DR. M.A. HAQUE AND ORS. A

*v.*

UNION OF INDIA AND ORS.

FEBRUARY 18, 1993

[P.B. SAWANT AND G.N. RAY, JJ.] B

*Civil Services:*

*Railways—Assistant Divisional Medical Officers—Ad-hoc appointees between 1968 and 1984—Regularisation by Court's orders—Inter-se seniority—Fixing of—Directions—Issued.* C

**The petitioner-applicants were recruited by the Railways on *ad hoc* basis as Assistant Divisional Medical Officers between 1968 and 1984. Though UPSC recruited candidates on regular basis from time to time, either due to non-availability of number of candidates or non-joining of** D **selected candidates, vacancies remained and persons like the petitioners continued in such vacancies on *ad-hoc* basis. The petitioners filed Writ Petitions before this Court for regularisation of their services. By orders of this Court, the services of the petitioners have already been regularised.**

**The present application is for fixing the seniority of the Writ** E **Petitioners whose services were regularised.**

**Disposing of the application, this Court,**

**HELD: 1. Since the petitioner-applicants are admittedly not regularly appointed through the UPSC according to the rules but have been** F **directed to be regularised by following the procedure laid down by this Court, it is obvious that they are not appointed to their posts according to the rules. Under no circumstances, therefore, they fall within the scope of guidelines in *Direct Recruit Class II Engineering Officers' Association's* case. The expression "in accordance with the rules" or "according to rules"** G **used in the said guidelines means the rules of recruitment and not the special procedure laid down by this Court. The petitioner-applicants thus fall in an altogether different category. Therefore, a procedure for fixing their seniority has to be evolved. That procedure cannot be in violation of the guidelines laid down in *Direct Recruit Class II Engineering Officers'*** H

A *Association's* case. Further, the seniority given to the petitioner-applicants will have to be below the seniority of the outsiders directly recruited through the UPSC as well as below that of the directly recruited erstwhile *ad-hoc* Medical Officers. [8C-F]

*Direct Recruit Class II Engineering Officers' Association & Ors.* v. *State*
B *of Maharashtra & Ors.*, [1990] 2 SCC 715, referred to.

2.1. Of late this Court has been witnessing a constant violation of the recruitment rules and a scant respect for the Constitutional provisions requiring recruitment to the services through the Public Service Commis-
C sion. Since this Court has in some cases permitted regularisation of the irregularly recruited employees, some Governments and authorities have been increasingly resorting to irregular recruitments. The result has been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidates dictated by various considerations are being recruited as a matter of course. [9E-G]

D

2.2. What is further, in the present case, some of those like the petitioner-applicants who were initially recruited on *ad-hoc* basis, have exerted themselves and taken pains to appear for the tests before the UPSC and have enrolled themselves through regular channel. There are
E three classes of employees viz., the outside direct recruits, the in-service direct recruits and the *ad-hoc* employees like the petitioner-applicants who were regularised through the Court's order. The direction given in *Dr. Rawani's* case for creation of supernumerary posts has to be confined to the special facts of that case and cannot be extended to other cases. In any case, this Court should not give any such direction to the Railways. If,
F however, the Railways decide to follow that course, they can do so and nothing prevents them from doing it. This Court would rather refrain from creating a precedent by giving such directions. [9G-H; 10A-D]

*Dr. A.K. Jain & Ors. etc. etc.* v. *Union of India & Ors.* [1987] Supp.
G SCC 497 and *Dr. P.P.C. Rawani & Ors etc.* v. *Union of India & Ors.*, JT 1991 (6) 534, referred to.

3. The seniority of the direct recruits - both outsiders and insiders should be determined according to the dates of their regular appointment through the UPSC and the petitioner-applicants should be placed in the
H seniority list after those direct recruits who are recruited till date. Among

**themselves, their seniority will be governed by the dates of their initial appointment. [10E]** A

ORIGINAL JURISDICTION: Interlocutory Application No. 1 of 1992.

IN B

Writ Petition No. 1165 of 1986.

(Under Article 32 of the Constitution of India).

M.C. Bhandare, P.P. Rao, N.N. Goswamy, C.K. Sucharita, Ms. Shashi Kiran, Ms. Manjula Gupta, R. Shashi Prabhu, V.K. Verma and Raj Kumar Gupta for P.C. Kapur for the appearing parties. C

The Judgment of the Court was delivered by

D

**SAWANT, J.** The petitioner-applicants are some of the Medical Officers who were recruited by the Railways on *ad hoc* basis as Assistant Divisional Medical Officers between 1968 and Ist October, 1984. They were appointed as such *ad hoc* employees by way of a stop-gap arrangement pending the regular recruitment to the said posts through the Union Public Service Commission [UPSC' for short], according to the rules. It appears E that although from time to time the UPSC recruited candidates on regular basis, there remained some vacancies unfilled, either because the doctors recruited were less in number than the number of vacancies since suitable candidates were not available or some of those who were selected did not join the service or between the date of advertisement by the UPSC and F that of the empanelling, some more vacancies occurred. Whatever the reasons, the fact was that even after the UPSC undertook the exercise of recruiting the doctors from time to time, some vacancies always remained unfilled. The result was that every time the petitioner-applicants and others like them were continued on *ad hoc* basis as a stop-gap arrangement till G the next recruitment by the UPSC. It may be mentioned in this connection that the *ad hoc* appointees were always at liberty to appear before the UPSC for their regular recruitment. Some of them in fact did so appear and were selected; others like the petitioner-applicants either failed to be selected or did not care to appear. The fact, however, remains that the petitioner-applicants and others like them continued to serve on *ad hoc* H

A basis since 1968. Hence they filed writ petitions in this Court for their regularisation in service. By an order dated 24th September, 1987 passed in the case of *Dr. A.K. Jain & Ors. etc. etc.* v. *Union of India & Ors.*, [1987] Supp. SCC 497 at 500 this court directed as follows:

B "(1) The services of all doctors appointed either as Assistant Medical Officers or as Assistant Divisional Medical Officers on *ad hoc* basis up to October 1, 1984 shall be regularised in consultation with the Union Public Service Commission on the evaluation of their work and conduct on the basis of their confidential reports in respect of a C period subsequent to October 1, 1982. Such evaluation shall be done by the Union Public Service Commission. The doctors so regularised shall be appointed as Assistant Divisional Medical Officers with effect from the date from which they have been continuously working as Assistant D Medical Officer/Assistant Divisional Medical Officer. The Railway shall be at liberty to terminate the services of those who are not so regularised. If the services of any of the petitioners appointed prior to October 1, 1984 have been terminated except on resignation or on disciplinary grounds, he shall be also considered for regularisation and E if found fit his services shall be regularised as if there was not break in the continuity of service but without any back wages.

(2) The petitions of the Assistant Medical Officers/Assis- F tant Divisional Medical Officers appointed subsequent to October 1, 1984 are dismissed. But we however direct that the Assistant Divisional Medical Officers who may have been now selected by the Union Public Service Commission shall first be posted to the vacant posts available wherever they may be. If all those selected by the UPSC G cannot be accommodated against the available vacant posts they may be posted to the posts now held by the doctors appointed on *ad hoc* basis subsequent to October 1, 1984 and on such posting the doctor holding the post on *ad hoc* basis shall vacate the same. While making such H postings the principle of 'last come, first go' shall be

observed by the Railways on zonal basis. If any doctor who is displaced pursuant to the above direction is willing to serve in any other zone where there is a vacancy he may be accommodated on *ad hoc* basis in such vacancy.

(3) All Assistant Medical Officers/Assistant Divisional Medical Officers working on *ad hoc* basis shall be paid the same salary and allowances as Assistant Divisional Medical Officers on the revised scale with effect from January 1, 1986. The arrears shall be paid within four months.

(4) No *ad hoc* Assistant Medical Officer/Assistant Divisional Medical Officer who may be working in the Railways shall be replaced by any newly appointed AMO/ADMO on *ad hoc* basis. Whenever there is need for the appointment of any AMO/ADMOs on *ad hoc* basis in any zone the existing *ad hoc* AMO/ADMOs who are likely to be replaced by regularly appointed candidates shall be given preference.

(5) If the *ad hoc* doctors appointed after October 1, 1984 apply for selection by the Union Public Service Commission the Union of India and the Railways Department shall grant relaxation in age, to the extent of the period of service rendered by them as *ad hoc* doctors in the Railways.

All the Writ Petitions are disposed of in the above terms."

It appears that since they experienced difficulty in adjusting the seniority of the petitioner-applicants the Union of India moved an application before this Court and this court on Ist November, 1988 made the following order in that application:

"We have heard learned counsel for the Union of India (the applicant in this Civil Miscellaneous Petition) and the learned counsel for the petitioners in the Writ Petition. In the circumstances of the case we feel that the Union

A Government should be directed to implement the order passed by us in the writ petition Nos. 522, 875, 180 & 200 of 1987 and connected cases on 24th September, 1987 in full except to the extent of fixing the *inter-se* seniority between the petitioners in the Writ Petition and the direct recruits. We accordingly make an order in this case. The B question of seniority, however, is left to be decided by the Government in the light of the decision to be rendered by this Court in the cases which are pending before the Constitution Bench involving similar questions. If any person is aggrieved by the decision of the Government on the C question of seniority he is at liberty to question it in an appropriate forum. The order passed by us in the Writ Petition subject to the above modification shall be complied with by the Union Government within two months without failure.

D The Civil Miscellaneous Petition is disposed of accordingly."

The present application has been moved in Writ Petition No. 1165 of 1986 which has been disposed of on 24th September, 1987 along with E other writ petitions in which also the aforesaid order of Ist November, 1988 was made by this Court.

Thus we are concerned in this application with those Assistant Divisional Medical Officers who were appointed between 1968 and Ist October, 1984 and who have been regularised by the aforesaid two orders F but whose seniority remains to be fixed.

After the order of Ist November, 1988, the Constitution Bench of this Court delivered its judgment in *Direct Recruit Class II Engineering Officers' Association & Ors.* v. *State of Maharashtra & Ors.*, [1990] 2 SCC 715 pending G which decision the fixation of seniority of the petitioner-applicants was kept pending. In that case the Constitution Bench has laid down certain guidelines for fixing the seniority. Two of them, viz., (A) & (B), which are relevant for our purpose are as follows:

"(A) Once an incumbent is appointed to a post according H to rule, his seniority has to be counted from the date of

his appointment and not according to the date of his confirmation. A

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

(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

Before we discuss as to which of the above two guidelines would be applicable in this case, it is necessary to state the relevant facts relating to the applicants' appointment. Firstly, it is an admitted fact that the UPSC D introduced the Combined Medical Services Examination for the first time in the year 1977. Prior to 1977, the method of recruitment was otherwise than by examination. As stated earlier, some of the petitioner-applicants were recruited between 1968 and 1977. Secondly, the petitioner-applicants were given three chances for their selection through the UPSC but they E did not avail of them. Some of those who were appointed with them, however, had availed of the chances and have been appointed as regular direct recruits and they have been given their seniority from the date they were regularly appointed through the UPSC. Thirdly, it appears that although in 1977 the written examination was introduced, on account of exigencies, the UPSC held two special selections in the years 1982 and 1985 F based on interviews only and by relaxing the age limit. In these two special selections respectively 100 and 67 *ad hoc* doctors like the petitioner-applicants were selected and absorbed in the regular cadre. They have also been given their seniority from the date they were so absorbed regularly. The petitioner-applicants either failed to appear in these examinations also G or after appearing in the same, had failed.

Thus, while fixing the seniority of the petitioner-applicants we have to keep in mind that there are three classes of Assistant Divisional Medical Officers - (i) the outsiders who have been directly recruited through the UPSC either on the basis of the written examination or the interview; (ii) H

A those who were *ad hoc* appointees like the applicants but who came to be regularly recruited through the UPSC by appearing in the written examination or in the interview; and (iii) the present petitioner-applicants who either did not appear in any written examination/interview or had failed to get through them but who have been regularised in service because of the
B orders of this Court dated 24th September, 1987 and Ist November, 1988.

Since the petitioner-applicants are admittedly not regularly appointed through the UPSC according to the rules but have been directed to be regularised by following the procedure laid down by this Court, it is obvious that they are not appointed to their posts according to the rules.
C Under no circumstances, therefore, they fall within the scope of guideline (A) laid down in *Direct Recruit Class II Engineering Officers' Association's* case (supra). In fact, they do not fall under guideline (B) given therein either, since their regularisation is not in accordance with the rules but as a consequence of special procedure laid down by this Court. The expres-
D sion "in accordance with the rules" or "according to rules" used in the said guidelines (A) and (B) means the rules of recruitment and not the special procedure laid down by this Court. The petitioner-applicants thus fall in an altogether different category not covered under any of the guidelines given in *Direct Recruit Class II Engineering Officers' Association's* case (supra). We have, therefore, to evolve a procedure for fixing their seniority.
E That procedure cannot be in violation of the guidelines laid down in *Direct Recruit Class II Engineering Officers' Association's* case (supra). Secondly, the seniority given to the petitioner-applicants will have to be below the seniority of the outsiders directly recruited through the UPSC as well as below that of the directly recruited erstwhile *ad hoc* Medical Officers. This
F is not and cannot be disputed on behalf of the petitioner-applicants.

This matter was heard earlier on 14th September, 1992 and was reserved for judgment. At that time, neither the in-service direct recruits nor the outsider direct recruits were made parties to the application. They made separate applications, being I.A. Nos. 2 and 3 respectively for im-
G pleadment/intervention and requested that they be heard in the matter before judgment is pronounced. Hence, this matter was set down for a fresh hearing and all the parties were heard on 11th and 18th January, 1993. The anxiety of the interveners, was obvious. In no case their seniority should be disturbed and they be penalised for passing the examinations/in-
H terview tests and for coming into the cadre according to the rules through

the UPSC, and no premium should be given to the applicants for their refusal to appear for the tests or for their failure to pass the same. This contention of their is unexceptionable and whether they had appeared in the case or not, the Court was bound to protect their interests particularly when the matter was heard in their absence. The petitioner-applicants, however, relied upon a decision of this Court in *Dr. P.P.C. Rawani & Ors. etc* v. *Union of India & Ors.,* (JT 1991 (6) 534). Shri Bhandare, appearing for the petitioner-applicants, made a very fervent plea that in the circumstances, the course adopted by this Court in *Dr. Rawani's* case (supra) should be followed which will do no injustice to both the categories of direct recruits. We have gone through the said decision and have anxiously considered whether the course adopted there should be adopted in the present case. We are conscious of the fact that the petitioner-applicants have been serving the Railways from the year 1968. It is also possible, as contended on their behalf that many of the outside direct recruits have joined the service long after 1968 and some of them might have even taken initial instructions from the petitioner-applicants. We are also conscious of the fact that candidates in service have a disadvantage as against the fresh candidates in the tests particularly when they face the tests after a long lapse of time. As against this, however, we cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and the by-passing of the Public Service Commissions are permitted, it will open a back-door for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the Constitutional provisions requiring recruitment to the services through the Public Service Commission. It appears that since this Court has in some cases permitted regularisation of the irregularly recruited employees, some Governments and authorities have been increasingly resorting to irregular recruitments. The result has been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidates dictated by various considerations are being recruited as a matter of course. What is further, in the present case, some of those like the petitioner-applicants who were initially recruited on *ad hoc* basis, have exerted themselves and taken pains to appear for the tests before the UPSC and have enrolled themselves through regular channel unlike in *Dr. Rawani's* case (supra). We have thus on hand three classes of

A employees as pointed out earlier, viz., the outside direct recruits, the in-service direct recruits and the *ad hoc* employees like the petitioner-applicants who were regularised through the Court's order. Further, *Dr. Rawani's* case (supra), as has been pointed out on behalf of the respondents, pertains to the Central Government Health Services which has a B larger component both at the initial and promotional stages. The course adopted by this Court to direct creation of supernumerary promotional posts at every higher promotional stage there, may not be feasible in the medical service in the Railways. The creation of supernumerary posts has its own limitations, both physical and financial. The burden of additional C posts even when they are not necessary and cannot be accommodated, is not easy to carry. We are, therefore, of the view that the direction given in *Dr. Rawani's* case (supra) has to be confined to the special facts of that case and cannot be extended to other cases. In any case, this court should not give any such direction to the Railways. If, however, the Railways D decide to follow that course, they can do so and nothing prevents them from doing it. We would rather refrain from creating a precedent by giving such directions.

In the result, we direct that the seniority of the direct recruits - both outsiders and insiders should be determined according to the dates of their E regular appointment through the UPSC and the petitioner-applicants should be placed in the seniority list after those direct recruits who are recruited till this date. Among themselves, their seniority will be governed by the dates of their initial appointment.

The interlocutory application is disposed of in the above terms.

G.N. Application disposed of.