 34.

Respondent No. 3 appeared in person.

The Judgment of the Court was delivered by

Jaganmohan Reddy, J. The three petitioners by these petitions under Art. 32 of the Constitution have challenged the promotion by the first respondent, who, ignoring the claims of the petitioners, have promoted respondents 2 to 5 and other persons similarly situated to the post of officiating Executive Engineers contrary to the principles of natural justice and in violation of Arts. 14 and 16 of the Constitution. All the three petitioners were directly recruited by the Public Service Commission as Deputy Engineers in the Bombay Service of Engineers Class II, now known as Maharashtra Service of Engineers Class R. The first respondent is the State of Maharashtra. Respondent No. 2 belonged to the erstwhile State of Bombay; respondents 3 and 4 belonged to the former State of Hyderabad, while respondent No. 5 to the former State of Madhya Pradesh, and were allocated to the State of Bombay under the States reorganisation. Likewise the other respondents who were formerly in the service of different States referred to above, now belong to the Maharashtra Service of Engineers.

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The petitioners' case is that under the rules in force the respondents who were in the substantive rank of overseers were only officiating Deputy Engineers and that as they did not belong to the cadre of Deputy Engineers they were not entitled to promotion inasmuch as they had to put in after confirmation as Deputy Engineers 7 years of actual service before being eligible for promotion, as officiating Executive Engineers. On the other hand, the petitioners were direct recruits and were entitled to promotion after 7 years of service from the date of appointment, as their subsequent confirmation related back to that date. It is contended that the first respondent, contrary to these rules, appointed respondents 2 to 34 as officiating Executive Engineers before they had completed 7 years of actual service after the date of confirmation and particularly in the case of employees from the erstwhile State of Hyderabad it had, contrary to the rules relating to promotion, by a resolution dated the 23rd February 1967 directed respondents 3, 4, 6 to 14 to be treated as having been appointed in the reorganised Bombay State as temporary Deputy Engineers with effect from 31st March 1937 only for the purpose of fixation of their seniority in the grade of Deputy Engineers and for promotion to higher posts. By so directing, respondent No. 1 conferred, in an arbitrary manner, an advantage on the said respondents to the detriment of the petitioners while, as a matter of fact, those respondents had not completed either 7 years of actual service after confirmation as required by the rules nor did they have even 7 years' service as officiating Deputy Engineers on the date of promotion as officiating Executive Engineers.

In order to understand the contentions urged on behalf of the petitioners it will be necessary to state briefly the history of the service and the several resolutions which are applicable to them in respect of recruitment as well as seniority. The Bombay and subsequently the Maharashtra service of engineers consists of Class I and Class II (Deputy Engineers). They were initially governed by rules framed under the resolutions of the Government in the Public Works Department dated the 22nd March 1937. The recruitment to these services both in class I and class II was partly by direct recruitment and partly by promotion from amongst the members of the lower cadres. In 1939 further rules were made to regulate the method of recruitment to the State services. Under these rules recruitment to the Bombay Service of Engineers Class I was to be from two sources, (1) by nomination under r. 3 by virtue (1) the guarantee given to the engineering college of Poona and (2) by promotion from the existing Bombay Service of Engineers (since discontinued) or from the Bombay Service of Engineers Class II. The recruitment to the Bombay Service of Engineers Class II under the rules of 1939

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was also to be similarly from two sources, (1) by nomination under r. 11 in accordance with the guarantee to the Royal College of Poona (which was withdrawn in 1947) and (2) by promotion from (a) Bombay Subordinate Engineer Service, (b) permanent and temporary supervisors and (c) temporary engineers appointed on annual sanction. These rules however did not specify the principles upon which the seniority of the direct recruits and the promotee officers was to be determined. The Government of Bombay accordingly by a resolution dated 21st November 1941 laid down the following principles to be applicable to direct recruits and promoted

officers in the provincial service except the Bombay Service of Engineers Class I :-

- (1) "In the case of direct recruits appointed directly on probation, the seniority should be, determined with reference to the date of their appointment on probation;
- (2) In the case of officers promoted to substantive vacancies the seniority should be determined with reference to the date of their promotion to the substantive vacancies

provided

there has been no break in service prior to their confirmation in those vacancies."

It may here be stated that the Bombay Government had appointed a committee known as Gurjar Committee to examine "whether class I and class II cadres in the said services should be continued or whether they should be combined into one class and what should be the ratio between the direct recruits and the departmental promotees to the said service. The Committee made its recommendations in 1951. The Government after due considerations of the recommendation and the earlier rules regulating the condition of service in the Bombay Service of Engineers passed a resolution dated 29th April 1960 setting down the principles for recruitment to the Bombay Service of Engineers Class I and Class II. Before this resolution, as we have noticed earlier, the Deputy Engineers Class II service cadre consisted of (a) direct recruits to the Bombay Service of Engineers Class II, (b) Deputy Engineers confirmed from the subordinate services of Engineers, (c) temporary deputy engineers recruited by the Bombay Public Service Commission and (d) officiating Deputy Engineers and similar other categories. These four categories were being compiled into 2 lists only, namely, (1) Bombay Service of Engineers Class II cadre of permanent Deputy Engineers and (2) the list of officiating Deputy Engineers. It also further continued the existing constitution of class I and class II engineering service. The appointments to be made were to be both by direct recruitment through the competitive examinations held by the Public Service Commission and by promotion, provided however that

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the ratio of appointments by nomination and by promotion shall as far as practicable be 75 : 25. The candidates appointed to either of the two services by nomination had to be on probation for 24 years before being confirmed provided further that an Assistant Engineer would be confirmed as Executive Engineer after nine years' service unless the period is extended by the government. The Deputy Engineers Permanent in class II cadre had to put in at least 15 years of service in class II in temporary and permanent capacities and must be officiating executive Engineers at the time of their absorption.

The resolution of 1960 provided that in future recruitment to Bombay Service of Engineers class II cadre shall be made (1) by nomination of candidates recruited directly by a competitive examination held by the Commission and (2) by promotion from the list of officiating Deputy Engineers. The direct recruitment of temporary Deputy Engineers was to cease and the officiating vacancies were to be filled from the ranks of subordinate service of Engineers for which purpose a statewise select seniority list of members of the subordinate service of Engineers cadre considered fit to hold sub-divisional charges was to be compiled and maintained as on 30th June each year. On July 29, 1963 the

Government of Bombay further amended the rules prescribed in Government Resolution of November 21, 1941 for regulating the seniority of direct recruits and promoted officers. In supersession of the previous rules it provided that the seniority of the direct recruits is to be determined according to the date of appointment on probation and of the promotees according to the date of promotion to officiate continuously irrespective of whether the appointments are made in temporary or in permanent vacancies subject to the provisions contained therein.

In so far as promotion from lower to higher grade of post is concerned, the principle of seniority-cum-merit was always followed by the Government which subsequently also formed the bases of the Government resolution dated 18th December 1950 which inter alia prescribed that no officer who had positive qualification should be passed over by an officer junior to him unless the latter had in addition really exceptional ability or qualification. This resolution was passed after consultation of the Bombay Public Service Commission and in supersession of the orders of the previous resolutions dated 22nd May 1944, 23rd March 1945 and the 18th March 1947. Thereafter by another resolution dated 4th March 1957 the principle for the preparation and maintenance of a select list of Deputy Engineers who were considered fit for promotion as Executive Engineers was formulated. According to this resolution, a committee consisting of 3 Chief Engineers under the chairmanship of the senior Chief Engineer

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was to review in December each year the claim of officers in the Bombay Service of Engineers class II for promotion to the post of Executive Engineer. This committee had to prepare a select list with due regard to the provisions of the government resolution dated the 18th December 1950. Likewise, the Government by a resolution dated 20th August 1965, revising its previous resolution dated 24th August 1954 and 14th December 1959, formulated the principles for preparation, maintenance and revision of a list of overseers fit for promotion as Deputy Engineers. Under this resolution statewide list as on 1st April of every year of each of the categories of overseers had to be made comprising of (1) graduate overseers, (2) diploma holder overseers (DCE-Poona) or equivalent, (3) subordinate overseers holding the Diploma of the Osmania University, and (4) non qualified overseers. The length of service required for eligibility to promotion to the post of officiating Deputy Engineer in respect of the first category was 3 years, second category 8 years, third category 10 years including past service as sub-overseers of those allocated from the ex-Hyderabad State, and fourth category 13 years.

We may now briefly state the different grades of service and the channels of promotion in the Engineering service of the Maharashtra State created as a consequence of the various rules. At the apex of the service are the Chief Engineers, Superintending Engineers and the Executive Engineers who constitute class I service. The channels of promotion to the cadre of Executive Engineers is from two sources, (a) direct recruit to class Assistant Engineers, and (2) Deputy Engineers class II. The cadre of Deputy Engineers class II is constituted by direct recruits 75 per cent and promotees 25 per cent. The channels of promotion to the promotees class II were from temporary engineers and from the subordinate service, namely, graduate engineers, now known as junior engineers, diploma holder overseers and junior or

non-technical overseers promoted from still lower ranks. The case of the first respondent and the other respondents is that the 7 years' qualifying service required for promotion as Officiating Executive Engineers is continuous officiating service as Deputy Engineer and not as contended by the petitioners to be reckoned from the date of confirmation as Deputy Engineers. It is contended first, that the interpretation of rr. 6, 7 and 8 of the 1960 Resolution does not ex facie lend itself to the interpretation suggested by the petitioners; secondly, that it ignores the subsequent amendment effected by the 1963 Resolution; thirdly, that for the purpose of promotion the seniority which is relevant is not the seniority in the department but the seniority in the Select List to be prepared in accordance with the Resolution of 1957 in which the petitioners could not and did not find a place during the

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relevant period fourthly, the basis of promotion being seniority-cum-merit the petitioners who had at no time complained that their names were not considered cannot complain of a violation of Art. 14 or Art. 16, nor could a writ of mandamus lie in such circumstances; and fifthly, that the Resolutions to which references have been made and which are relied upon by the petitioners are not made either under Art. 309 or any other provision of law but are merely executive instructions which the Government would be entitled to issue in the absence of rules which have statutory binding force. In so far as respondents who are allotted from Hyderabad service are concerned, it is contended that they were all selected by the Hyderabad Public Service Commission in June 1956 and would have been appointed as Assistant Engineers in that State 'in a few months had not States reorganisation taken place. In view of the fact that they had been selected by the predecessor State and also the successor state it was open to the Government to make the appointment of the respondents having regard to the various provisions of the States Reorganisation Act, and accordingly the Government directed that their appointments be treated as temporary Deputy Engineers effective from 31-3-1957 for the purpose of seniority and promotion. What in fact the Government has done is to recognise the just claims of those who had already been selected for class I posts in the Hyderabad State which posts have been equated with the post of Deputy Engineers in the Bombay State while arriving at the equation envisaged under the States Reorganisation Act and under the allotted Government Service Rules of 1957. In fact the claim of the respondents was that the Assistant Engineers of class I of the Hyderabad State should be equated with the posts of Assistant Engineers Class I of the Bombay State.

Shri Gupte learned counsel for the petitioners however contends that all the respondents from the erstwhile Hyderabad State were allotted to the Bombay State as overseers which posts they were holding substantively on and after 1st November 1956. They were thereafter promoted as officiating Deputy Engineers between 1958 and 1963 and were not confirmed in their respective posts on the date when they were appointed officiating Executive Engineers. The learned Advocate further contends that these persons were in fact not appointed as Assistant Engineers in the erstwhile Hyderabad State though they might have been selected by the Hyderabad Public Service Commission and that in any case as the Bombay Public Service Commission did not select them they could not be classified in the category of temporary

Deputy Engineers selected by the Bombay Public Service Commission. Apart from this category, there are respondents who were appointed as officiating Deputy Engineers before the reorganisation on 1st November 1956 and were confirmed only after the petitioners were directly

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appointed. The first petitioner was appointed on 9th June 1959, the second petitioner on 11th June 1959 and the third petitioner on 12th June 1959. Though the petitioners were confirmed 2 years thereafter, namely, on 9th June 1961, 24th June 1961 and the 18th June 1961 respectively, none the less for the purpose of seniority the dates on which they were first appointed in June 1959 would be relevant dates because confirmation under the rules relates back to that date and therefore they would be senior to those respondents who were confirmed thereafter. There are yet a few respondents who were promoted as officiating Deputy Engineers after the 1st November 1956, namely, those persons who were non gazetted sub divisional officers of the former State of Madhya Pradesh and the former State of Hyderabad who were treated as Deputy Engineers from 1st November 1956 and there were others who were not so deemed but were not confirmed as Deputy Engineers on the date when they were promoted as officiating Executive Engineers. The contention of Shri Gupte in the main is that officiating Deputy Engineers could only be considered as promoted to the grade of Deputy Engineers on confirmation and therefore the 7 years qualifying service necessary for their being promoted as officiating executive engineers is to be reckoned from the date of their confirmation as Deputy Engineers and since good many of them were confirmed after the appointment of the petitioners and most of them were not so confirmed even on the date of their promotion as Executive Engineers under the rules they would not be entitled to those promotions. Shri Chagla and Shri Kumaramangalam, on the other hand, contend that the rules nowhere prohibit the promotion to Executive Engineers from officiating Deputy Engineers, nor is there anything to indicate either expressly or otherwise that the 7 years' qualifying service should be from the date of confirmation. All that is required is that a person in order to become eligible for promotion as officiating Deputy Engineer should be promoted as Deputy Engineer that in either case he should have 7 years in that capacity whether as permanent Deputy Engineer or continuously as an officiating Deputy Engineer and that he should be selected and put on a Select List. The respondents, it is contended, have fulfilled all these requirements. The second respondent who appeared in person has adopted these arguments of the learned Advocate for the respondents. We may here read the relevant rules as set out in the respective resolutions.

1957 Rules-

(1) Government should review in December each year the claims of all officers in the Bombay Service of Engineers, Class II for promotion to the posts of Executive Engineers by setting up a Committee consisting of the three Chief Engineers under the

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Chairmanship of the Senior Chief Engineer, which should draw up a select list of those considered by them suitable for promotion.

(2) The Committee should scrutinise the case of each officer and prepare a select list with regard to the provisions of Government Resolution and Government Circular Memorandum, Political and Services Department Nos. 4099/34,

dated the 18th December, 1950. Only such officers should be selected for inclusion in the select list as have put in at least seven years' service (excluding the period of training but including the period of probation) in the grade of Deputy Engineer. The officers should also possess the necessary personality, initiative, strength of character, fitness to assume independent responsibility and capacity for outdoor as well as office work. No officer should be included in the Select list merely on the negative ground that he is not manifestly unfit.

(3) The seniority of the officers on the Select list should be determined by the date of entry of their names in the select list. The seniority inter se of officers whose names are entered on the same day should be determined in accordance with their seniority in the Class II cadre, unless in consultation with the Commission, it is decided to give an officer accelerated promotion on account of really exceptional ability or qualification.

(4) The Committee should submit to Government the Select List for approval in consultation with the Bombay Public Service Commission. While submitting the list, the Committee should give full justification for supersession involved, if any, and full information regarding qualifications and previous service of those recommended to be brought on the Select List should be given.

1960 Rules-

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

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

(iii) The seniority of the Class II promotees shall be fixed below the bunch of Assistant Engineers, any one of whom is due for confirmation as Executive Engineer during that calendar year, provided that no Class II promotee shall be placed senior to a direct recruit to Class I Assistant Engineer who has been officiating as Executive Engineer from a date earlier than the Class II promotee. In the latter case, the Class II promotee, though holding a post and lien as a confirmed Executive Engineer shall be shown both under permanent Engineers, and, also along with the direct recruited Class I Assistant Engineers with a suitable remark under the Permanent Executive Engineers list. This is also subject to further conditions as in paragraph 7 below.

7. (i) Since the percentages in the superior posts of direct Class I recruits and promotees from Class II is to be about 75 and 25, the number of promotions from Class II in any year would be about one third the number of direct recruited Assistant Engineers confirmed as Executive Engineers during that year. Recruitments in the past have, however, been erratic and insufficient even to the extent of there being no recruitments to Class I in certain years. In

Order to deal with such situations, the following rules shall be supplemental and I exceptional to those in paragraph 6 above :

(ii) As far as possible, promotions as officiating Executive Engineers shall be so- made that the promotee, under consideration from Class II has to his credit at least 6 years longer service than a promotee under consideration from Class I, subject, as far as practicable, to the condition that a Class I Officer shall not hold a divisional rank at less than 4, and a Class II Officer at less than 7 years service.

Subject to avail-abilities, and, the above criteria, an attempt should be made to maintain the percentages, stated in paragraph 6(1) above, between direct Class I and promoted Class II officers in the total of permanent plus officiating superior posts.

(iii) In the interests of manning superior administrative ranks, it is considered necessary to have at least two confirmations to the Executive Engineers ranks every year. In years when this is not possible of achievement according to the percentages as per (i) above, the number of promotions from Class II may be increased to get the two confirmations, mentioned hereinabove.

Per contra, there would be a reduction in the percentage promotions from Class II in the following years in order to work up to the overall percentages of about 75 to 25.

(iv) Confirmations, if any, made from the bunch of Temporary Executive Engineers, who have, at present lien on no cadre, shall be counted against the 25 per cent meant for the non-direct recruits to Bombay Service of Engineers, Class I.

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

(ii) All direct recruitment of temporary Deputy Engineers having been stopped, further officiating vacancies will be, manned from the ranks of the Subordinate Service of Engineers. For this purpose, a statewide Select Seniority List will be maintained. of members of the Subordinate Service of Engineers cadre, considered fit, to hold subdivisional charges. This list shall be compiled as on 30th June each year.

For inclusion in this list a graduate shall have to his credit not less than 3, a diploma holder not less than 8, and, a nonqualified person not less than 13 years' service as overseer.

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

(iii) The probationers recruited directly to in the Bombay Service of Engineers, Class II cadre in any year

shall, in a bunch be placed senior to promotees confirmed, during that year.

1963 Rules-

(A) The seniority of direct recruits and promoted officers in the State services should be determined according to the date of

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appointment on probation in the case of direct recruits and according to the date of promotion to officiate continuously in the case of these appointed by promotion, irrespective of whether the appointments are made in temporary or in permanent vacancies, subject to the provisions of the following clauses

(B) A list of services in respect of which special orders for fixation of seniority are in force and to which these orders will not apply will 'be issued in due course.

It would be apparent from the 1941 rules that they merely provide for fixation of seniority of the direct recruits and officers promoted to the substantive vacancies but have nothing to do with the qualifications required for promotion to the next higher rank. Rule 6 of 1960 deals with class I posts. Clauses 1, 2 and 3 of this rule provide (1) that 25 per cent posts in class I are to be filled by promotees, (2) that for absorption into class 1, class II Officer must have a permanent service in class II cadre, (b) have 15 years of service in class II in temporary and permanent capacities, and (c) that he must be holding an officiating divisional rank at the time of such absorption. Clause 3 deals with inter se seniority between the Assistant Engineers and Class II promotees to the post of Executive Engineers. The absorption referred to in r. 6 is a permanent absorption because cl. 2 provides that on such absorption the class II officers shall be confirmed as Executive Engineers. Clause 6 gives no indication that class II officers whether direct recruits or promotees cannot be promoted as officiating Executive Engineers. That is dealt with by cl. 2 of as officiating Engineers. That is dealt with by cl. 2 of r. 7 which r. 7 which provides that Class II officers should have as far as possible at least 6 years longer service than the promotee under consideration from class 1, viz., Assistant Engineers, and further that he should at least have seven years service. Even this rule does not indicate that the qualifying service of either of six years or of 7 years specified in the rule has to be permanent service. In cl. (ii) of r. 6 it is provided that 15 year-, of service in class II for absorption as Executive Engineer can be in temporary or permanent capacities. There is nothing in r. (ii) to militate against the interpretation that the service specified there can be the total service of any description whether provisional, temporary or permanent. If promotion from class II a, officiating Executive Engineer can only be made after 7 years of permanent service, then there would be no meaning in including the temporary service in class II for the purpose of absorption as Executive Engineer. Even r.8 upon which Shri Gupte has laid great emphasis in support of his contention. does not, in our view, justify an interpretation that the

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7 years' service required to entitle persons in class II for promotion as an officiating Executive Engineer should be permanent service in class II. Shri Gupte however relied on the requirement in cl. (ii) of r. 8 that the recruitment to Bombay Service of Engineers, Class II cadre shall in so far as promotees are concerned be by promotion from the list of officiating Deputy Engineers. Relying on this rule the

learned Advocate contends that for promotion as Deputy Engineer Class II he must be on the list of officiating Deputy Engineers before he is entitled to promotion as Deputy Engineer Class II and be confirmed in that post after satisfying the requirements of 3 years' service as officiating Deputy Engineer. Until he is so confirmed, he will not be considered to have been promoted as Deputy Engineer or to belong to class II service for promotion as officiating Executive Engineer as required under cl. (ii) of r. 7. As we have seen earlier, cl. (ii) of r. 7 does not use the word 'belong' but requires only that the person under consideration for promotion should be from class II service. To be in class II service the Deputy Engineer promoted from subordinate service has to put in at least 3 years of service as officiating Deputy Engineer before being confirmed and thereafter he can when he is promoted to the next higher rank be confirmed as Executive Engineer if he has put in 15 years in class II service in temporary or permanent capacities and is holding an officiating divisional rank, namely of an Executive Engineer. If temporary service can be taken into account for confirmation as an Executive Engineer, so can officiating service, and if officiating service can be taken into consideration, there is no impediment to a Deputy Engineer with 7 years' service whether officiating, temporary or permanent to entitle him for promotion as an Executive Engineer.

The list that is referred to in cl. (i) of r. 8 must be read with the further provision in that rule that for inclusion in that list of persons a graduate shall have to his credit not less than 3, a diploma holder not less than 8 and a non qualified person not less than 13 years of service as overseers. In our view it is the list of such persons that is referred to in cl. (ii) of r. 8 and not that there should be a list of persons actually officiating as Engineers for further promotion to the same post which will have little meaning, for there cannot be a promotion of a person in the same cadre of g service who is already promoted whether as an officiating or temporary or permanent incumbent. If cl. (i) of r. 8 provides that class IT cadre shall be recruited by competitive examination, the promotees also are promoted from the list of persons considered fit to hold sub divisional charge, i.e., posts of Deputy Engineers. If in the case of direct recruits the appointment is without reference to confirmation, it cannot be any different in the case of promotees.

We cannot, therefore, accept the contention of Shri Gupte that a promotee officiating Deputy Engineer Class II is not entitled to

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be considered for promotion under r. 7 to the post of an officiating Executive Engineer unless he has put in 7 years of service from the date of confirmation. On the other hand, the subsequent resolution of the Government of 1963 makes it abundantly clear that the seniority of promotees should be considered as from the date of promotion to officiate continuously irrespective of whether the appointments are made in temporary or permanent vacancies. It is no doubt submitted that this does not have the force of rules and cannot therefore have the effect of amending the rules of 1960. As we have already held on art interpretation of the rules of 1960 that they do not support the contention of the petitioners, the question whether the resolution has the force of rules may not be relevant in this context, but none the less in our view, there is force in the contention of Shri Kumaramangalam, learned advocate

for the respondents, that even the 1960 rules have no statutory force and are no better than the executive instructions issued from time to time by means of resolutions. It may be observed that the rules referred to are part of the resolution of 1960. The resolution itself lays down the principles and in the end formulates those principles in terms of rules, which however are not purported to be made under any provision of law or even under Art. 309. There also is nothing to indicate that the procedure and formalities required for making rules have been gone through.

It is next contended that the persons from the Hyderabad service did not have 7 years even as officiating Deputy Engineers but were only deemed to have been appointed as temporary engineers as from 31-3-1957. This contention also, in our view, has no force because the respondents who were from Hyderabad State were in fact selected by the Hyderabad Public Service Commission as Assistant Engineers and would have been appointed as such but for the States Reorganisation Act which came into force as from 1-11-1956. Had they been appointed earlier, they would have had to be equated with the posts in Bombay. In fact as the notification issued by the Hyderabad Public Service Commission furnished by Mr. Joshi shows, the candidates who were to be selected were required to serve in any of the districts of Hyderabad State- Hyderabad proper or according to the allocation in the reorganised set up of the State if and when it took place. It was therefore, in the contemplation of the Public Service Commission that the State would be reorganised and the candidates selected may be required to serve in the reorganised State. The allocation of persons after the reorganisation from one, State to the other was subject to the Reorganisation Act which dealt with matters pertaining to allocation, transfer, fixation of service conditions, seniority etc. The claims of the respondents who were allotted from the Hyderabad State arose earlier than the appointments of the petitioner, and the Government of Bombay and subsequently the

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Maharashtra Government was entitled to consider these claims and to give redress.

It is again argued that if they had a claim under the States Reorganisation Act, they should have been treated as Deputy Engineers from 1st Nov. 1956, and not from 31st March 1957 and therefore they could not be considered as having been dealt with under the States Reorganisation Act. We are unable to accept the force of this argument 'because it was open to the Government of the State to which they were allotted to take into consideration the fact that they would have been appointed in the erstwhile State from a particular date, to treat them as such and to equate their posts which they would have held. In these circumstances, there is no statutory bar or rule which prohibits the Government of Maharashtra from deeming their appointment as from 31-3-1957 for the limited purpose of seniority and promotion.

Apart from these contentions it appears to us that there is another formidable obstacle in the way of the petitioners' success and it is that under the 1957 Resolution for promotion to the post of officiating Executive Engineers, they should be put on the Select List by a committee of the Chief Engineers to be prepared each year for that purpose. When promotions are made on the basis of seniority-cum-merit, all that can be required is that persons entitled to promotion should be considered and if having been considered they have been left out, they would

have no claim to promotion as a matter of right. In State of Mysore v. Syed Mahmood(1) this Court had so held. Bachawat, J. speaking for the Court observed at p. 366,

"Where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted."

It is however stated that no list was made for 1966 which is the crucial year in so far as the petitioners are concerned because their 7 years would have been completed in June 1965 and they would have been entitled to be considered for promotion in 1966. In answer to this contention the affidavit on behalf of the respondents shows that the select list of the Deputy Engineers fit for promotion to the post of Executive Engineers in class I was prepared for the year 1964 and 1965 according to the principles and rules laid down in the resolutions of 14th December 1957 and 29th April 1960. None of the petitioners, it is averred, was included in the Select List for 1964 or 1965 because not only did any of them not

[1] [1958] 3 S. C. R. 363.*

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have the requisite seven years' service as Deputy Engineer at the relevant time but they were also not entitled to be included because of the classes of recommendation earned by them during the relevant period. The petitioners however denied in their rejoinder that the lists were prepared keeping in view the criteria laid down by the rules, 'but, in our view, it is significant that they did not possess the required length of service in class II for them to be entitled to promotion when the respondents were included in the list and promoted as such they cannot challenge the appointments made as being in violation of Art. 14 or Art. 16.

In the result these petitions merit dismissal and are accordingly dismissed.

Y.P.

Petitions dismissed.

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