

ASHOK KUMAR SHRIVASTAVA AND ORS.

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v.

RAM LAL AND OTHERS

(C.A. No. 4968 of 2007)

JANUARY 8, 2008

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(ALTAMAS KABIR AND P. SATHASIVAM, JJ.)

Constitution of India, 1950:

Article 320(3) proviso – Withdrawal of posts from purview of State Public Service Commission and appointments to such posts by State Government – HELD: Proviso to clause (3) of Article 320 empowers the Governor of a State to withdraw from the purview of Public Service Commission, services and posts in connection with affairs of the State, and to make regulations in respect thereof – Uttar Pradesh (Sales Tax Officers Grade-II) Service Rules, 1983:

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Service Law:

Uttar Pradesh (Sales Tax Officers Grade-II) Service Rules, 1983:

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r. 3(as amended in 1997) – “Substantive appointment” – Trade Tax Officers Grade II – Appointed in 1987 under direct recruits quota, by State Government through ‘Limited Departmental Examination’ after withdrawing certain posts from purview of U.P. Public Service Commission – Seniority of, vis-à-vis direct recruits appointed in 1990 pursuant to requisition of 1985 and selection tests held in 1988 – HELD: In view of the amendment made in r.3 in 1997 and in facts and circumstances of the case, the officers appointed in 1987 through ‘Limited Departmental Examination’ must be held to have been substantively appointed at the time of their initial appointment – Seniority list to be revised accordingly – Constitution of India – Article 320(3), proviso – Equity.

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The Commissioner, Trade Tax sent various

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A requisitions to the U.P. Public Service Commission in the years 1980 to 1986 for selecting candidates to fill up the vacancies of Trade Tax Officers Grade II in the U.P. Trade Tax Department, under the direct recruits quota, but latter could not meet the demand. Since the work of assessment and collection of revenue was being hampered seriously, the Cabinet approved Department's proposal to withdraw 97 posts of Trade Tax Officer Grade II of direct recruits from the purview of the Public Service Commission, and to conduct a 'Limited Departmental Examination' to fill up the said posts. Accordingly, the Commissioner, Trade Tax invited applications from amongst the permanent employees in Grade 'C' to fill up the said 97 posts under the direct recruits quota. This was challenged in a Writ Petition No.456 of 1987 before the High Court which passed an interim order to the effect that the Department would make ad hoc appointments in the vacant posts of Sales Tax Officer Grade-II. Consequently, the candidates selected through the 'Limited Departmental Examination' were given appointment letters on 26.8.1987 containing the condition that their appointment was ad hoc and would be subject to the result in the writ petitions pending before the High Court. Another writ petition was filed, which came to be known as Zaki Khan's case, challenging the Government Order withdrawing the 97 posts from the purview of the Public Service Commission. The said writ petition was dismissed on 19.5.1996 by the High Court upholding the decision of the State Government. The S.L.P. filed thereagainst was also dismissed by the Supreme Court.

G In view of the decision in Zaki Khan's case, Writ Petition No.456 of 1987 was also dismissed. Meanwhile, on 28.10.1995, the Government proposed to regularize the services of the candidates appointed through the 'Limited Departmental Examination' in 1987 and amended the definition of "substantive appointment" in the Uttar

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Pradesh (Sales Tax Officers Grade-II) Service Rules, 1983 to include therein the appointments made in 1987 through the 'Limited Departmental Examination'. The amendment was challenged in a writ petition. Further writ petitions were filed by the direct recruits selected pursuant to the 1985 requisition and appointed between 1990 and 1996 as also by the candidates selected in 1987 through the 'Limited Departmental Examination' claiming seniority over each other. Ultimately, on the directions of the Supreme Court, all the writ petitions were placed for hearing before a Special Bench of the High Court. During the pendency of the writ petitions, the State Government regularized the services of the candidates appointed through the 'Limited Departmental Examination' w.e.f. 25.9.1997. The High Court disposed of the writ petitions holding that the appointments made in 1987 through the 'Limited Departmental Examination' were ad hoc and such candidates could claim seniority only from 25.9.1997 when their services stood regularized, and that the directly recruited candidates of 1985 batch appointed in 1990 be placed above them. The said decision was challenged in the instant appeals.

On the pleadings of the parties, the questions which arose for consideration before the Court were: (i) whether the State Government was entitled to withdraw from the purview of the U.P. Public Service Commission, the 97 posts which were to be filled up by direct recruitment? (ii) whether the 97 posts which were withdrawn from the purview of the Commission would continue to be governed by the recruitment process for direct recruits as contained in the Uttar Pradesh (Sales Tax Officers Grade II) Service Rules, 1983 ?; and (iii) whether having regard to the condition contained in the appointment letters of candidates appointed in 1987 through the 'Limited Departmental Examination' that their appointments were being made on purely ad hoc basis, they could claim seniority on the basis of the service

A rendered by them from 1987 to 25.9.1997 when pursuant to an amendment of the Service Rules their services were regularised?

Disposing of the appeals, the Court

B HELD: 1.1 The High Court in the judgment under
C appeal has rightly held that validity of the State action in
D withdrawing 97 posts from the purview of the U.P. Public
Service Commission was upheld in the *Zaki Khan's* case
and that the right of the State Government to fill up the
said posts in accordance with the norms laid down by it
was also upheld. The said findings of the High Court, by
virtue of dismissal of SLP thereagainst, having become
final, were not capable of being questioned in similar
proceedings either before the High Court or this Court.
[para 65] [328-E, F]

E 1.2 It is clear that the proviso to clause (3) of Article
320 of the Constitution of India empowers the Governor
of a State to withdraw from the purview of the Public
Service Commission, services and posts in connection
with the affairs of a State and to make regulations in
respect thereof. [para 67] [328-G, 329-A]

F 1.3 In the instant case, the State Government, after
the Public Service Commission expressed its inability to
fill up the vacancies for various reasons indicated by it,
and also on account of the fact that the collection of
revenue was being seriously hampered, took steps to
withdraw 97 posts from the purview of the Commission,
and to fill up the same by a 'Limited Departmental
Examination'. Besides, the posts which were vacant in
G 1984 were advertised by the Commission in 1985 and
the selection tests were held only in 1988, pursuant to
which recommendations were made in 1990. [para 68]
[329-A, B, C, D, E]

H 2.1 However, the High Court in the judgment under

appeal erred in holding that although the 97 posts had been taken out of the purview of the Public Service Commission, the recruitment to the said posts would continue to be governed by the U.P. (Sales Tax Officers Grade-II) Rules, 1983 and, that the appointment of the candidates to fill up the said 97 posts by a Limited Departmental Examination could only be an ad hoc arrangement to tide over the period within which regular candidates could be recommended by the Public Service Commission. [para 69] [329-F, G]

2.2 The very fact that the 97 posts were taken out of the purview of the Public Service Commission indicates that the recruitment in respect thereof was not required to be in conformity with the recruitment rules followed by the said Commission but in accordance with the norms and regulations as might be prescribed by the State Government in that behalf. The decision was taken at the Cabinet level to fill up the said 97 posts by a 'Limited Departmental Examination'. There was, therefore, no foundation that appointment to the 97 posts were only meant to fill up a temporary need and were not intended to be substantive in nature. [para 70] [330-A, B, C]

2.3 It is well-established that in the absence of specific rules for recruitment, guidelines framed by the Executive authorities and directions given from time to time in aid thereof would be applicable to such recruitment. Having once exercised powers under the proviso to clause (3) of Article 320 of the Constitution and having withdrawn the 97 posts from the purview of the Public Service Commission, the Government was also free to take steps for recruitment in the said posts and to prescribe guidelines for such recruitment. [para 75] [332-D, E, F]

3.1 It is no doubt true that in the appointment letters issued to the candidates through the selected 'Limited Departmental Examination', it was indicated that the

A appointments were purely of an ad hoc nature, but such
a condition came to be inserted in the appointment letters
on account of an interim order passed by the High Court
in a writ petition. This was also the stand initially taken by
the State Government in various writ petitions. Of course,
B such stand was subsequently altered by the State
Government, but it is clear that the change in stance came
after a decision was taken to amend Rule 3 of the 1983
Rules to regularise the services of the 1987 appointees,
on 25.9.97, the date on which the third amendment in the
C Service Rules was notified. It was also the stand of the
State Government that the appointments made in 1987
by way of the Limited Departmental Examination had been
made after following due procedure. The most important
was the Government's stand that the appointments made
on 20.6.1987 on the basis of the Limited Departmental
D Examination were of substantive nature. [para 70,77]
[330-F, G; 331-A, 334-A, B]

3.3 Subsequently, when the 1983 Service Rules were
amended in 1997, the Government also indicated that the
E amendment was made only to clarify/declare that the
appointments made under the Limited Departmental
Examination were regular and substantive and only a
declaration was made in that regard in the third
amendment and that no regularisation was at all
F envisaged. In the counter affidavit it was once again
emphasised that in the facts of the case, it was not a case
of regularisation of the services of the 1987 appointees,
as projected on behalf of the respondents in the first two
appeals, but that on the contrary it was a case where the
1987 appointees had been appointed on substantive
G basis with due procedure which had been approved in
Zaki Khan's case. It was also emphasised that the
amendment only declared what was in existence and did
not create any new right. The State Government had
considered the appointments on the 97 posts to be
H substantive in nature. As a result whereof no steps were

taken between 1987 and 1997 to regularise the appointments of the 1987 appointees. [para 78-80] [334-D, E, G; 335-A, B, D, E]

3.4 It is only a fortuitous circumstance, namely, passing of the interim order by the High Court that the expression 'ad hoc' came to be mentioned in the appointment letters of the 1987 appointees, although the State Government had intended such appointments to be substantive in nature. It is quite obvious that having included the condition that the appointments were ad hoc in nature in the appointment letters issued to the 1987 appointees, the State Government has now sought to place the 1987 appointees below those who had sat for the recruitment examination after the appointment of the 1987 appointees and were not borne in the cadre prior to 1990. [para 80, 82] [335-E, F; 336-B, C, D]

4.1 Notwithstanding the well-settled principle that an employee's service is to be counted for seniority only after he is borne in the cadre, in the facts of the instant case, the 1987 appointees will have to be treated differently. Although, the State Government may have shifted its stand to the extent that the services rendered by the 1987 appointees till 1997 could not be counted for computing their seniority, as their initial appointment was ad hoc in nature, such a stand would lead to inequity in view of the expressed intention of the State Government in the earlier writ petitions. The fact remains that the 1987 appointees were appointed on the 97 posts which were taken out of the purview of the Public Service Commission but continued to be in the cadre of Trade Tax Officer, Grade II. Having regard to Rule 3(1) of the 1983 Rules, the 1987 appointees must be held to have been substantively appointed in accordance with the procedure prescribed by the State Government. Such an appointment did not, in any manner, derogate from their appointment in the cadre of Trade Tax Officer, Grade II. [para 81-82] [335-G;

A 336-A, B, F, G]

4.3 The respondent-authorities are directed to treat the 1987 appointees who had been appointed on the basis of 'Limited Departmental Examination' to have been substantively appointed at the time of their initial appointment in 1987 and to revise the seniority list pertaining to Trade Tax Officer, Grade II accordingly. [para 86] [338-A, B]

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Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha 1962 (2) SCR 159; *State of Tamil Nadu v. Arooran Sagars Limited* 1997 (1) SCC 326; *State of U.P. V. Manbodhanlal Srivastava* AIR 1957 SC 912; *Shitala Prasad Shukla v. State of U.P.* AIR 1986 SC 1859; *K. Madalai Muthu vs. State of Tamil Nadu* 2006 (6) SCC 558; *M.P. State Coop. Bank V. Nanuram Yadav* 2007 (11) SCALE 439; *K. Narayanan v. State of Karnataka* (1994) Supp. (1) SCC 44 ; and *Direct Recruit Class-II Engineering Officers Association Vs. State of Maharashtra and Anr.* 1990 (2) SCC 715 - cited.

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CIVILAPPELLATE JURISDICTION : Civil Appeal No. 4968 of 2007.

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From the common final Judgment and Order dated 20.9.2006 of the High Court of Judicature at Allahabad, Lucknow Bench. Lucknow in W.P. Nos. 1041(S/B)1996, 1295 (S/B)/1997 and 1863 (S/B) 1998.

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Civil Appeal Nos. 4969/07 and 4970 of 2007

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Shail Kumar Dwivedi, Addl. Adv. Gen., U.P., M.N. Rao, Gourab Banerji, R. Venkataramani, Aseem Chandra, Anurag Singh, T. Mahipal, Saurav Agarwal, Arjun Krishan, Gautam Jha, Gaurav Agrawal, Ruby Singh Ahuja, Raj Kumar Gupta, Manoj Kumar Dwivedi, Vandana Mishra, G. Venkateswara Rao, Kamlendra Misra and C. Balakrishna for the appearing parties.

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The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. These three appeals arise out of a common judgment and order dated 20.9.2006 passed by the Lucknow Bench of the Allahabad High Court disposing of several Writ petitions filed by the appellants in these appeals. Since these appeals arise out of a common judgment and common questions of fact and law are involved, they have been taken up together for final hearing and disposal. While C.A.No. 4968/2007, arises out of W.P.No.1041/96, W.P.No.1295/97 and W.P.No.1863/98, the other two appeals arise out of the other Writ petitions disposed of by the common judgment.

2. In order to appreciate the issues which arise in these appeals it is necessary to indicate some of the facts set out in the writ petitions.

3. At the relevant point of time in the U.P. Trade Tax Department there were 669 posts of Trade Tax Officers, Grade II. Out of the said 669 posts, about 502 posts belonged to the Direct Recruits quota, but in 1980 only 243 of the posts had been filled. The vacancy in respect of the remaining 259 posts were the result of the slow and long drawn out process of the U.P. Public Service Commission in conducting the U.P. Subordinate Service Examination.

4. During the hearing of the writ petitions it transpired that the Commissioner, Trade Tax, had sent a requisition to the U.P. Public Service Commission on 25.9.1980 for filling up 75 vacancies. Another requisition was sent on 9.12.1981 for 115 posts. Against the first requisition the Public Service commission sent the names of candidates only on 6.9.1982. In the meantime, after December 1981 a further 28 vacancies arose and a revised requisition was sent on 14.10.1982 for 143 vacancies. A total number of 143 posts were advertised in 1985 and in September 1986 the said 143 candidates were made available by the Public Service Commission.

5. As will also appear from the records, between 1982-1986, further requisitions were repeatedly made by the Commissioner, Trade Tax, requesting the Public Service

A Commission and the Government to make available further candidates in the direct recruits quota to fill up the remaining vacancies. Along with the vacancies in the quota for direct recruits there were 167 vacancies in the promotion quota also. On 6.12.1983 the Commissioner, Trade Tax sent a requisition for 26 posts which was enhanced to 33 posts by a letter dated 28.8.1984. In February 1985 a reminder was sent for 176 posts, though by that time the Public Service Commission had already advertised for 143 posts and the Commissioner, Trade Tax was informed in January 1986 that 143 candidates would probably be made available in June 1986.

6. Since apparently the work of assessment and collection of revenue was being seriously hampered, the Commissioner, Trade Tax, wrote to the Secretary, Institutional Finance, in February 1986, to provide retrenched officers from other Departments to conduct the said work and in March 1986 the Commissioner, Trade Tax mooted the proposal to amend the U.P. Sales Tax Officers (Grade II) Service Rules 1983, and to add a proviso to Rule 5(1) which would enable the Governor, in case of an administrative necessity and in the public interest, to authorise the Commissioner, Trade Tax, to conduct a Limited Departmental Examination from amongst the permanent Group 'C' employees to fill up the vacancies in Group 'B'. The said employees would be deemed to be officers of the quota of direct recruits and would be entitled to regular appointment as contemplated under the Rules.

7. The Special Secretary suggested that the proposal of the Commissioner, Trade Tax, could be placed before the Cabinet for its approval for conducting a Limited Departmental Examination. On 11.8.1986 a detailed proposal was also sent by the Commissioner, Sales Tax, for holding a Limited Departmental Examination from amongst permanent employees of the Department.

8. The Special Secretary, Institutional Finance, wrote to the Chairman, Public Service Commission, on 23.8.1986

apprising him of the department's decision to hold a Limited Departmental Examination for which an interview would have to be conducted by a Selection Committee where the Public Service Commission would also be represented by a Member. The said decision was disapproved by the Commission, but ultimately the Cabinet gave its approval to the Department's proposal to withdraw 97 posts of direct recruits from the purview of the Public Service Commission and to conduct a Limited Departmental Examination for the said posts. The Commissioner, Trade Tax, was informed of the said decision by the Special Secretary by his letter dated 11.12.1986.

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9. Pursuant to the aforesaid communication a Circular was issued by the Commissioner, Trade Tax, on 23.12.1986 whereby applications were invited for 97 posts from amongst the permanent employees in Grade 'C' who had completed 7 years of service. In the Circular the posts to be filled up were described as temporary posts from the direct quota which would be converted into permanent posts in course of time. It was also mentioned that those who had been appointed as Trade Tax Officers, Grade II, pursuant to the requisition sent on 11.10.1982 would be senior to the 143 candidates whose select list had been made available by the Public Service Commission in September, 1986.

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10. The two decisions taken by the Government on 11.12.86 and 23.12.86 were challenged by one Brijendra Bahadur Singh by way of Writ Petition No.456 of 1987. On 5.2.1987, while issuing notice on the said writ petition, the High Court also passed an interim order to the effect that it would be open to the respondents to make ad hoc appointments in the vacant posts of Sales Tax Officer, Grade II, but no permanent appointment was to be made in respect of 2/3rd of the total number of vacancies which were meant to be filled up directly through the Public Service Commission under the U.P. Sales Tax Officers Rules, 1977.

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11. Consequent to the above, the State Government

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- A directed the Commissioner, Trade Tax, to include a condition in the appointment orders to be issued to the persons selected through the Limited Departmental Examination that in view of the aforesaid order of the High Court the appointment was being made on an ad hoc basis and would be subject to the result of
- B Writ Petition No.456 of 1986. On 19.2.1987 a similar interim order was passed by the High Court in the Writ Petition filed by Jai Singh. Pursuant to the above direction, the persons who were selected through the Limited Departmental Examination were given appointment on 28.6.1987 and their appointment
- C orders contained the condition that their appointment was ad hoc and would be subject to the result of the writ petitions pending before the High Court.

12. In 1990, one Mohd. Zaki Khan and some others filed a Writ Petition challenging the Government Order dated

D 11.12.1986 withdrawing the 97 posts from the purview of the Public Service Commission. The said writ petitioners were candidates who had appeared in the written examination conducted by the Public Service Commission pursuant to the advertisement published in 1985, but had failed to pass the

E examination. The case of the writ petitioners in the said writ petition was that while making a requisition for 33 posts, if 97 posts for which the Limited Departmental Examination was held had been included in the requisition, they too would have been selected. It was also their case that since the 97 posts had been

F filled up only on an ad hoc basis from the departmental candidates, they would continue to be available in 1988 when fresh examinations were held by the Public Service Commission. A prayer was accordingly made for a Mandamus to be issued to the Public Service Commission to fill up the said 97 posts

G also by regular candidates and since the Public Service Commission was, in any event, conducting the U.P. Subordinate Service Examination, the select list could be expanded to include recommendations for the 97 posts which had been filled up by the department on ad hoc/temporary basis.

- H 13. The writ petition of Mohd. Zaki Khan and others was

decided against the writ petitioners on the basis of the detailed correspondence between the Commissioner of Trade Tax and the Department, and between the Department and the Public Service Commission. The High Court ultimately came to the conclusion that the Government had valid and cogent reasons for taking out the 97 posts from the purview of the Public Service Commission. It was also held that since the matter had been decided by the Cabinet the Governor was bound to accept such advice. It was also held that since the said posts had been validly taken out from the purview of the Public Service Commission it was not open to the court to issue a Mandamus to the Public Service Commission to fill up the said posts which had gone out of the domain of the said Commission.

14. The said decision in the writ petition filed by Mohd. Zaki was delivered on 19.5.1996. A Special Leave Petition filed against the said decision was dismissed in limine by this Court on 19.9.1996.

15. After the decision in Mohd. Zaki's case, the writ petition filed by the Brijender Bahadur Singh was also dismissed on 3.10.1996 on the basis of the decision in Mohd. Zaki Khan's writ petition.

16. In the meantime, the Commissioner, Trade Tax mooted a proposal on 28.10.1995 to regularise the services of the officers who had been appointed pursuant to the Limited Departmental Examination held in 1986-87, by amending Rule 5(1) of the Service Rules of 1983 and urged the Government to effect such amendment expeditiously.

17. The said letter of 28.10.1995 written by the Commissioner, Trade Tax, was challenged by one Ram Lal and others by way of writ petition No.1041/1996 whereby the direct recruits selected pursuant to the 1985 requisition sought seniority over the officers appointed on the basis of the Limited Departmental Examination conducted in 1987.

18. The ground of challenge was that the appointment of

A those candidates who had been appointed pursuant to the Limited Departmental Examination was de hors the rules and had not been approved by the Public Service Commission.

B 19. Pursuant to the request of the Commissioner, Trade Tax, for regularisation of the ad hoc appointments made through the Limited Departmental Examination, the Government effected the Third Amendment to the 1983 Rules whereby the definition of "substantive appointment" was amended to include appointments made in 1987 through the Limited Departmental Examination.

C 20. The aforesaid amendment of 1997 was challenged in writ petition No.1297 of 1997 by one Vinod Kumar Gupta on the ground that the amendment sought to retrospectively amend the Rules of 1983 for the purpose of regularising those candidates who had been appointed in 1987 through the Limited Departmental Examination.

D 21. Two other officers, Shri Govardhan Lal and Shri Arvind Kumar Tiwari, who had been directly recruited pursuant to the result of the examination conducted by the U.P.Public Service Commission in 1990 and appointed in 1994 and 1993 respectively, filed Writ Petition No.1863 of 1998, challenging the Government Order dated 5.6.1998 directing the Commissioner, Trade Tax, to prepare a gradation list of officers of the 1985 batch who had been directly recruited and appointed in 1990 and the 1987 batch who had been appointed through the Limited Departmental Examination. The direct recruits who had been appointed in 1990 claimed seniority over those who had been appointed in 1987 by the Limited Departmental Examination on the ground that the 1987 appointees had been appointed on an ad hoc basis and their officiating service could not be counted towards seniority.

G 22. The State Government passed an order on 22.9.2000 directing that the seniority list of those candidates, who had either been appointed directly or on the basis of the Limited Departmental Examination, would be deemed to be undisputed

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up to 1985 in order to enable promotions to be made therefrom. The Commissioner, Trade Tax, thereafter passed an order to include the candidates of the 1985 direct recruits batch, who had been appointed in 1990, in the seniority list and though the order was passed on 9.10.2000 the same did not include the names of the appointees who had been appointed in 1987 on the basis of the Limited Departmental Examination.

23. Two writ petitions, namely, Writ Petition No.1778/2000 and Writ Petition No.2000/2000 were filed at Lucknow by Jugal Kishore Pandey and Rajendra Prasad, who had both been appointed in 1987. Another writ petition was filed by Ashok Kumar Shrivastava at Allahabad in which an interim order was passed staying the operation of the Government Order dated 22.9.2000 and 9.10.2000. In the meanwhile, pursuant to an application made under Clause 14 of the Amalgamation Order this Court transferred Writ Petition No.2787/2001 filed in Allahabad to Lucknow with a request to the Chief Justice of Allahabad High Court to constitute a Special Bench to hear all the writ petitions at an early date, and, if possible on a day to day basis. The matters then came up before the Division Bench of the Lucknow Bench of the Allahabad High Court for final disposal.

24. During the pendency of the writ petitions, the State Government passed orders regularising the services of the candidates who had been appointed in 1987 pursuant to the Limited Departmental Examination with effect from 25.9.1997. The State Government also informed the Commissioner, Trade Tax, U.P., Lucknow, on 9.5.2005 that the date of substantial appointment of the persons selected through the Limited Departmental Examination was 25.9.1997.

25. Accepting the submissions made on behalf of the candidates who had been selected pursuant to the advertisement published in 1985 and thereafter in 1990 for direct recruitment to the post of Trade Tax officer, Grade II, the High Court also came to the conclusion that the appointments made

A in 1987 on the basis of the Limited Departmental Examination were ad hoc in nature and consequently such candidates could claim seniority in the cadre only from 25.9.1997 when their services stood regularised. Accordingly, even though the candidates of the 1985 batch were appointed after the 1987 candidates, the High Court directed that they along with the candidates of 1990, who had been selected by the regular selection process as contemplated under the Rules, be placed above the 1987 appointees as their appointment stood regularised only with effect from 25.9.1997, when the Third Amendment to the Service Rules was effected. It is the aforesaid decision of the High Court in the said 8 writ petitions which is the subject matter of the three appeals being heard by us.

26. Appearing for the appellants in C.A.Nos.4968 and 4969 of 2007, filed by the officers who had been appointed pursuant to the Limited Departmental Examination held in 1987, Mr. M.N. Rao, learned Senior Advocate, submitted that the controversy forming the subject matter of the appeals involve the validity of the amendments made to the U.P. Trade Tax Officers, Grade II, Service Rules, 1983, (hereinafter referred to as "1983 Service Rules") in 1987, as also the seniority given to those officers who had been recruited pursuant to the Limited Departmental Examination held in 1987. Mr. Rao further contended that the appellants in Civil Appeal No. 4970/2007 were those direct recruits who had been appointed by the U.P. Public Service Commission in 1991 and 1994.

27. According to Mr. Rao, the aforesaid 1983 Rules contemplated recruitment to the post of Trade Tax Officer, Grade II, through two methods. Rule 5 of the Rules provides that 75% of the said officers are to be appointed through the Public Service Commission by way of direct recruitment and upon holding a competitive examination, whereas the remaining 25% are to be appointed by promotion after consultation with the Public Service Commission. However, in 1979, the State Government was facing an acute shortage of Trade Tax Officers, Grade II, which was seriously hampering the revenue collection,

and this resulted in the withdrawal of 97 vacant posts of Trade Tax Officers, Grade II, from the purview of the Public Service Commission with the object of filling up the same by a Limited Departmental Examination

28. Mr. Rao also referred to the writ petition of Mohd. Zaki Khan and submitted that while dismissing the writ petition the High Court held that the State Government was fully empowered to withdraw the 97 posts from the control of the Public Service Commission. Mr. Rao submitted that the High Court had also held that once the 97 posts had been taken out of the purview of the Public Service Commission the State Government was free to fill up those posts after laying down norms consistent with the constitutional provisions and other related laws.

29. Mr. Rao submitted that the disputes concerning the appointment of the 1987 appointees through the Limited Departmental Examination had been set at rest by the High Court in Zaki Khan's case and with the dismissal of the special leave petition (SLP (C) No.18183/96) preferred against the said judgment of the Allahabad High Court on 19.9.1996, the finding with regard to the validity of the withdrawal of the said 97 posts of Trade Tax Officers, Grade II, attained finality and could not be reopened.

30. Mr. Rao referred to the writ petition filed by Brijender Bahadur Singh and others and the interim order passed therein on 5.2.1987. He also referred to the writ petition filed by Jai Singh and others, wherein also an interim order was passed on 19.2.1987. Mr. Rao urged that the effect of the interim orders was that the State Government was free to make appointments from the candidates selected through the Limited Departmental Examination, but such appointments were to be treated as ad hoc. As a result, in the appointment letters issued to the appointees of 1987, it was mentioned that the appointments were 'ad hoc'. Mr. Rao, submitted that this was the stand taken by the State Government in the counter-affidavit filed on behalf of the State in the said two writ petitions, which were

A subsequently dismissed on 3.10.1996 and 6.5.1994, respectively.

31. It was then urged that in 1997 the State Government amended the 1983 Service Rules and such amendments included amendment to Rule 3(j) and 3(l). By virtue of the said amendments the definition of the term "member of the service", mentioned in the judgment herein, was widened to include those who had been appointed on the basis of the Limited Departmental Examination. A proviso was also added to the existing definition of "substantive appointment" indicating that persons appointed on ad hoc basis in the year 1986-87 through the Limited Departmental Examination from Group 'C' posts would be deemed to have been substantively appointed. It was further urged that although it was never the intention of the State Government to appoint those selected on the basis of the Limited Departmental Examination on an ad hoc basis, the said expression had been included in the appointment letters issued to such appointees in view of the interim orders which had been passed by the High Court in the writ petitions filed by Brijendra Singh and Jai Singh, which were subsequently dismissed. Mr. Rao submitted that it had always been the intention of the State Government to treat the appointments of the said candidates to be substantive. It was only later that the State Government changed its stand and contended that the 1987 appointees had been substantively appointed only in 1997 from the date of amendment of the Rules.

32. The change in the stand of the State Government was thereafter challenged by Muneshwar Babu and others, who were 1987 appointees, in writ petition No.166/05 before the Allahabad High Court. They are some of the appellants in Civil Appeal No.4969 /2007.

33. Mr. Rao submitted that the direct recruits, who had been appointed pursuant to the advertisements published in 1985 and 1990, long after the 1987 appointees had been appointed by way of a Limited Departmental Examination, had

no locus standi to question the seniority of the 1987 appointees since at that time they had not even been born in the cadre. Mr. Rao contended that once the question involving the exclusion of the 97 posts from the purview of the Public Service Commission had been finally decided in Zaki Khan's case, the direct recruits who had been subsequently appointed through the Public Service Commission had no right to challenge the seniority of the 1987 appointees or to canvas a claim that the said 97 posts should be thrown open to the candidates who had appeared at the examination conducted by the Public Service Commission in 1988 pursuant to the advertisement published in 1985. It was submitted that the same would also apply to the direct recruits appointed pursuant to the publication of a similar advertisement in 1990. Mr. Rao submitted further that since the 1987 appointees had not encroached on any post earmarked for the direct recruits, the said direct recruits could have no valid grievance against the exclusion of certain posts from the purview of the Public Service Commission.

34. Mr. Rao urged that the High Court had erred in coming to a finding that the appointment given to the 1987 appointees was in violation of the procedure laid down in the Rules, and was discriminatory for open market and senior departmental candidates. It was also urged that the High Court had erroneously accepted the contention of the direct recruits that the 1987 appointees had been appointed *de hors the rules*, and, consequently, the amendment effected to the Rules in 1997 could only operate prospectively.

35. Mr. Rao submitted that the Division Bench of the High Court had erred in taking the view that the appointment of the 1987 appointees was in violation of Rule 5 and the recruitment procedure contemplated in the Rules. He submitted that once the posts had been taken out of the purview of the Public Service Commission, Rule 5 of the Service Rules, which prescribes the manner of recruitment through the Public Service Commission, was no longer applicable to such posts and the procedure contemplated thereunder for recruitment to the post of Trade

A Tax Officer, Grade II, and the Government was free to prescribe the procedure to be followed for the purpose of filling up the said posts. Mr. Rao urged that the 1983 Service Rules did not prescribe any method for recruitment to posts which were taken out from the purview of the Public Service Commission and, in fact, the definition of "substantive appointment" in the unamended Rule 3 (l) takes care of such a contingency by providing that if there are no rules prescribed for such recruitment then the procedure as prescribed by executive instructions would be valid and persons appointed through such a procedure would be considered to have been substantively appointed. Mr. Rao submitted that since in the Service Rules of 1983 no such procedure has been prescribed for recruitment of posts excluded from the purview of the Public Service Commission, the State Government had issued executive instructions for the purpose of filling up the posts in question and since the procedure adopted for filling up the said 97 posts had been duly laid down by the State Government, the finding of the High Court that the method prescribed was *de hors* the Service Rules was not tenable.

E 36. It was lastly contended by Mr. Rao that the judgment of the High Court had proceeded on the incorrect proposition that the appointment of the 1987 appointees by the Limited Departmental Examination was ad hoc and fortuitous. Mr. Rao submitted that the High Court had wrongly referred to the 1987 appointees as "promotees" when, in fact, they were direct recruits of the year 1987 who had been inducted in the cadre of Trade Tax Officer, Grade II, by means of a Limited Departmental Examination in respect of the posts which had been taken out of the purview of the Public Service Commission.

G 37. Mr. Rao submitted that the intention of the State Government not to treat the 1987 appointees as having been appointed on an ad hoc basis would be evident from the fact that soon after the High Court dismissed the writ petition of Brijender Bahadur Singh, the State Government effected an amendment in Rule 3(j) and 3(l) of the Service Rules, with the

intention of putting the controversy beyond the pale of challenge. Mr. Rao referred to the proviso to Rule 3(l), as amended in 1997, which provides that those officers who had been appointed pursuant to the Limited Departmental Examination held in 1987 would be deemed to have been substantively appointed. The High Court, according to Mr. Rao, had committed an error in holding, while interpreting the amended Rules, that the 1987 appointees were promotees and formed a different group.

38. In support of his aforesaid submission Mr. Rao referred to and relied upon the decision of this Court in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha* (1962 (2) SCR 159) wherein, while interpreting a deeming fiction incorporated in the proviso, this Court held that the same had to be given full effect. Mr. Rao also referred to a Constitution Bench decision of this Court in *State of Tamil Nadu v. Arooran Sagars Limited* (1997 (1) SCC 326) where the scope of a deeming provision had been explained. Mr. Rao submitted that the amendment in question being remedial in nature, the same had to be given retrospective effect to correct the prejudice caused earlier, unless of course a specific date was indicated from which the amended provisions would come into force.

39. On the submissions made by learned counsel for the Public Service Commission that temporary or officiating appointments could be made as per Rule 18(4) of the 1983 Rules, Mr. Rao submitted that such a stand was not tenable on account of the fact that the posts covered by Rule 18(4) were within the purview of the Public Service Commission and Regulation 5(a) of the U.P. Public Service Commission (Limitation of Function) Regulations, 1954, would apply.

40. Concluding on the decision of the High Court in Zaki Khan's case, Mr. Rao submitted that in *State of U.P. V. Manbodhanlal Srivastava* (AIR 1957 SC 912), it had been held that Article 320 (3) of the Constitution is directory in nature and consultation with the Public Service Commission does not mean concurrence with the said Commission and the State

A Government, in view of Regulation 3 of the 1954 Regulations, which fully empowered the State Government to take out 97 posts from the purview of the Public Service Commission. Mr. Rao submitted that it was not open to the later Division Bench of the High Court to take a contrary view.

B 41. Mr. Rao submitted that the judgment of the High Court impugned in these Civil Appeal Nos. 4968-4969 of 2007 preferred by those officers who had been appointed on the basis of the Limited Departmental Examination held in 1987, was liable to be set aside.

C 42. Mr. Rao's submissions in support of Civil Appeal Nos. 4968-69 of 2007 were strongly opposed by Mr. Gaurab Banerji, learned Senior Advocate appearing for the direct recruits of the 1985 and the 1990 batches, who have been made respondent Nos. 1 to 6 in the said appeals. Mr. Banerji submitted that it was the case of the said respondents that persons who had been appointed on the basis of the Limited Departmental Examination were not substantively appointed and their appointment was of an ad hoc and/or temporary nature and de hors the Service Rules. It was also submitted that consequently their services could be counted for the purpose of seniority only from the date of regularisation of their services in 1997.

F 43. Mr. Banerji urged that the issues which had arisen for determination in these appeals revolved around the question as to whether the appointments made in 1987 on the basis of the Limited Departmental Examination held in 1987 were substantive or were ad hoc/temporary in nature and contrary to the rules, in the light of Articles 14 and 16 of the Constitution. Referring to the case made out in the writ petition filed by Muneshwar Babu & others, Mr. Banerji contended that the limited issue for determination in Zaki Khan's case was whether the State Government had the power to withdraw certain posts from the purview of the Public Service Commission. He added that the petitioners in Zaki Khan's case were unsuccessful candidates who had appeared for the Public Service Commission

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examination held in 1988. Mr. Banerji submitted that the Public Service Commission had not filed any counter affidavit in Zaki Khan's case to bring into focus the stand of the Public Service Commission. Mr. Banerji urged that the Cabinet decision, on which reliance had been placed by the High Court, had gone uncontroverted. Mr. Banerji also urged that in Zaki Khan's case the High Court had specifically held that the method of appointment to the 97 posts, which were withdrawn from the purview of the Public Service Commission had not been challenged in the Writ Petition, and, consequently, the validity of the appointments made in respect of the said posts remained untouched.

44. Mr. Banerji submitted that the Court had also held that the writ petitioners had not acquired any right on the strength of having appeared at the interview when ultimately they were unsuccessful in their endeavour to be appointed as Trade Tax Officers, Grade II.

45. Mr. Banerji contended that the mode and manner of appointment of the 1987 appointees was not in issue in Zaki Khan's case and the High Court had wrongly relied on the decision rendered therein while deciding the several writ petitions out of which these three appeals arise.

46. Mr. Banerji reiterated that the Limited Departmental Examination was in violation of Rule 5(1) and Rule 15 of the Rules and those appointed on the basis thereof could not be said to have been substantively appointed as per Rules 3(j) and 3(l). He also submitted that the instructions contained in the letters dated 11.12.1986 and 23.12.1986, on the basis whereof the Limited Departmental Examination was conducted, could at best be treated as executive instructions which could not go beyond or be contrary to Article 309 of the Constitution. Mr. Banerji submitted that even in the letter dated 23.12.1986 the posts in question had been shown as temporary posts in the direct recruits quota. Reference was also made to the appointment letter issued to Muneshwar Babu on 20.6.87 which

A included the condition that the concerned employee could be removed to his parent post. It was submitted that the said condition made it clear that the appointments made on the basis of the Limited Departmental Examination were all of a stop-gap and/or temporary nature.

B 47. Mr. Banerji urged that the appointments made on the basis of the Limited Departmental Examination was contrary to the 1983 Rules and was only an ad hoc arrangement to meet the demands of the Department pending the recommendations from the Public Service Commission of regular candidates to fill up the vacancies in respect of which such ad hoc arrangements had been made.

C 48. Mr. Banerji also referred to writ petition No.1041 of 1996 filed by the direct recruits of the 1985 batch, wherein the letter of the Commissioner of Trade Tax dated 28.10.1995 seeking regularisation of the appointees of 1987 by amendment of Rule 5 of the 1983 Rules had been challenged. Mr. Banerji submitted that in the said writ petition an interim order had been passed on 26.9.1996 categorically directing that the appointees under the Limited Departmental Examination held in 1987 would not be assigned seniority over and above the writ petitioners who had been regularly appointed in accordance with the rules in 1991.

E 49. Mr. Banerji submitted that the amendment had been effected on 26.9.97 and if the same was to be given retrospective effect it would be contrary to the order passed on 26.9.96 in which it had not been stipulated that the rule was to be given retrospective effect. Mr. Banerji submitted that it could only be given prospective effect from the date on which it was made effective.

F 50. Relying on various decisions of this Court namely – i) *Shitala Prasad Shukla v. State of U.P.* (AIR 1986 SC 1859); ii) *K. Madalai Muthu vs. State of Tamil Nadu* (2006)6 SCC 558; and iii) *M.P. State Coop. Bank V. Nanuram Yadav* (2007 (11) SCALE 439), Mr. Banerji urged that seniority could be counted

only from the date on which a temporary post was regularised and since in the instant case the appointment of the candidates selected by the Limited Departmental Examination was regularised only in 1997, they could claim seniority only thereafter and not with retrospective effect. He also submitted that as had been held in *K. Narayanan v. State of Karnataka* (1994) Supp. (1) SCC 44, Rules operate prospectively and that retrospectivity is an exception. Even where the statute permitted framing of Rules with retrospective effect the exercise of power under such provision could not be exercised in violation of any constitutional right so as to affect a vested right.

51. Mr. Banerji submitted that the submission advanced by him on behalf of the respondents in C.A.Nos.4969-70/2007, apply equally to the case of the appellant, Govardhan Lal, in C.A.No.4970/2007, since the appellant in the said appeal was similarly placed as the respondents in the other two appeals.

52. Mr. R. Venkataramani, Learned Senior Advocate, who appeared for the private respondents in C.A. No. 4970 of 2007, generally adopted the submissions made by Mr. Rao. He, however, added that once the issue relating to the appointment of the 1987 appointees on the basis of the Limited Departmental Examination stood concluded in *Zaki Khan's* case, the High Court erred in re-opening the same. He urged that after the exclusion of the Public Service Commission from the appointment of the 1987 appointees, there was no further occasion for the High Court to once again enquire into the process of appointment of the said candidates as it amounted to reviewing the judgment rendered in *Zaki Khan's* case. Mr. Venkataramani submitted that the expression "substantive appointment" as defined in clause 3(c) of the 1983 Service Rules provides for appointment in terms of executive instructions when no Rules are available to deal with a situation such as the one in the instant case. Learned counsel referred to Rule 3(1) of the aforesaid Rules which reads as follows:-

"Rule 3(1) – Substantive appointment means an

A appointment, not being an ad hoc appointment, on a post in the Cadre of the service made after selection in accordance with the rules and if there are no rules in accordance with the procedure prescribed for the time being by executive instructions issued by the Government."

B 53. It was urged that the aforesaid Rule clearly indicates that where the Rules did not provide for appointment in certain contingencies, the vacuum could be filled up by executive instructions, as had been done in the instant case. Mr. Venkataramani submitted that once the 1987 appointees had
C been deemed to have been substantively appointed, which, in fact, was the stand initially taken by the State Government, a fresh enquiry into the matter was not permissible. It was also urged that even if the initial appointment of the 1987 appointees had not been made by following the procedure laid down by the
D Rules but the appointees continued in the post uninterruptedly till their services were regularised, the period of officiating service would be counted for the purpose of seniority, as had been held by a Constitution Bench of this Court in *Direct Recruit Class-II Engineering Officers Association Vs. State of Maharashtra and Anr.* (1990 (2) SCC 715. This Court had held
E that for the purposes of seniority, where 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
F period of officiating service would be counted.

54. The stand of the State of Uttar Pradesh was placed by Mr. Shail Kumar Dwivedi, learned Additional Advocate General. He submitted that while admittedly 97 posts had been taken out by the State Government from the purview of the U.P. Public
G Service Commission, before the appointment letters to the selected candidates could be issued, one Brijendra Bahadur Singh filed Writ Petition No. 456 of 1987 before the Allahabad High Court in which the following interim order was passed on
H 5th February, 1987, namely :-

“Issue notice. It will be open to the respondents to make ad hoc appointments on the vacant posts of Sales Tax Officers Grade-II but no permanent appointment shall be made on 2/rd of the total number of vacancies of Sales Tax Officer which meant to be filled up directly through Public Service Commission under the U.P. Sales Tax Officers Rules, 1977.”

55. It was submitted that having regard to the above interim order of 1987, candidates selected on the basis of the Limited Departmental Examination, were appointed on 20th June, 1987 on an ad hoc basis. Mr. Dwivedi submitted that the interim order passed on 5th February, 1987 in the Writ Petition of Brijendra Bahadur Singh was never challenged, though ultimately the said Writ Petition was dismissed on 3rd October, 1996. It was also contended that the 1987 ad hoc appointees from the departmental candidates had never filed any writ petition for regularisation of their services.

56. It was then submitted that respondent nos. 1 to 6 in the instant appeal and some other direct recruits had filed Writ Petition No. 1041 of 1996 before the Allahabad High Court praying for an order not to regularise the services of the 1987 ad hoc appointees and on 26th September, 1996, wherein an interim order was passed in their favour in the following terms :-

“Three weeks time is allowed to the standing counsel to seek necessary instructions. List thereafter. In the meantime in the case opposite parties 3 to 99 are regularised, they shall not be assigned seniority over and above the petitioners who according to the petitioner’s case were regularly appointed in accordance with the rules in the year 1991.”

57. It was submitted that the interim order continued till the passing of the impugned judgment dated 20th September, 2006. Mr. Dwivedi submitted that the said interim order had also not been challenged by the appointees of the 1987 batch and the said position continued for about 10 years. It was only by way of

A Notification dated 25th September, 1997 that the State of Uttar Pradesh amended the 1983 Service Rules whereupon the appointment of the appointees of the 1987 batch were regularised.

B 58. Mr. Dwivedi also relied on the *Direct Recruit's* case (supra) wherein it had also been held that once an incumbent is appointed to a post according to the rules, his seniority has to be counted from the date of his appointment and not from the date of confirmation. In other words, according to Mr. Dwivedi, where an appointment is made as a stop gap arrangement, the officiation in such post could not be taken into account for consideration of seniority.

C 59. Reference was also made to the case of *Shitala Prasad Shukla* (supra), wherein it had been held that an employee must belong to the same stream before he can claim seniority over others.

D 60. Mr. Dwivedi concluded on the note that having regard to the aforesaid decision, the appointees of the 1987 batch could not for the purpose of seniority in the cadre, claim the benefit of their service from the time of their initial appointment till they were regularised in 1997.

E 61. Although, extensive arguments have been advanced on behalf of the various parties, the controversy involved in these appeals is broadly limited to three questions, namely :

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- i) Was the State Government entitled to withdraw from the purview of the U.P. Public Service Commission posts which were to be filled up by direct recruitment?
 - ii) Would the 97 posts which were taken out from the purview of the U.P. Public Service Commission continue to be governed by the recruitment process for direct recruits as contained in the Uttar Pradesh (Sales Tax Officers Grade II) Service Rules, 1983 ? ; and
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- iii) Whether having regard to the condition contained in their appointment letters that their appointments were being made on purely ad hoc basis the appointees to the said posts could claim seniority on the basis of the service rendered by them from 1987 to 25.9.1997 when pursuant to an amendment of the Service Rules their services were regularised ?

62. The first two questions were raised and decided in Mohd. Zaki Khan's case. After discussing the circumstances which led to the decision of the State Government to withdraw the 97 posts from the purview of the U.P. Public Service Commission, the High Court observed that the question for consideration in the said case was whether the State Government was empowered to take out the said 97 posts from the purview of the Commission and to fill up the same through a Limited Departmental Examination.

63. After considering the proviso to clause (3) of Article 320 of the Constitution and the 1983 Rules framed thereunder, the High Court held that from the second part of clause (b) of Regulation (3), it was amply clear that the Governor after consultation with the Commission could direct that the service or post in question would be outside the purview of the Commission. It was also observed that the Cabinet had taken the decision to take out the 97 posts from the purview of the Commission which was communicated to the Commissioner of Sales Tax by letters dated 11.12.1986 and 17.12.1986. Further, considering the effect of Article 163 of the Constitution, the High Court had also held that the Governor was required to act on the aid and advice of the Council of Ministers headed by the Chief Minister and that the decision of the Cabinet had to be accepted by the Governor. The High Court ultimately held that the said 97 posts of Trade Tax Officer, Grade II, had been taken out from the purview of the Commission by the State Government on the basis of the decision of the Cabinet and that though the Commission did not concur with the decision of the Cabinet, the State Government fulfilled its obligation of

A consulting the Commission on the issue before taking a decision in the matter.

B 64. The other question which came up for consideration before the High Court in Zaki Khan's case was the contention raised by the respondents in the first two appeals also that since the appointments in the 97 posts were of an ad hoc nature, such appointments could last only till the regularly-selected candidates became available from the Commission. The said contention was also negatived by the High Court upon holding that since the 97 posts had been taken out from the purview of the Public Service Commission, the State Government was free to fill up the said posts after laying down norms consistent with the constitutional provisions and other laws. While considering the case of the writ petitioners in the said writ petition, the High Court also held that simply because the writ petitioners in the said case had appeared in the interview test held for the combined Upper Subordinate Examination 1985-86, they did not acquire any right to be selected on the ground that more vacancies existed at the time of the examination or at the time of the advertisement.

E 65. It is, therefore, apparent that the validity of the State action in withdrawing 97 posts from the purview of the U.P. Public Service Commission had been answered in the affirmative in Zaki Khan's case and the right of the State Government to fill up the said posts in accordance with the norms laid down by it had also been approved. Since the special leave petition which was filed against the said decision of the High Court was dismissed, the findings of the High Court in Zaki Khan's case became final and were not capable of being questioned in similar proceedings either before the High Court or this Court.

G 66. The submissions made on behalf of the appellants in Civil Appeal Nos. 4968-69 of 2007, in this regard have, therefore, to be accepted.

H 67. It is clear that the proviso to clause (3) of Article 320 of the Constitution empowers the Governor of a State to withdraw

from the purview of the Public Service Commission services and posts in connection with the affairs of a State and to make regulations in support thereof.

68. In the instant case, as has been indicated in detail by the High Court, the State Government took the step to withdraw 97 posts from the purview of the Public Service Commission after the said Commission expressed its inability to fill up the vacancies within a short span of time because of the various reasons indicated by it, such as shortage of staff and the malfunctioning of obsolete machinery and equipment. It is in such circumstances and also on account of the fact that the collection of revenue was being seriously hampered, that the State Government in its Cabinet ultimately took the decision to withdraw the 97 posts from the purview of the Public Service Commission and to have them filled up on the basis of a Limited Departmental Examination. Even after concluding its judgment, the High Court spent some time in scrutinising the laches on the part of the Commission in providing candidates to fill up the vacancies in the Sales Tax/Trade Tax department. There is no getting away from the fact that posts which were vacant in 1984 were advertised by the Commission in 1985 and the selection tests were held only in 1988 pursuant to which recommendations were made in 1990. The process of providing candidates for the vacancies which occurred in 1984 or even before that could not be filled up by the Commission for whatever reason before the passage of seven years.

69. As far as the second question is concerned, we are unable to accept the view of the High Court that although the 97 posts had been taken out of the purview of the Public Service Commission, the recruitment to the said posts would continue to be governed by the 1983 Rules, and, consequently, the appointment of the candidates to fill up the said 97 posts by a Limited Departmental Examination could only be an ad hoc arrangement to tide over the period within which regular candidates could be recommended by the Public Service Commission.

A 70. Though the said approach appears at the first instance
to be correct, on a closer scrutiny the situation appears to be
different. The very fact that the 97 posts were taken out of the
purview of the Public Service Commission indicates that the
recruitment in respect thereof was not required to be in
B conformity with the recruitment rules followed by the said
Commission but in accordance with the norms and regulations
as might be prescribed by the State Government in that behalf.
In the present case, a decision was taken at the Cabinet level
to fill up the said 97 posts by a Limited Departmental
C Examination. There was, therefore, no foundation for the
submission that appointment to the 97 posts were only meant
to fill up a temporary need and was not intended to be
substantive in nature. It is no doubt true that in the appointment
letters issued to the departmental candidates who had been
D selected, it was indicated that such appointments were purely
of an ad hoc nature, but such a condition came to be inserted in
the appointment letters on account of an interim order passed
by the High Court in the writ petition No.456/1987 filed by one
Brijendra Bahadur Singh on 5.2.1987. By the said order the
High Court indicated that it would be open to the respondents
E to make appointments in the vacant posts of Sales Tax Officers
Gr. II, but no permanent appointment was to be made on 2/3rd
of the total number of vacancies which were meant to be filled
up directly through the Public Service Commission under the
U.P Sales Tax Officers Rules, 1977. Further, as will be evident
F from the stand initially taken by the State Government,
appointments in the 97 posts were intended to be substantive
in nature and the condition relating to the ad hoc nature of the
appointments was included in the appointment letters of the
candidates who had been appointed for filling up the said
G vacancies only on account of the interim order passed in
Brijendra Bahadur Singh's case. Of course, such stand was
subsequently altered by the State Government, but it is clear
that the change in stance came after a decision was taken to
amend Rule 3 of the 1983 Rules to regularise the services of
H the 1987 appointees on 25.9.97, the date on which the third

amendment in the Service Rules was notified.

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71. The said issue has also been considered in detail in Mohd. Zaki Khan's case and the shifting stand of the State Government has been extensively dealt with as indicated hereinbefore. In Mohd. Zaki Khan's case the High Court after considering the provisions of clause (3) of Article 320 of the Constitution came to the finding that once the decision had been taken by the State Government to withdraw the 97 posts from the purview of the Public Service Commission, it was open to the State Government to fill up the said vacancies by formulating its own norms which were within the constitutional requirements.

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72. We agree with the view expressed in Zaki Khan's case that once the power of the State Government to withdraw certain posts from the purview of the Public Service Commission in certain exigencies is accepted, it would naturally follow that the Rules of recruitment as applicable to the Commission would not apply in respect of the said 97 posts and the same could be filled up by the State Government in keeping with its prescribed norms. It is well-established that in the absence of specific rules for recruitment, guidelines framed by the Executive authorities and directions given from time to time in aid thereof would be applicable to such recruitment. The second question, therefore, is also answered in the affirmative.

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73. This brings us to the last and in our view the most important question to be answered in these appeals, as to whether having regard to the terms and conditions contained in their appointment letters, the 1987 appointees could claim the benefit of the service rendered by them between 1987 and 1997 for purposes of computing their seniority.

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74. It has already been indicated hereinabove as to how the Public Service Commission delayed in making recommendations for filling up the vacancies in the Trade Tax Department and the inability expressed by it to make recommendations quickly to fill up the vacancies that were gradually increasing. It is only thereafter that the Commissioner

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A of Sales Tax took up the matter of taking out the 97 posts from
the purview of the Public Service Commission. The matter was
taken up by the Chief Secretary with the Public Service
Commission requesting its concurrence to the Department's
B suggestion of holding a Limited Departmental Examination to
fill up the vacancies in order to prevent loss of revenue and to
ensure smooth working of the Department. The Commissioner,
in his turn, sent the detailed outline of the Limited Departmental
Examination proposed to be held to the Special Secretary
(Finance) by his letter dated 12.8.1986. The same was followed
C by the sanction given by the Cabinet to withdraw the 97 posts
and to fill them up by a Limited Departmental Examination.
Although, initially the number of posts had not been specified,
by its letter dated 17.12.1986 the Government informed the
Commissioner that the Cabinet decision was in relation to the
D 97 posts which had been withdrawn from the purview of the Public
Service Commission.

75. In taking the aforesaid decision, the State Government
had apparently chosen to act in terms of the proviso to clause
(3) of Article 320 of the Constitution which also empowered the
E State Government to specify either generally or in any particular
class of case that it would not be necessary to have any
consultation with the Public Service Commission. Having once
exercised such powers and having withdrawn the 97 posts in
question from the purview of the Public Service Commission,
F the Government was also free to take steps for recruitment in
the said posts and to prescribe guidelines for such recruitment.
Apparently, in the absence of Rules for such a contingency, the
High Court took an erroneous view in holding that even though
the posts in question had been taken out of the purview of the
G Public Service Commission the appointments made therein
would be subject to the 1983 Service Rules relating to
recruitments, as they were of a purely ad hoc nature.
Consequently, till such time as the services of the said
appointees were regularised they could not be said to be part
H of the cadre and only after their services were regularised in

1997 could they be treated to be part of the cadre of Trade Officers for the purpose of computing their seniority. A

76. We are aware that it is a well-established principle of law that till such time as an employee is born on the cadre he cannot have any claim to seniority over others who are already in the cadre. The High Court has proceeded on the basis that the recruits by way of Limited Departmental Examination may have been appointed in 1987 before the direct recruits but the direct recruits were appointed in the cadre long prior to the regularisation of the services of the 1987 appointees which was initially ad hoc in nature. According to the High Court, since the regular appointment of the direct recruits of 1985 and 1990 were confirmed prior to the regularisation of the services of the 1987 appointees in 1997, they would be senior to the 1987 appointees. B C

77. In our view, although the stand of the High Court is legalistically correct, we will have to pierce the veil in order to ascertain the true intention of the Government while making the appointments for the 97 posts by a Limited Departmental Examination. The said intention is, in fact, borne out from the initial stand taken by the State Government in the different writ applications filed by the candidates who had either been successful in the Limited Departmental Examination or had failed to succeed in the regular recruitment process undertaken by the Public Service Commission. As has been commented upon by the High Court, in these writ petitions the State had filed counter-affidavits indicating that the decision of the Government to hold Limited Departmental Examination had already been upheld in Zaki Khan's case which had substantially decided the issue raised in the said writ petitions by the direct recruits and it was also the stand of the State Government that the expression "ad hoc appointments" had been used in the appointment letters issued to the successful 1987 candidates having regard to interim order passed by the High Court in Brijendra Bahadur Singh's case. It was the Government's stand that in order to pay due regard to the interim order dated D E F G H

A 5.2.1987 that the Government had directed the Commissioner, Trade Tax, to use the expression "ad hoc" in the appointment letters. In any event, the said interim order stood discharged when the writ petition was dismissed on 3.10.1996. It was also the stand of the State Government that the appointments made in 1987 by way of the Limited Departmental Examination had been made after following due procedure. What is most important was the Government's stand that the appointments made on 20.6.1987 on the basis of the Limited Departmental Examination were of substantive nature.

C 78. In the writ petition filed by Vinod Kumar Gupta (W.P.No.1295/SB/1997) the Government filed its counter affidavit indicating that the amendment was made to achieve the policy decision of giving substantive appointment from the date of initial appointment to those persons who had been D appointed on the basis of the Limited Departmental Examination and the word 'ad hoc' had been used in due deference to the interim order passed by the High Court on E 12.2.1987 which ceased to operate after the dismissal of the writ petitions Nos.496 of 1987 and 1008 of 1987. Subsequently, F when the 1983 Service Rules were amended in 1997, the Government also indicated that the amendment was made only to clarify/declare that the appointments made under the Limited Departmental Examination were regular and substantive and only a declaration had been made in that regard in the third amendment and that no regularisation was at all envisaged. In the writ petition filed by Govardhan Lal the State in its counter affidavit stated :

G *"The Service Rules of 1985 had been amended which envisaged that the persons appointed through Limited Departmental Examination were appointed on a regular and substantive basis from the date of their initial appointment"*

(Emphasis supplied)

H 79. In the said counter affidavit it was once again

emphasised that in the facts of the case, it was not a case of regularisation of the services of the 1987 appointees, as projected on behalf of the respondents in the first two appeals, but that on the contrary it was a case where the 1987 appointees had been appointed on substantive basis with due procedure which had been approved in the case of Mohd. Zaki Khan. It was once again emphasised that the amendment only declared what was in existence and did not create any new right. Again at para 34 of the counter affidavit it was stated as follows:

"..that no process was ever initiated to regularise the service of respondents Nos. 3 to 99. This was for the reason that the appointment of respondent Nos.3 to 99 (1987 appointees) was always considered to be substantive appointment"

80. The shift in the State Government's stand came later as would be evident from the orders passed by it on 22.9.2000 onwards. It will be evident from the above, that the State Government had considered the appointments in the 97 posts to be substantive in nature. As a result whereof no steps were taken between 1987 and 1997 to regularise the appointments of the 1987 appointees. It is only a fortuitous circumstance, namely passing of the interim order in Brijendra Bahadur Singh's case on 5.2.1987, that the expression 'ad hoc' came to be mentioned in the appointment letters of the 1987 appointees, although the State Government had intended such appointments to be substantive in nature. It is to be decided whether the respondents in the first two appeals and the appellants in the third appeal, as also the State Government, can now take advantage of the inclusion of such expression in the appointment letters issued to the 1987 appointees, particularly when the writ petitions out of which the same emanated were ultimately dismissed.

81. In our view, notwithstanding the well-settled principle that an employee's service is to be counted for seniority only after he is born in the cadre, in the facts of this case the 1987

A appointees will have to be treated differently. Although, the State
Government may have shifted its stand to the extent that the
services rendered by the 1987 appointees till 1997 could not
be counted for computing their seniority, as their initial
appointment was ad hoc in nature, we are of the view that such
B a stand would lead to inequity in view of the expressed intention
of the State Government in the earlier writ petitions.

82. As we have mentioned earlier, it is in only fortuitous
circumstances that the appointment of the 1987 appointees
through the Limited Departmental Examination was treated to
C be ad hoc, although, as initially expressed by the State
Government such appointments were meant to be substantive
in nature. It is quite obvious that having included the condition
that the appointments were ad hoc in nature in the appointment
letters issued to the 1987 appointees, that the State Government
D has now sought to place the 1987 appointees below those who
had sat for the recruitment examination after the appointment
of the 1987 appointees and had not been borne on the cadre
prior to 1990. While agreeing with Mr. Gaurab Banerji that it is
well-settled that an employee can only count his seniority from
E the moment he becomes part of the cadre, in the instant case
we are of the view that the facts are distinguishable in that the
services of the 1987 appointees should be treated as
substantive from the date of their initial appointment and not
from 1997 when by amendment of the Service Rules their
F services were deemed to have been regularised and they were
included in the cadre with effect from the date of such
amendment. The fact remains that the 1987 appointees were
appointed in the 97 posts which were taken out of the purview
of the Public Service Commission but continued to be in the
G cadre of Trade Tax Officer, Grade II. Having regard to Rule 3(1)
of the 1983 Service Rules, the 1987 appointees must be held
to have been substantially appointed in accordance with the
procedure prescribed by the State Government. In our view, such
an appointment did not, in any manner, derogate from their
H appointment in the cadre of Trade Tax Officer, Grade II. .

83. It is nobody's case that the 97 posts which were taken out from the purview of the Public Service Commission ceased to be posts in the cadre of Trade Tax Officer, Grade II. On the contrary, the specific stand taken in Mohd. Zaki Khan's case was that since the appointment of the 1987 appointees were ad hoc in nature the said posts were never filled-up and were still available for being filled up by regular candidates from amongst the direct recruits.

84. The State Government has in paragraph 34 of its counter-affidavit in Govardhan Lal's writ petition said in no uncertain terms that no process had been initiated to regularise the services of the 1987 appointees for the reason that their appointment was always considered to be substantial in nature. We, therefore, have little hesitation in holding that the service rendered by the 1987 appointees between 1987 and 1997 cannot be ignored for computing their seniority in the cadre on the ground that in view of the interim orders passed by the High Court in different writ petitions, which ultimately came to be dismissed, their appointments were treated to be ad hoc.

85. We, accordingly, allow Civil Appeal Nos. 4968 of 2007 filed by Ashok Kumar Shrivastava and 63 others, Civil Appeal No.4969 of 2007 filed by Muneshwar Babu and Ashok Kumar Srivastava, as also Civil Appeal No.4970 preferred by Goverdhan Lal.

Consequently, Writ Petition No.1041(SB) of 1996 filed by Ram Lal and others, Writ Petition No.1295 (S/B) of 1997 filed by Vinod Gupta, Writ Petition No.1863 (S/B) of 1998 filed by Govardhan Lal are dismissed and the impugned order so far as it relates to the aforesaid writ petitions, is set aside.

86. Consequently, Writ petition No.1778 (S/B) of 2000 filed by Jugul Kishore, Writ Petition No.2000 (S/B) of 2000 filed by Rajendra Prasad, Writ Petition No.2787(S/B) of 2001 filed by Ashok Kumar Srivastava, Writ Petition No.1666 (S/B) of 2005 filed by Muneshwar Babu and another, and Writ Petition No.894 (S/B) of 1999 filed by Shiv Prasad Tewari and others are

- A allowed. The concerned respondents are directed to treat the 1987 appointees who had been appointed on the basis of Limited Departmental Examination to have been substantially appointed at the time of their initial appointment in 1987 and to revise the seniority list pertaining to Trade Tax Officer, Grade II, on such basis.
- B

All the three appeals are disposed of accordingly, but having regard to the peculiar circumstances the parties will bear their own costs.

C R.P.

Appeals disposed of.