

UNION OF INDIA AND ANR. ETC. ETC.

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v.

LALITA S. RAO AND ORS. ETC. ETC.

APRIL 10, 2001

[G.B. PATTANAIK, U.C. BANERJEE AND B.N. AGRAWAL, JJ.]

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Service Law :

Inter. se seniority—Medical Officers—Direct Recruits and ad hoc appointees upto 1.10.1984 regularised by UPSC pursuant to Supreme Court decision in A.K. Jain's case—Period of service rendered prior to regularisation—Counting of—Held, services rendered by ad hoc doctors prior to regularisation not entitled to be counted for the purpose of determination of seniority.

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Inter se seniority—Direct Recruits and ad hoc appointees upto 1.10.1984 regularised by UPSC on the basis of written test and interview—Service rendered prior to regularisation—Counting of—Held, entitled to be counted for the purpose of determination of seniority applying principle laid down in Direct Recruit Class II Engineering Officers Association case.

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Inter se seniority—Direct Recruits and ad hoc appointees appointed after 1.10.1984 and selected by UPSC—Period service prior to regularisation—Counting of—Held : Not entitled to be counted for the purpose of determination of seniority since the Recruitment Rules do not provide for ad hoc appointment—Indian Railway Medical Department (Assistant Medical Officers Class II) Recruitment Rules, 1977.

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Prior to 1986, recruitment of Assistant Medical Officers under Railway Administration was being done by Union Public Service Commission (UPSC). The Government of India, through an Administrative order of the Railway Board, permitted General Managers to recruit Assistant Medical Officers in Class II on *ad hoc* basis, in emergencies, for a period not exceeding six months; their services would be terminated as soon as the candidates selected by UPSC become available. As per the Order, UPSC could consider their applications for regularisation after written examination and interview. Besides, the Order provide for retaining *ad hoc* doctors beyond six months subject to prior approval of the Board. The *ad hoc*

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A doctors, whose services were not regularised by UPSC, apprehending termination of their services, filed Writ Petition before this Court. Meanwhile, during the pendency of the Writ Petitions, the Central Government formulated new rules for recruitment called Indian Railway Medical Department (Assistant Medical Officers Class II) Recruitment Rules, 1977.

B The Rules never contemplated *ad hoc* appointment. The Writ Petitions were disposed of by this Court with direction regarding regularisation of services of those who were appointed prior to 1.10.1994, filling up of vacancies and salary and allowances; but did not deal with seniority. (*Dr. A.K. Jain & Ors. v. Union of India*, [1987] Supp. SCC 497). On an application filed by the Central Government seeking clarification with regard to seniority, this Court, by order dated 1.11.1988, held that the *inter se* seniority between the direct recruits and the unsuccessful *ad hoc* doctors, who were regularised on basis of *A.K. Jain's* decision would be decided depending on the outcome of Constitution Bench decision in *Direct Recruits Class II Engineering Officers Association v. State of Maharashtra*, [1990] 2 SCC 715 CB. Later, a similar interlocutory application was filed before this Court by the unsuccessful doctors for determination of seniority. Meanwhile, the Constitution Bench decision in *Direct Recruits Class II Engineering Officers Association* case was pronounced and this Court disposed of the interlocutory application on 18.2.1993 holding that the unsuccessful *ad hoc* doctors would be placed in the seniority list after the other two categories i.e., direct recruits and successful *ad hoc* doctors, who were regularised by UPSC *Dr. M. Haque & Ors. v. Union of India*, [1993] 2 SCC 213.

Meanwhile, in 1987 some successful *ad hoc* doctors, who were regularised by UPSC, filed a petition before Tribunal challenging the seniority list dated 10.6.1987. The Tribunal, by order dated 18.3.1993, held that the period of *ad hoc* service should be also counted for purpose of seniority. Union of India filed an appeal before this Court challenging the Tribunal's Order. It was dismissed on the ground that the decision of this Court in *Dr. M. Haque's* case will have no application to the case of the Tribunal as they deal with different categories of people. Seniority was revised for those doctors who were parties before the Tribunal, by the Union of India by order dated 24.8.1994. Respondent No. 1 and several other doctors filed applications before the Tribunal claiming same benefit. The applications were allowed directing re-fixation of seniority. Direct recruits filed Writ Petitions before the High Court questioning the seniority lists. The High Court dismissed the Writ Petitions. Hence these appeals by direct recruits

and the Union of India.

Direct recruits contended that the *inter se* seniority should be determined according to the dates of their regular appointments through UPSC; that the *ad hoc* doctors, who were regularised pursuant to the decision in *A.K. Jain's* case, should be placed below the direct recruits, who were recruited till the date of the order, in the seniority list.

Disposing of the appeals, the Court

HELD : 1.1. The seniority of an employee in a cadre has to be determined in accordance with the Rules, if such Rules provided for the same. But if such Rules do not make any provision or do not fix the criteria for determination of seniority of the employees in a cadre, then the same could be determined on the principles enunciated by the Constitution Bench decision in *Direct Recruits Class II Engineering Officers Association* case. [1074-B-C]

1.2. The *ad hoc* appointees, who were not regularised by UPSC will not be entitled to claim the benefit of their *ad hoc* period for being counted for the purpose of seniority in the cadre, after they were regularised pursuant to the order of this Court in *A.K. Jain's* case. The Court in *Dr. M. Haque's* case observed that so far as outsider and insider direct recruits are concerned, their *inter se* seniority would be determined according to the date of their regular appointment through UPSC, which must be held to be *per incuria* and not a guiding principle. [1074-E; 1077-C]

1.3. If the initial appointment had not been made in accordance with the prescribed procedure laid down by the Recruitment Rules and the appointees were allowed to continue in the post uninterruptedly and then they appeared at the selection test conducted by UPSC and on being selected their services stood regularised, then there would be no justification in not applying the principle 'B' of the *Direct Recruits Class II Engineering Officers Association* case and denying the period of officiating services for being counted for the purpose of seniority. Since there is no provision in the Recruitment Rules for determining seniority, the principles evolved by the Constitution Bench in *Direct Recruits Class II Engineering Officers Association* case will have to be followed and judged from that angle, there is no inconsistency between the judgment of this Court in *Dr. M. Haque's* case and the judgment of this Court confirming the

A decision of the Tribunal in *Dr. Srinivasulu's* case accepting the observation in *Dr. M. Haque's* case, which has been held to be *per incuria*. [1077-E-H; 1078-A-B]

B 2. All doctors appointed on *ad hoc* basis upto 1.10.1984, who were regularised by the Railway Administration in consultation, with UPSC on the evaluation of their work and conduct and on the basis of their confidential reports in respect of a period subsequent to 1.10.1984 pursuant to the direction of this Court in *Dr. A.K. Jain's* case will not be entitled to count the services rendered prior to regularisation for the purpose of determination of their seniority in the cadre. Doctors who had been appointed by the Railway Administration on *ad hoc* basis or on temporary basis and had got themselves regularised prior to 1.10.1984, by appearing in the selection test held by UPSC, then the period prior to regularisation could be counted for determining seniority applying principle 'B' of the *Direct Recruits Class II Engineering Officers Association* case. If any doctor, who had been appointed subsequent to 1.10.1984 and had applied for selection by UPSC on obtaining relaxation of age pursuant to the direction in *Dr. A.K. Jain's* case and got selected thereby finally, in such a case the services rendered prior to such regularisation would not be counted for the purpose of their seniority in the cadre, particularly when the Recruitment Rules did not provide for appointment to be made through UPSC. The cut off date has been fixed as 1.10.1984 on the basis of *Dr. A.K. Jain's* case. The *ad hoc* appointees subsequent to 1.10.1984 even if got themselves regularised by appearing in the selection test conducted by UPSC in accordance with the Rules, it will not be in the interest of justice to apply principle B to their case as the statutory Recruitment Rules do not provide for any other mode of recruitment other than by process of selection by UPSC. [1078-C-H; 1079-A-B]

Direct Recruit Class II Engineering Officers Association v. State of Maharashtra & Ors., [1990] 2 SCC 715 CB and *Dr. A.K. Jain & Ors. v. Union of India & Ors.*, [1987] Supp SCC 497, relied on.

G *E.S.P. Rajaram & Ors. v. Union of India & Ors.*, JT (2001) 1 SC 573 CB; *Union of India & Ors. v. M. Bhaskar & Ors.*, JT (1996) 5 SC 500 and *Dr. M. Haque & Ors. v. Union of India*, [1993] 2 SCC 213, referred to.

H CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2478-2479 of 2000.

From the Judgment and Order dated 16.4.99 of the Delhi High Court in C.W. Nos. 2802/97 and 2795/97

WITH

Civil Appeal Nos. 2480 of 2000 and Civil Appeal No. 2680 of 2001.

Mukul Rohtagi, ASG, T.L.V. Iyer and Raju Ramachandran, Ms. Smita Inna, Narsimhan, P. Sridhar, Anil Katiyar, Ms. Sushma Suri, Ms. Nisha Bagchi, Gaurav Aggarwal, Ms. Nivedita Singh and Ms. Indu Malhotra for the Appellants.

Salman Khurshid, P.N. Mishra and Raju Ramachandran, Rakesh K. Khanna, U.N. Goyal, Surya Kant, Nisha Bagchi, Gaurav Aggarwal, Ms. Indu Malhotra, Imtiaz Ahmed, S. Prasad and S.N. Jha for the Respondents.

The Judgment of the Court was delivered by

PATTANAIAK, J. Leave granted in S.L.P.(C) No. 18846/99.

The determination of *inter se* seniority between the two categories of doctors engaged by the Railway Administration is the subject matter of dispute in these batch of cases. It would be necessary to state the facts in a greater detail in view of the chequard history of the case. Prior to 1986, normal recruit to the post of Assistant Medical Officers under the Railway Administration was being made through a process of selection by the Union Public Service Commission. There was no statutory rule framed for the purpose of recruitment. Government of India in the Ministry of Railway through the Railway Board had, however, permitted the General Managers to recruit Assistant Medical Officers in Class II on *ad hoc* basis for a period not exceeding six months and such power had been conferred in the public interest as the process of selection through Union Public Service Commission was taking some time. The *ad hoc* recruits, however, were advised to apply to Union Public Service Commission in response to the advertisement to be issued by the Commission for getting regular appointment. The administrative instructions dated 21st May, 1966, unequivocally indicated that the *ad hoc* appointees should be made known that their services would stand terminated as soon as candidates selected by the Commission become available. The aforesaid Government Order also provided that the *ad hoc* appointees could be retained beyond six months with prior approval of the Board. Some time in the year 1986 several such doctors having failed in their attempt to get selected through the Union Public Service Commission apprehended termi-

A nation of their services, therefore, a batch of Writ Petitions were filed in this Court under Article 32, which stood disposed of by judgment dated 24th September, 1987, *Dr. A.K. Jain and Others v. Union of India & Ors.*, reported in [1987] (Supp.) Supreme Court Cases 497. By the time these Writ Petitions were taken up for consideration a set of Recruitment Rules have been framed under the proviso to Article 309 of the Constitution, called The Indian Railway Medical Department (Assistant Medical Officers Class II) Recruitment Rules, 1977, (hereinafter referred to as "The Recruitment Rules"), and the said Rule never contemplated of any *ad hoc* appointment. Even under the provisions of the Railway Establishment Code, which governs the recruitment of the Group 'A' service in the various departments of Railways, as indicated in Section 205, no *ad hoc* recruitment was contemplated, and as such, the *ad hoc* appointments were in the exigencies of service to meet a particular contingency under the Administrative Orders of the Board. This Court disposed of the batch of cases with following directions:-

D "(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 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 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 if found fit his services shall be regularised as if there was no break in the continuity of service but without any back wages.

G (2) The petitions of the Assistant Medical Officers/Assistant Divisional Medical Officers appointed subsequent to October 1, 1984 are dismissed. But however direct that the Assistant Divisional Medical Officers who may have been now selected by the Union Public Service Commission shall first be posted

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to the vacant posts available wherever they may be. If all those selected by the UPSC 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 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/ADMO 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* in the Railways."

Be it be stated the Court took a compassionate view of the matter and directed regularisation of the *ad hoc* doctors in consultation with the Union Public Service Commission on the evaluation of their work and on the basis of their Confidential Reports, but did not indicate as to how their seniority in the cadre could be determined. An Interlocutory Application, titled *Dr. M. Haque and Ors. v. Union of India* was thereafter filed in this Court for appropriate direction as to how their seniority could be determined. This application was disposed of by order dated 18.2.1993, since reported in 1993 (2) SCC 213.

A Before filing of the aforesaid Interlocutory Application the Union of India had itself moved an application before the Court and that stood disposed of by order dated 1.11.1988 and the order was to the following effect:-

B “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 Government should be directed to implement the order passed by us in the Writ Petition Nos 522, 875, 180 and 200 of 1987 and connected cases on September 24, 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 made an order in this case. The 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 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.”

The civil miscellaneous petition is disposed of accordingly.

E In Interlocutory Application this Court was concerned with those Assistant Divisional Medical Officers who had been appointed between 1968 and 1st October, 1984, whose services stood regularised pursuant to the order of this Court in *Jain's* case [1987] Suppl. SCC 497, but the seniority had not been fixed up. The Court for fixing the *inter se* seniority of the doctors considered the existence of three classes of Assistant District Medical Officers -

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- (i) The outsiders who have been directly recruited through Union Public Service Commission on the basis of written test or interview;
 - G (ii) *Ad hoc* appointees who were initially recruited *ad hoc* but in the course of their continuance as *ad hoc* came to be regularly recruited through Union Public Service Commission by appearing in the written examination and interview;.
 - H (iii) The petitioners in *Dr. Jain's* case who either did not appear in the written examination and interview or had failed to get

through the UPSC examination but could be regularised because of the Court's order dated 24th September, 1987 (1987 Suppl. Supreme Court Cases - 497), as well as the Clarificatory order passed on 1.11.1988 on the application filed by the Union of India.

By the date an Interlocutory Application was being considered the Constitution Bench decision in the *Direct Recruit Class II Engineering Officers' Association* case had already been pronounced. (1990 (2) Supreme Court Cases 715). The Court considered the principles evolved in the direct recruits case and held that neither guideline 'A' nor guideline 'B' would govern the case of those Assistant Divisional Medical officers who could be regularised only in pursuance to the earlier orders of the Court in *Jain's* case (supra). The Court ultimately held that so far as, the outsiders, who have been directly recruited through the UPSC and the *ad hoc* appointees, who have been also regularised by appearing in the written examination conducted by the UPSC and being selected by the UPSC, their seniority will be determined according to the dates of their regular appointment and the *ad hoc* appointees who could not get selected or did not appear in the examination conducted by the UPSC could be placed in the seniority list after two former categories. It may be stated for the purpose of convenience that the nomenclature of these three categories of doctors is assigned as :- (i) outsiders, directly recruited doctors on the basis of selection through UPSC; (ii) insiders, *ad hoc* recruits those regularised after being successful in the UPSC examination and on being selected by the UPSC, and (iii) the unsuccessful Medical Officers through UPSC who stood regularised pursuant to the orders of the Court in *Dr. A.K. Jain* (supra) and the subsequent clarificatory order dated 1.11.1988 on the application filed by the Union of India. In the application which was disposed of by order dated 18.2.1993 (1993 (2) SCC 213) this Court was actually concerned with evolving a principle of determining *inter se* seniority between the third category of Medical Officers, namely, who were regularised pursuant to the order of this Court in *Dr. A.K. Jain's* case and the direct recruit Medical Officers appointed on the basis of they being selected by the Union Public Service Commission. The *inter se* dispute between those outsiders direct recruits and the insiders direct recruits, who were initially appointed on *ad hoc* basis but got themselves selected by appearing in the examination through UPSC had not been really in issue though in the ultimate analysis the Court had made some observation in respect of them. While the matter stood thus *Dr. P. Srinivasulu* and 20 others who belong to the second category,

A namely, insider *ad hoc* recruits who got themselves regularised after being selected by the UPSC either by written examination or by interview filed an application before the Central Administrative Tribunal, Principle Bench, New Delhi which was registered as O.A. No. 1603 of 1987. The Tribunal in the aforesaid case came to the conclusion that the *ad hoc* appointees being

B regularised after being selected through the UPSC would be entitled to get their *ad hoc* period also counted towards seniority, and therefore, the seniority list that had been drawn up on 10th June, 1987 was quashed. This order of the Tribunal is dated 18th March, 1993. It may be stated herein that the Interlocutory Application that had been filed in Writ Petition No. 1165 of 1986 though had been disposed of on 18th February 1993 but the same had

C not been brought to the notice of the Tribunal. The order of the Tribunal was assailed by the Union of India in Special Leave Application, which was registered as SLP(C) No. 10714 of 1993, but the Court refused to grant leave after hearing the counsel for parties by order dated 15.11.1993. While dismissing the Special Leave Application the Court did consider the order

D dated 18th February, 1993 passed in Interlocutory Application (1993 (2) Supreme Court Cases - 213) and came to the conclusion that the two category of people who are being dealt with are different and what has been stated in Interlocutory Application will have no application to the case of Srinivasulu since Srinivasulu and others had been selected through UPSC and got regularised. The Union of India thereafter filed an application for clarification and modification of the order dated 15.11.1993, which was registered as I.A. No. 2 in Special Leave Petition No. 10714/93. But that was also dismissed by order dated 13.5.1994 holding that no clarification is needed. It appears, that several Writ Petitions, filed under Article 32 of the Constitution, some by the Doctors Association and some by the individual were also dismissed

E by this Court subsequent to the aforesaid order dated 28th February, 1993 and the order in *Srinivasulu's* case was implemented and those of the doctors who were party to the said case (21 in number) their seniority was revised by the Union of India by order dated 24th August, 1994. One doctor D.P. Pande, a direct recruit, had filed a Writ Petition under Article 32, which was registered as Writ Petition No. 612 of 1994, that was, however, dismissed by

F the Court on 4.10.1994. While dismissing the Writ Petition this Court had observed that dismissal will not prevent the petitioners from moving the Tribunal or any other appropriate forum. Said Dr. Pande then approached the Central Administrative Tribunal, Principal Bench, but the application was dismissed for default. A Writ Petition was filed by a Dr. Satish Chandra,

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and he filed a Special Leave Petition which was registered as S.L.P. (Civil) No. CC 4125 of 1995. That was also dismissed by order dated 11.4.1997. Dr. Lalita Rao - respondent no. 1 in Civil Appeal Nos. 2478-79 of 2000, filed application before the Central Administrative Tribunal, Principal Bench, New Delhi claiming same benefit that had been given to Srinivasulu. This Application was registered as OA No. 321 of 1996. The Direct Recruits Railway Doctors Association also filed a Writ Petition in Delhi High Court, which was registered as C.W.P. 2802 of 1997. Some direct recruit doctors also individually filed Writ Petition in Delhi High Court, which was registered as Writ Petition No. 2795 of 1997. Delhi High Court by judgment dated 16.4.1999 dismissed the Writ Petitions filed on the ground that the Special Leave Application against the judgment of the Tribunal in *Srinivasulu's* case having been dismissed the relief sought for by the direct recruits cannot be granted. The said judgment of the Delhi High Court is under challenge in this Court in C.A. No. 3057 of 1999. Civil Appeal No. 2478-79 of 2000 have been filed by the Union of India against the said judgment of Delhi High Court dated 16.4.1999 passed in Civil Writ Petition Nos. 2802 of 1997 and 2795 of 1997, one filed by the Direct Recruits Railway Doctors Association and the other filed by some individual direct recruit doctors. When the matter had been placed before this Court on 13th January, 2000, *prima facie* being of the view the direction in *Haque's* case would run contrary to the directions in *Srinivasulu's* case, the case had been placed before a three Judge Bench. The three Judge Bench by order dated 31st March, 2000 granted leave and that is how the matter has finally been heard by a three Judge Bench. Against the judgment of Delhi High Court in Civil Appeal Nos. 2802/97 and 2795 of 1997, the Direct Recruits Railway Doctors Association have moved this Court in Civil Appeal No. 2480 of 2000. The Indian Railways Medical Officers (*ad hoc*) Association through its General Secretary doctor Sudhir Sharma and one doctor C.P. Singh filed an Application before the Central Administrative Tribunal praying that their past services as *ad hoc* doctor should also be counted for the purpose of their seniority as directed in *Srinivasulu's* case. This application was registered as O.A. No. 1555 of 1996. Dr. Brahm Prakash & Anr. who are petitioners in Special Leave Petition No. 18846 of 1999 were allowed to intervene in the said proceedings. Tribunal ultimately allowed the application and following the judgment in *Srinivasulu's* case called upon the authorities to re-fix the seniority. That judgment of the Tribunal was assailed before the Delhi High Court by filing a Writ Petition, which was registered as CWP No. 3916 of 1999. A Division Bench of High Court dismissed the Writ Petition on the ground that against the earlier

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A judgment of the Division Bench in C.W.P. Nos. 2795 of 1997 and 2802 of 1997, a Special Leave Petition, filed by the Direct Recruits doctors having been dismissed nothing survives in the matter. As stated earlier, the aforesaid judgment of the Delhi High Court in C.W.P. Nos. 2795 of 1997 and 2802 of 1997 is the subject matter of challenge in Civil Appeal Nos. 2478-79 of 2000, filed by the Union of India.

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The Railway Establishment Code contains the general provisions indicating the method of recruitment to Group A service in the various departments of railways as in Paragraph 205. The same is quoted hereinbelow in extenso:-

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“205. *Method of Recruitment* :- Recruitment to Group A service in the various departments of Railways shall be made through -

- (a) Competitive Examination held by the Union Public Service Commission;
- D (b) Promotion of officers in Group B Service including officiating Group B Railway officers of the service or department;
- (c) By appointment of candidates initially recruited as Special Class Apprentices on the results of the examination conducted by U.P.S.C. in accordance with the rules for recruitment to Indian Railway Service of Mechanical Engineers.
- E (d) By transfer of an officer in service of the Government provided the recruitment rules include a provision to this effect.
- F (e) By occasional admission of other qualified persons in consultation with the U.P.S.C.”

It thus stipulates that recruitment could be made by a competitive examination held by the Union Public Service Commission by promotion of officers from Group B, by appointment of candidates initially recruited as Special Class Apprentice, by transfer of an officer in service of the government, provided Recruitment Rules included provision to the said effect and by occasional admission of other qualified persons in consultation with the Union Public Service Commission which would obviously be a direct recruitment. The President of India, in exercise of powers conferred by the proviso to Article 309 of the Constitution made a set of Rules for recruitment to the post of

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Assistant Medical Officers (Class II) called, the Indian Railways Medical Department (Assistant Medical Officer Class II) Recruitment Rules, 1967 (hereinafter referred to as 'The Recruitment Rules of 1967'). The said Rule came into force with effect from 29th July, 1967. Rule 4 of the aforesaid Rules provides, that the method of recruitment to the post, age limit, qualification and other matters connected therewith, would be as specified in Columns 5 to 13 of the Schedule. Rule 8 is the power of relaxation of the Central Government and that power could be exercised only after recording reasons in writing and that also must be in consultation with the Union Public Service Commission. So far as the Assistant Medical Officer is concerned, the Recruitment Rules of 1967 provides that it could be by promotion to the extent of 25 per cent and by direct recruitment including occasional recruitment from other sources in consultation with the UPSC to the extent of 75 per cent, and failing both the aforesaid methods then by transfer on deputation. Prior to the aforesaid Recruitment Rules there was no statutory rule, and therefore, recruitments were being made in accordance with paragraph 205 of the Railway Establishment Code and the Assistant Medical Officer being a post in Group A service it was being made through Union Public Service Commission. The letter of the Ministry of Railways, Government of India dated 21.5.1966 clearly assumes the aforesaid position and by this letter General Managers were permitted to recruit Assistant Medical Officers in Class II on an *ad hoc* basis for a period not exceeding six months even though by the date of the issuance of the aforesaid letter Union Public Service Commission had already advertised the vacancies and made arrangements to complete the selections expeditiously. It would be appropriate to extract the aforesaid letter in extenso hereunder :-

“ New Delhi, dated 21.5.1966
No.E(GR)I-66-RC12-3

The General Managers
All Indian Railways including CLW and DLW,

The Chief Administrative Officer,

Sub: Recruitment of Assistant Medical Officers on the Indian Railways.

Reference Board's letter No. E(GR)I-66 RC12-1 dated 20.4.1966 addressed to the Secretary, Union Public Service Commission and

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A copy endorsed to all Railway Administrations. The Union Public Service Commission have advertised the vacancies and made arrangements to complete the selections as expeditiously as possible.

2. However, in order to enable Railway Administrations to man the existing vacant posts which cannot, in the public interest, continue to be kept unfilled until candidates selected by the Commission become available, the Board have with the approval of the President, decided that the General Managers may recruit Assistant Medical Officers in Class II on an ad hoc basis for a period not exceeding six months. The candidates so appointed should be advised to apply to the Union Public Service Commission in response to the advertisement issued by them for filling vacant posts of Assistant Medical Officers on Railways and it should be made perfectly clear to them that their services are purely temporary and will be terminated as soon as candidates selected by the Commission become available. The particulars of candidates so appointed viz. their names, qualifications, experience, date of birth, date of appointment, etc., may please be forwarded to this office in due course.

3. The Union Public Service Commission advertisement for posts of Assistant Medical Officers has appeared on today's papers. The Assistant Medical Officers recruited on *ad hoc* basis by General Managers should fulfil the qualifications laid down therein. A copy of the advertisement is enclosed.

4. The Board have also suggested that you may try to obtain assistance from State Governments by getting qualified doctors on the normal deputation terms for a short period of about six months.

5. Assistant Medical Officers appointed on *ad hoc* basis should not be retained in service beyond six months without Board's prior approval. Where, due to non-availability of candidates selected by the Commission, it becomes necessary to continue the appointment of locally recruited doctors a reference should be made to the Board two clear months in advance."

The 1967 Recruitment Rules stood superseded on 16th September, 1977 when the President of India enacted, in exercise of powers conferred by the proviso to Article 309, another set of Rules called, The Indian Railway Medical

Service (Assistant Divisional Medical Officer) Recruitment Rules, 1977. The A
aforesaid Rules were given retrospective effect and must be deemed to have
come into force from 16.10.1976. Rule 3 of 1977 Recruitment Rules also
provides that the method of recruitment, age limit, qualifications and other B
matters relating to the post of Assistant District Medical Officer would be as
specified in columns 5 to 13 of the Schedule. Rule 7 of 1977 Rules further
provides that the persons who are recruited under the Rules to post to which
the conditions prescribed in Rule 2423 - (CSR) 404B of the Indian Railway
Establishment Code applies, shall be eligible to the benefit of the provisions
contained in that Rule. By the time the 1977 Rules came into force there had
been re-organisation of the cadre on the basis of recommendations of the C
Third Central Pay Commission, being accepted by the Government of India
and Class II cadre in the Railway Medical Service (which was the post of
Assistant District Medical Officer in the 1967 Recruitment Rules), stood
abolished and a combined junior and senior scale was introduced, the cadre
being Assistant Divisional Medical Officer. This is apparent from the Reso- D
lution of the government of India dated 1st May, 1974, as notified in the
Gazette. In the Recruitment Rules of 1977, so far as for the post of Assistant
Divisional Medical Officers, the method provided was either by direct
recruitment or by promotion or by deputation/transfer and the percentage of
vacancies to be filled by various methods was to be decided in consultation
with the Union Public Service Commission. So far as the outsider direct E
recruitment is concerned, the same was required to be made through a written
examination followed by interview, on the basis of such schemes of exami-
nation to be decided from time to time, in consultation with the Union Public
Service Commission, and failing the direct recruitment it could be by transfer
on deputation. The scale of pay for the post of Assistant Divisional Medical
Officer was Rs. 700-40-900-EB-50-1250-EB-50-1600. Though the post of F
Assistant District Medical Officer, as provided in the Railway Establishment
Code as well as in the 1967 Recruitment Rules stood abolished under the
Recruitment Rules of 1977, but a note was appended indicating that existing
Assistant Medical Officers (Group B) shall continue in Group B post in scale
of pay of Rs. 650-1200 till such time they are selected for absorption in Group G
A Grade of Assistant Divisional Medical Officer in consultation with the
Union Public Service Commission. By the time the 77 Recruitment Rules
came into force the Union Public Service Commission had already issued
advertisement on 16th October, 1976 to hold examination for filling up the
post of Assistant Divisional Medical Officer Class I, the said cadre having H

A come into existence in the year 1974 on acceptance of the recommendaion of Third Central Pay Commission by Government of India, and therefore, to regularise the matter 1977 Recruitment Rules was given retrospective effect with effect from 16.10.1976. We have devoted a considerable attention to these Rules, as in the earlier cases referred to, in *Haque's* case (supra) as well as *Srinivasulu's* and others, the relevant Recruitment Rules had not been brought to the notice of the Court. It is too well settled, that the seniority of an employee in a cadre has to be determined in accordance with the Rules if such Rules provided for the same. But if such Rules do not make any provision or do not fix the criteria for determination of seniority of the employees in a cadre then the same could be determined on the principles enunciated by the Constitution Bench decision in the *Direct Recruits Engineering Officers'* case, [1992] 2 Supreme Court Cases. This being the position, and in view of the letter of Government of India, in the Ministry of Railways dated 21.5.1966 authorising General Managers to recruit Assistant Medical Officer Class II on *ad hoc* basis for a period not exceeding six months, and further indicating that such *ad hoc* appointees should apply to the Union Public Service Commission in response to the advertisement issued by the Commission, those of the *ad hoc* appointees who had not got themselves regularised by getting themselves selected through UPSC examination will not be entitled to claim the benefit of their *ad hoc* period for being counted for the purposes of seniority in the cadre, after they were regularised pursuant to order of this Court in *A.K. Jain's* case (supra) . In fact the directions contained by this Court in *Dr. Jain's* case (supra) deals with all the *ad hoc* doctors appointed either as Assistant Medical Officer or as Assistant Divisional Medical Officer upto October 1, 1984 should be regularised in consultation with the UPSC on the evaluation of their work. The Court having issued the direction for regularisation even in respect of Assistant Divisional Medical Officers appointed after coming into force of the Recruitment Rules of 1977, advisedly did not indicate as to how their seniority in the cadre would be determined and these group of officers who got themselves regularised in pursuance to the order of the Court were treated to be a separate group by itself in the Clarificatory Order of this Court. When the Union of India moved application finding difficulty in adjusting the seniority of those *ad hoc* doctors appointed upto 1st October, 1984, who were regularised pursuant to the direction of the Court dated 24th September, 1987 in *Dr. A.K. Jain's* case (supra) that application was disposed of, as already indicated, by order dated 1.11.1988. In the said order it was specifically

indicated that the *inter se* seniority between the direct recruits and the *ad hoc* recruits who got themselves regularised under the orders of the Court in *Jain's* case (supra) should be decided by the Government in the light of the decision to be rendered in the cases which are pending before the Constitution Bench involving similar questions. After the Constitution Bench decision in the *Direct Recruits Class II Engineering Officers Association* case (supra) an Interlocutory Application No. 1 of 1992 was filed and that stood disposed of by order dated February 18, 1993, called *Dr. M.A. Haque's* case (supra). In paragraph 7 of the said order the Court has kept in mind three classes of Assistant District Medical Officers, namely, the outsiders directly recruited through UPSC, *ad hoc* appointees who came to be recruited through UPSC by appearing in the written examination or interview; and those who had filed I.A. were also *ad hoc* appointees but did not appear in a written examination/interview or had failed to get through but could be regularised in service because of the Court's intervention and order dated 24.9.1987 and 1.11.88. So far as the direct recruits are concerned, both outsiders and insiders, it was held, that the same should be determined according to the dates of their regular appointments through UPSC and so far as those *ad hoc* appointees who could be regularised only pursuant to the order of the Court they were directed to be placed after those direct recruits who had been recruited till the date of the order. In other words even in case of insider direct recruits i.e., those who joined as *ad hoc* appointees but got themselves regularised after appearing in the examination or interview and being selected by UPSC the Court did not apply guideline B of the *Direct Recruits Class II Engineering Officers Association* case (supra). It must be borne in mind that the applicants who had filed Interlocutory Application belong to the Third category, namely, those who could be regularised because of the orders of the Court in *A.K. Jain's* case dated September 24, 1987 and the Clarificatory order dated 1.11.1988 on the application of the Union of India and in that proceeding neither the outsiders directly recruited doctors nor insiders directly recruited doctors had been arrayed as parties. The present dispute appears to be between the outsider direct recruits, who got themselves recruited by appearing at the test conducted by the UPSC and the insider direct recruits, who initially had been appointed on *ad hoc* basis but got themselves selected through UPSC while continuing in service. But the Union of India is of the view that the principles enunciated in *Haque's* case is running contrary to the principles enunciated in *Srinivasulu's* case by the Tribunal and upheld by this Court. In view of the apprehended confusion in the mind of the Railway

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A Administration on account of the judgments of this Court, referred to earlier, and for doing complete justice in the matter of determination of seniority amongst the medical officers recruited by the Railway Administration through the UPSC, we have approached the problem on consideration of the different Rules in force as well as the orders issued by this Court in several earlier

B cases and this should apply irrespective of the fact whether some are parties to this proceeding or not. In fact one of the grievance of insider direct recruit Medical Officers like, *doctor Srinivasulu* is that they had not been arrayed as party when the Court was considering the Interlocutory Application filed by *doctor Haque* for determination of their seniority, who belong to the category, namely, *ad hoc* appointees who got recruited without getting

C themselves selected through any examination conducted by the UPSC only because of the compassionate view that was taken by this Court in *Dr. A.K. Jain's* case (supra). A similar problem arose in the case of Traffic Apprentices in Southern Railways and a Three Judge Bench of this Court in the case of *Union of India and Others v. M. Bhaskar and Others*, JT (1996) 5 SC 500,

D issued directions notwithstanding some other Traffic Apprentices who would be directly affected were not parties. The correctness of that decision was considered by the Constitution Bench in the case of *E.S.P. Rajaram & Ors. v. Union of India & Ors.*, JT (2001) 1 SC 573, and the Constitution Bench came to hold that the judgment in *Bhaskar's* case (supra) does not require

E any re-consideration, the Court having invoked its power vested under Article 142 of the Constitution for doing complete justice amongst the Traffic Apprentices in Southern Railways and the decision/direction therein could not have been nullified on the ground that an affected person was not a party to the same. In the aforesaid background and the earlier judgments of this

F Court on being critically analysed, it would appear that in *Dr. A.K. Jain's* case (supra) this Court merely directed that the services of all doctors appointed on *ad hoc* basis, whether as Assistant Medical Officer or Assistant Divisional Medical Officer up to 1.10.1984 shall be regularised in consultation with the UPSC on the evaluation of their work conduct on the basis of their CRs in respect of the period subsequent of October 1, 1984. So far as these doctors

G - *ad hoc* appointees, who got themselves regularised pursuant to the orders of this Court, the question of counting their prior *ad hoc* period of service for determination of their seniority in the cadre does not arise. Though in *doctor Jain's* case (supra) as well as in the subsequent order on the application filed by the Union of India the Court had not indicated as to how their

H seniority in the cadre would be determined, but on the Interlocutory Appli-

cation filed by *doctor Haque*, the Court examined and did indicate that they could be placed in the seniority list after both the outsider direct recruits as well as insider direct recruits, who have been recruited till the date. It is no doubt true that while saying so the Court did observe that so far as outsider and insider direct recruits are concerned, their *inter se* seniority would be determined according to the date of their regular appointment through the UPSC, but as has been stated earlier, this dispute was not really before the Court and Court had not focussed its attention minutely as the insider direct recruits had not been parties to the same and the Court was merely examining how the case of those officers, who got themselves regularised pursuant to the orders of this Court in *Dr. Jain* would be determined. The observations of this Court in *Dr. Haque* (supra) to the effect "we direct that seniority of direct recruits - both outsiders and insiders should be determined according to the dates of their regular appointments through UPSC" must be held to be per incuria and cannot be the guiding principle. In *Srinivasulu's* case, however, the Tribunal was considering as to whether their *ad hoc* period could be counted for the purpose of seniority, be it be stated, that Srinivasulu belong to that category of officers who were initially appointed as *ad hoc* but got themselves regularised by appearing at the examination conducted by the UPSC, on being selected, and this Court upheld the decision of the Tribunal in *Srinivasulu* being of the opinion that the *ad hoc* services rendered by such officers could be counted for the purposes of their seniority. Obviously the Court had in mind the principle B evolved by the Constitution Bench in the *Direct Recruit Engineering Officers Association* case (supra). If the initial appointment had not been made in accordance with the prescribed procedure laid down by the Recruitment Rules, and yet the appointees Medical Officers were allowed to continue in the post uninterruptedly and then they appeared at the selection test conducted by the Union Public Service Commission, and on being selected their services stood regularised then there would be no justification in not applying the principle 'B' of the *Direct Recruit Class II Engineering Officers Association* case (supra) and denying the period of officiating services for being counted for the purpose of seniority. This has what happened in *Srinivasulu's* case and this Court did not interfere with the order of the Tribunal. It may be reiterated that there being no provision in the Recruitment Rules, either of the 1967 or of the 1977 for determining the seniority of the persons employed as Assistant Medical Officers Class II, or the 1977 Recruitment Rules, for the purpose of determining the seniority the principles evolved by the Constitution Bench in the

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A *Direct Recruit Class II Engineering Officers Association* case (supra) will have to be followed, and judged from that angle we see no inconsistency between the judgment of this Court in *Dr. Haque's* case (supra) and the judgment of this Court confirming the decision of the Tribunal in *Dr. Srinivasu's* case (supra) accepting the observation in *Dr. Haque's* case which we have already held to be *per incuria*. This being the position, the grant of benefit to Dr. Lalita Rao, as had been given to *Dr. Srinivasulu* by the Tribunal in O.A. No. 3218 of 1996, we do not see any infirmity in the same. At the cost of repetition we would record our conclusions as under :-

C 1. All doctors appointed either as Assistant Medical Officer or as Assistant Divisional Medical Officer on *ad hoc* basis upto October 1, 1984, who were regularised by the Railway Administration in consultation with the Union Public Service Commission on the evaluation of their work and conduct and on the basis of their CRs in respect of a period subsequent to October 1, 1984, pursuant to the direction of this Court in the case of *Dr. A.K. Jain* (supra) will not be entitled to count the services rendered prior to the regularisation for the purpose of determination of their seniority in the cadre. This has been so held in the Interlocutory Application filed by *Dr. Haque* and answered by this Court in its judgment dated 18th February, 1993, reported in 1993 (2) SCC 213.

E 2. Doctors who had been appointed by the Railway Administration on *ad hoc* basis or on temporary basis and had got themselves regularised prior to 1st October, 1984, by appearing in the selection test held by the Union Public Service Commission then in their case the period prior to their regularisation could be counted for determining their seniority applying principle 'B' of the *Direct Recruit Engineering Officers Association* case (supra) and in fact, the Tribunal decided the case of *Dr. Srinivasulu* on that basis and this Court upheld the said decision.

G 3. If any doctor, who had been appointed subsequent to October 1, 1984, and had applied for selection by the Union Public Service Commission on obtaining relaxation of age pursuant to the direction No. 5 in *Dr. Jain's* case (supra) and got selected thereby finally, in such a case the services rendered prior to such regularisation would not be counted for the purpose of their seniority in the cadre, particularly when the Recruitment Rules did not provide for any *ad hoc* appointment and only provided for appointment to be made through Union Public Service Commission. We have taken the

date October 1, 1984 as cut off date since this Court in *Dr. Jain's* case (supra) had considered the impasse and had directed regularisation of *ad hoc* doctors appointed upto 1.10.1984. The *ad hoc* appointees subsequent to 1.10.1984, even if got themselves regularised by appearing in the selection test conducted by the Union Public Service Commission in accordance with the Rules it will not be in the interest of justice to apply principle 'B' to their case as the Statutory Recruitment Rules do not provide for any other mode of recruitment other than by process of selection by the Union Public Service Commission.

These Civil Appeals stand disposed of accordingly.

B.S.

Appeals disposed of.