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C.A.No. 6104 OF 1997

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Item No.101(P.H.)

COURT No. 3

SEC.XI

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL No.6104/1997 @@  
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Harihar Prasad & Ors.

Appellant (s)

VERSUS

State of U.P. & Ors.

Respondent(s)

(With appln.for directions and O.R.)

Date : 22.11.2001 This appeal was called on for hearing today.@@  
AA

CORAM :

HON'BLE MR. JUSTICE G.B. PATTANAIAK  
HON'BLE MRS JUSTICE RUMA PAL

For Appellant (s)	Mr. P.P. Rao,Sr.Adv. M/s. J.M.Sharma,S.K.Pundir,M.K.Goswami, Partap Mahapatra & S.Singh,Advs.
For Respondent (s)	Mr. Rakesh  Dwivedi,Sr.Adv. Mr. Pramod Swarup,Mrs.Niranjan Singh and Mrs. Abhishekh Choudhary,Advs.  Mr. P.N. Mishra,Sr.Adv. Mr.K.Mishra & Mr Manoj Kr. Mishra,Advs.for M/s.K.L.Mehta & Co.  M/s.Chandra Shekhar,S.K.Verma,Advs. Mr. Manoj Prasad,Adv.

UPON hearing counsel the Court made the following

O R D E R

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The appeal is disposed of.

.SP1	(Y.P.Dhamija) Court Master	(Suneet Bala Sharma) Court Master
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Signed order is placed on the file.



"Seniority: 7(1) A person appointed under these rules shall be entitled to seniority only from the date of order of appointment after selection in accordance with these rules and shall in all cases, be placed below the persons appointed in accordance with the relevant service rules, or

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as the case may be, the regular prescribed procedure; prior to the appointment of such person under these rules.

(2) If two or more persons are appointed together, their seniority inter se shall be determined in the order mentioned in the order of appointment."

Rule 8 of the aforesaid Regularisation Rules further indicated that the services of ad-hoc appointees, who are found unsuitable on their suitability being tested, and who are not covered by the sub-rule (1) of Rule 4 or who are not covered by sub-rule (1) of Rule 4, their services should be terminated forthwith, and on such termination the appointees were entitled to receive one month's pay. The present respondents not being covered under sub-rule(1) of Rule 4, their services ought to have been terminated in accordance with said rule 8. Be that as it may, the respondents were continuing on ad-hoc basis. The Government of Uttar Pradesh framed yet another set of rules called the Regularisation of Ad-hoc Appointments( Amendment) Rules of 1984. Under the amendment rules, rule 9 to the main rule was added, and by virtue of the aforesaid amendment rule ,persons appointed on ad-hoc basis before May 1, 1983 and continuing in service as such on the date of the main rules came into force were entitled to be considered for regularisation. It is because

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of this rule, the respondents became eligible for being considered for regularisation. On 27.1.1982 the State Government sent a requisition to the Public Service Commission for appointment of 460 Assistant Public Prosecutors through a competitive examination. Be it be stated that Government at that stage was trying to make rules for appointment of the Assistant Public Prosecutors, and was in consultation with the Public Service Commission, but before finalisation of the said rules, which, in fact, was finalised in the year 1991, Government took a decision that all appointments to the post of Assistant Public Prosecutors would be made through a competitive examination by the Public Service Commission. Pursuant to the said advertisement, the present appellants appeared at the competitive examination and the written examination was held on 20th January, 1984, and they got appointed between 28.12.1984 to 5.2.1985. It may be stated that though there has been requisition for 460 posts initially by the Government, the Government had sent a further intimation to the Public Service Commission on 16.1.1984 that they, in fact, want 253 posts, but notwithstanding the same, the Public Service Commission made a list of entire 460 posts. The present appellants were appointed by the State Government in the first lot of 257 posts of Assistant Public Prosecutors. It was stated therein that their appointments would be subject to any decision being taken by the several Writ Petitions pending in the High

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Court. It is appropriate to notice at this stage that when advertisement was issued on 17.4.1982 for filling up of 460 posts of APO through competitive examination, the ad-hoc appointees filed a Writ Petition, and the Court therein passed some interim orders indicating that the process of

selection may go on, but the services of ad-hoc appointees will not be terminated on the ground of selection made through the competitive examination. Subsequently as the State Government did not appoint other selected candidates to the post of APO, some of them filed a Writ Petition praying that the State Government be directed to appoint all the candidates recommended by the Public Service Commission. In that Writ Petition, an interim order was passed on 15.4.1985 to the effect that the Government is restrained from making appointment from amongst the candidates (obviously referring to the ad-hoc appointees) whose names do not find place in the list made by the Public Service Commission, by means of ad-hoc or regular appointments. It is because of this order, these respondents could not be regularised, though the selection committee adjudged their suitability and sent a list selecting them for being appointed on regular basis on 17.4.1985. After the vacation of the stay order the State Government appointed the ad-hoc appointees on regular basis with effect from 15.3.1994. Having appointed them on regular basis as the State Government thought that gross injustice is

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being perpetrated for determining their seniority and the regularisation was delayed because of the interim order passed by the Court, a committee was constituted to indicate the principles of seniority of the persons directly recruited on the basis of competitive examination held by the Public Service Commission, and the persons, who were initially appointed on ad-hoc basis and whose services stood regularised under the Regularisation Rules. The said committee evolved a formula after due consideration, which is extracted below:

" (1) The Committee of Appointment of Regularised Adhoc Prosecution Officers shall be 22.3.84, the date on which the rules for regularisation were passed by the Government.

(2) The selected prosecution officers appointed in 1985 and 1991 on the basis of examination conducted by Public Service Commission in 1982 and 1987 shall be considered to be appointed from the date of their appointment and in seniority list, they shall be placed after the appointments made in 1977-78, on adhoc basis and regularised on 22.3.84."

The aforesaid principles were assailed by filing a Writ Petition attacking the principles in question for

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inter-se-seniority. The High Court on consideration having found the principles to be in accordance with rules and no injustice having committed and appropriate equities having worked out did not interfere with those principles evolved and hence the present appeal. Apart from the aforesaid rules mentioned above, it would also be necessary to examine the provisions contained in Uttar Pradesh Prosecuting Officer Service Rules, 1991 dealing with the recruitment and conditions of service of these prosecuting officers including Assistant Public Prosecutors and Uttar Pradesh Government Servants Seniority Rules, 1991 dealing with seniority of all the Government servants.

Mr. P.P. Rao, the learned senior counsel appearing for the appellants contended that the seniority of ad-hoc appointees like the respondents, whose services stood regularised under the Regularisation Rules has to be determined under Rule 7 of the Regularisation Rules of 1979,

and necessarily therefore so far as the respondents are concerned, their services from 15.3.1994 would count for their seniority in the cadre. In that view of the matter, the two principles evolved by the committee cannot be sustained in law. He further contended that once a set of statutory rules deal with the question of seniority of these ad-hoc appointees, whose services stood regularised, it would not be

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permissible for the State Government to get the seniority adjudged by a set of administrative orders or instructions on the basis of a report of an expert committee, and High Court therefore was in error in upholding the principles evolved by the committee for the determination of the seniority as per the Office Memorandum dated 7.7.1994. Mr. Dwivedi, the learned senior counsel appearing for the State of U.P., and Mr. P.N. Mishra, the learned senior counsel appearing for the respondents, whose services stood regularised under the Regularisation Rules, on the other hand, contended that in view of the amended regularisation rules their services could have been regularised on being selected by the selection committee and therefore the order in their favour in 1994 was the consequence of the interim order passed by the High Court. For such interim orders their right to be appointed on regular basis once they have been selected by a selection committee under the regularisation rules should not be taken away. According to them, in the special contingencies, which had occurred in the case in hand, Government had no other option than to evolve an equitable principle for determining inter-se-seniority between the direct recruits recruited through the competitive examination held by the Public Service Commission and the ad-hoc appointees, who were regularised under the provisions of the Regularisation Rules, and that principle having been evolved by a duly appointed

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committee, which committee took into account all the relevant and germane factors, the principles evolved therein cannot be faulted with, and High Court therefore was wholly justified in upholding the said two principles, and the impugned order does not require any interference by this Court under Article 136 of the Constitution.

In view of the rival submissions at the Bar, the question that arises for consideration is whether in view of the rule 7 of the Regularisation Rules 1979, which indicates the principle for determination of seniority, could be altered by Office Memorandum on the basis of a committee being constituted, and on their recommendations. It is too well settled that a rule framed under proviso to Article 309 cannot be altered or modified by an administrative instruction. The Regularisation Rules of 1979 has been framed in exercise of power conferred under the proviso to Article 309 of the Constitution. Rule 7 thereof unequivocally indicates that a person appointed under these rules shall be entitled to seniority only from the date of the order of appointment after selection in accordance with rules and shall, in all cases, be placed below the persons appointed in accordance with relevant service rules or as the case may be. By virtue of the amended rules of 1984, and insertion of rule 9 to the main rule by amendment, the adhoc appointees before May 1, 1983 could be entitled to be

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considered for their regularisation, but so far as their seniority in the cadre is concerned, rule 7 will equally apply. In this view of the matter on a literal construction

to the rule 7 being given, the adhoc appointees like the respondents could be given their seniority with effect from the date of the order in their favour, which is 15th March, 1994. But while construing the provisions, one cannot lose sight of the consequences that had emanated on account of several interim orders passed by the Court, which prevented the State Government from making orders of appointment on regular basis in favour of these respondents, who were selected by the selection committee, and the recommendation of the committee is dated 17.4.1985. The two other rules, namely, Uttar Pradesh Prosecuting Officers Service Rules of 1991, which deals with the appointment and all service conditions of the Prosecuting Officers in the State of Uttar Pradesh, and rule 22 thereof deals with the seniority and stipulates that the seniority has to be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules, 1991. The seniority rules of 1991 more particularly rule 5, 6, 7 and 8 thereof will have no application to the case in hand inasmuch there is no provision therein to deal with the question of seniority of the adhoc appointees, whose services stood regularised under the provisions of the Regularisation Rules. Obviously

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provision has not been made therein for this set of employees inasmuch the very regularisation rules itself has provided for the determination of their seniority under rule 7, as already stated. The present appellants were appointed as Assistant Public Prosecutors on the basis of a competitive examination held by the Uttar Pradesh Public Service Commission between dated 28.12.1984 to 5.2.1985. The respondents, who were adhoc appointees as Assistant Public Prosecutors subsequent to 1.1.1977, and whose services were regularised under the provisions of the Regularisation Rules of 1979, as amended by the rule of 1984, though obtained their orders of regular appointment in the year 1994, but it would be wholly inequitable to give a literal construction of rule 7 in their cases and apply the same, particularly when on account of the interim orders of the High Court they could not get their appointment earlier than the order of vacation of the stay, and thereafter order of appointment could be made in the year 1994. Since the selection committee under the regularisation rules duly adjudged them suitable and recommended their cases for being appointed on regular basis by its letter dated 17.4.1985, it would be reasonable for us to hold that so far as these respondents are concerned, their seniority in the cadre should count from the said date, namely, 17.4.1985. Consequently, the present appellants would be held senior to these respondents, whose services

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were regularised under the regularised rules. Necessarily, therefore the two principles evolved under the Office Memorandum dated 7.7.1994 cannot be sustained, and the High Court committed error in upholding the said two principles. We therefore set aside the impugned judgment as well as the Office Memorandum dated 7.7.1994 and dispose of the appeal with the aforesaid observations and direction.

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.....J.  
(G.B. PATTANAİK)@@  
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New Delhi,  
November 22, 2001

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( RUMA PAL )@@  
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