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STATE OF ORISSA & ANR.

v.

B. K. MOHAPATRA

April 11, 1969

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[S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

The Indian Police Service (Regulation of Seniority) Rules, 1954, r. 3(3)(b), second proviso—Select List, Meaning of—Whether second proviso governs main rule or first proviso—Whether choice of date for fixing seniority arbitrary and discriminatory.

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In pursuance of an agreement dated October 21, 1946, between the Central and Provincial Governments regarding the constitution of an Indian Police Service, certain draft rules were framed and the appellant State constituted a Committee under the draft rules for preparing a list of State Police Officers *who are considered suitable for promotion*. The Committee prepared a list of officers 'fit for trial to promotion posts' in the I.P.S. and the list was approved by the U.P.S.C. on September 6, 1951. On October 29, 1951, the All India Services Act, 1951, came into force and the Indian Police Service (Regulation of Seniority) Rules, 1954 and the Indian Police Service (Appointment by Promotion) Regulation, 1955, were framed under the Act. Rule 3(3)(b) of the Seniority Rules provides that the year of allotment of an officer appointed to the service by promotion shall be the year of allotment of the junior most direct-recruit who officiated continuously in a senior post from a date earlier than the date of commencement of *continuous officiation* by the promotee. The second proviso to the rule provides that an officer shall be deemed to have officiated continuously in a senior post prior to the date of the inclusion of his name in the *Select List* if the period of such officiation was *approved* by the Central Government.

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The respondent was appointed as a Dy. S.P. in the appellant-State in 1947. In 1950, he was confirmed as D.S.P. and he was officiating continuously from 1951 to 1957 in senior officiating appointments of the I.P.S. His name was included in the List of officers *considered suitable for promotion* which was approved by the U.P.S.C. on September 6, 1951, and in similar 'fit for trial' lists prepared for the years 1952 and 1954. On November 10, 1955, the Selection Committee, set up in accordance with Regulation 3 of the Promotion Regulation, selected and recommended officers for officiating appointment in the I.P.S. and the respondent's name was included in that list also. That list was approved by the U.P.S.C. on February 10, 1956. On December 1, 1956, the Government of India consulted the U.P.S.C. as to whether this list of November 10, 1955 could be treated as the 'Select List' within the meaning of the second proviso to r. 3(3)(b) of the Seniority Rules. The U.P.S.C. wrote back saying that it could not be so considered, because, the Committee only recommended officers who were *considered suitable* to hold I.P.S. posts in an *officiating capacity* and not for appointment to I.P.S. The Selection Committee of the appellant-State, therefore, on February 15, 1957, prepared a 'Select List' for substantive posts in the I.P.S. and included the respondent's name in it. The Central Government decided that the officiation in the senior posts of the officers included in the 'fit for trial' lists could not be counted for the purpose of determining the seniority of such officers under the Seniority Rules. On July 10, 1957 the respondent was appointed to the I.P.S., and on July 22, 1958, the Central Government wrote to the appellant-State that the approved continuous officiation of the

respondent for seniority commenced from February 10, 1956 the date on which the U.P.S.C. approved the 'fit for continuous officiation list' containing the respondent's name, and, on that basis, the respondent was allotted the year 1951 as his year of allotment for purposes of seniority under r. 3(3)(b) of the Seniority Rules.

The respondent filed a writ petition in the High Court contending that : (1) Rule 3(3)(b) is not governed by its second proviso, that his case was governed by the main r. 3(3)(b) and on the basis of his *continuous officiation* in a senior post as an officer included in the Select List of the years 1952 and 1954 approved by the U.P.S.C. and accepted by the Central Government his year of allotment should be 1948 which was the year of allotment of a junior most direct-recruit officer who officiated continuously in a senior post from a date earlier than the date of commencement of the officiation by the respondent; (2) Even if the second proviso governed the main r. 3(3)(b) and only the list of February 15, 1957 was the Select List his year of allotment should be 1948, on the basis that his continuous officiation throughout from 1951 to 1957 was approved by the Central Government by inclusion in the approved lists; (3). The choice of February 10, 1956 mentioned in the Central Government communication dated July 22, 1958 was arbitrary; and (4) There was discrimination between him and another officer. The High Court allowed the writ petition.

In appeal to this Court,

HELD : (1) The object of the second proviso is to cut down the period of officiation which could be taken into consideration under r. 3(3)(b). Therefore, the second proviso governs r. 3(3)(b). The Promotion Regulation and the draft rules acted upon before the Promotion Regulation came into force, show that the Committee preparing the Select Lists should think of substantive appointments in the service and not officiating appointments. In the present case when the lists of 1951, 1952 and 1954 were prepared the names were not selected for the purpose of substantive appointment but only for the purpose of officiation. Therefore, the 'fit for trial' lists could not be deemed to be 'Select Lists' and hence the respondent's officiation was not *continuous officiation* of an officer in the 'Select List'. Only the List of February 15, 1957, could be deemed to be such Select List. Though in the letter of July 22, 1958, there was a reference to a list called 'fit for continuous officiation list', there was in fact no such list and the expression referred only to the list of November 10, 1955, of officers for promotion in an officiating capacity. [264 C, E; 265 A, C—D, G—266 A]

(2) Since the second proviso governs the main r. 3(3)(b), it was for the Central Government to approve or not to approve, the period of officiation prior to the date of inclusion of the respondent in the Select List of February 15, 1957. In the present case, the Central Government, after applying its mind to the problem, approved the period from February 10, 1956 to July 10, 1957; and there was no evidence to show that the period of officiation prior to February 10, 1956, of the respondent was approved by the Central Government. Such approval had to be accorded *after* the appointment to the I.P.S. [265 E—G; 266 D—E]

D. R. Nim v. Union, [1967] 2 S.C.R. 325, referred to.

(3) The date February 10, 1956, was not arbitrarily chosen. It has a definite relation to the question of approved period of officiation, because, it was on that date that the U.P.S.C. approved the inclusion of

- A the respondent in the list for officiating appointment for the first time after the Promotion Regulation had come into force. [266 B—C]

(4) There was no discrimination between the respondent and the other officer, because, the latter was appointed on June 1, 1955, after the Seniority Rules had come into force and was governed by the first proviso to r. 3(3)(b). [266 E—F]

- B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2162 of 1968.

Appeal from the judgment and order dated October 23, 1967 of the Orissa High Court in O.J.C. No. 156 of 1965.

- C *Niren De, Attorney-General, Santosh Chatterjee and R. N. Sachthy, for the appellants.*

B. M. Patnaik, Vinoo Bhagat and P. C. Bhartari, for the respondent.

The Judgment of the Court was delivered by

- D **Sikri, J.** This is an appeal by certificate granted by the High Court of Orissa under art. 133(1)(c) of the Constitution from the judgment and order of the High Court in Writ Petition O.J.C. No. 156 of 1965 filed by B. K. Mohapatra, I.P.S., hereinafter referred to as the petitioner, against the State of Orissa and the Union of India. In this petition the petitioner had prayed for a writ of *mandamus* directing the respondents to fix the petitioner's seniority and year of allotment as 1948 instead of the year 1951 fixed by the Government of India. The High Court quashed the order of the Union Government, dated July 22, 1958, and directed the Central Government to fix the year of allotment and seniority of the petitioner in accordance with its judgment and the law.
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- G In order to appreciate the points raised before us it is necessary to set out the facts somewhat in detail. The petitioner was appointed as Deputy Superintendent of Police in the State of Orissa on January 1, 1947. On January 1, 1950, he was confirmed as D.S.P. In the meantime an agreement had been arrived at between the Central Government and some State Governments, including Orissa, regarding the constitution of an Indian Police Service. This agreement is printed as annexure to the Indian Police Cadre Rules, 1950. This agreement provided for various matters such as the strength, including both the number and character of posts of the Indian Police Service, the method of recruitment to the Service, framing of rules regarding conditions of service, the penalties which could be imposed, etc. We are concerned, in particular, with para 2(e) and para 7 which are as under :
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"2(e) The rules regulating the promotion of Provincial Police Service Officers to the Indian Police Service shall be framed by the Provincial Government concerned in consultation with the Federal Public Service Commission and shall provide that no Provincial Police Service Officer shall be appointed to hold a superior post included in the Schedule for a period of more than one year unless the Federal Public Service Commission have certified that the officer is in every way fit to hold a superior post in the Indian Police Service.

7. In order to ensure that the conditions of service applicable to officers of the Indian Police Service are as uniform as possible, rules regulating pay and other conditions of services will be framed by the Central Government to such extent as may be considered necessary. Provincial Governments will, however, be consulted before the rules are framed, and before they are amended in any manner. In respect of matters not covered by the said rules, an officer of the Indian Police Service will be governed by such rules as may be framed by the Government under which he is for the time being serving and, if no such rules are framed, by the rules applicable to the Central Service/Provincial Police Service Class I, as the case may be."

The All India Services Act, 1951, came into force on October 29, 1951. Section 3 enabled the Central Government to make rules for the regulation of recruitment and conditions of service of persons appointed to an All India Service which was defined to include, among others, the Indian Police Service. Section 4 provided :

"All rules in force immediately before the commencement of this Act and applicable to an All India Service shall continue to be in force and shall be deemed to be rules made under this Act."

On April 30, 1951, the State Government wrote to the Secretary, Union Public Service Commission, that they proposed to hold a meeting of the committee (to be constituted in accordance with rule 2 of the Draft Rules) sometime in June 1951 with a view to prepare a select list of officers suitable for promotion to the Indian Police Service. The Commission was asked to depute one of its members to preside over the said meeting in accordance with rule 3 of the Draft Rules. On September 6, 1951, the Union Public Service Commission approved the recommendation of the above committee which met to prepare the select list for promotion to Indian Police Service, and agreed to

A the select list as drawn up by the Committee. The petitioner's name appears at No. 5 of Part II of the list which is in the following form :

"I. List of Officers fit for confirmation in promotion post.

- B
- 1.
 - 2.
 - 3.
 - 4.

II. List of officers fit for trial to promotion posts.

- C
1. H. P. Singh Deo
 - 2.
 - 3.
 - 4.
- D
5. Shri Binode Kishore Mohapatra
 6. Shri Banamali Dass".

E On May 14, 1952, the petitioner was promoted as Additional Superintendent of Police in the I.P.S. cadre. On August 21, 1952, his name again appeared in the list which we may call "fit for trial list". His name also appeared in a similar list on July 12, 1954.

F One of the questions which has to be decided in this case is whether these lists can come within the expression "select list" used in the second proviso in r. 3(3) of the Indian Police Service (Regulation of Seniority) Rules, 1954, hereinafter referred to as the Seniority Rules, which came into force on September 8, 1954.

G On November 10, 1955, the first meeting of the Selection Committee set up in accordance with Regulation 3 of the Indian Police Service (Appointment by Promotion) Regulation, 1955, hereinafter referred to as the Promotion Regulations, was held at Cuttack. In this meeting the Committee selected and recommended officers for officiating appointment in the I.P.S. and the petitioner's name appeared as No. 2 in the List.

H On February 10, 1956, the Union Public Service Commission approved the recommendations of the above selection committee. On December 1, 1956, the Government of India wrote to the Union Public Service Commission requesting for its advice as to whether the list prepared by the Selection Committee could

be treated as "Select List" as recommended by the State Government. On January 10, 1957, the Commission replied as follows : A

"I am directed to refer to Shri S. P. Mukherjee's letter No. 5/1/56-AIS(I), dated the 10th Dec. 1956 and to say that the Selection Committee which met at Cuttack on the 10th Nov. 1955 did not recommend any officer for appointment to the Indian Administrative Service/Indian Police Service. The Committee only recommended officers who were considered suitable to hold Indian Administrative Service/Indian Police Service cadre posts in an officiating capacity. Lists of such officers are made to avoid frequent references to the Commission in making interim arrangements in cadre posts till cadre officers become available and these lists cannot be considered as Select Lists. B

I am to suggest that the State Govt. may be advised to place the cases of all these officers before the Selection Committee when it meets again in Orissa sometime in the month of Feb. 1957, for preparation of the Select List." C

On February 15, 1957, the Selection Committee met and placed the petitioner, including some others, in the "Select List" for substantive appointment to the Indian Police Service. The Committee also recommended some persons for holding cadre posts in an officiating capacity. D

Reiterating the view that it had already expressed on January 23, 1957, on March 27, 1957, the Commission wrote to the Government of India stating : E

"(i) that the 'fit for trial' list is intended merely in order to avoid specific references to the Commission for casual appointments to senior Indian Administrative Service/Indian Police Service Posts. F

(ii) that the Commission have advised in para 2 of their letter No. F.950/55-R.III, dated the 25th Sept. 1956, that the 'fit for trial' list being not a list envisaged under the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, any officiation of an officer included in the 'fit for trial' list cannot be taken as approved officiation for purposes of seniority and...." G

On May 7, 1957, the Government of India wrote to the State Governments and observed : H

"The question whether the officiation in senior posts of the State Civil Service/State Police Officer after in-

- A** clusion of their names in the 'fit for trial list' should or should not be taken into account for the purpose of seniority, on their subsequent appointment to the Indian Administrative Service, Indian Police Service, has been engaging the attention of the Government of India for some time past. As the State Governments
- B** are aware, the Indian Administrative/Police Service (Appointment by Promotion) Regulations do not provide for the preparation of any such fit for trial list. Such a list has been devised merely to enable the State Government to try out a few officers irrespective of their seniority with a view to test their suitability for senior posts and is intended only to avoid specific
- C** reference to the Union Public Service Commission for casual short term appointments of the State Civil Service/State Police Service officers to senior Indian Administrative Service/Indian Police Service posts. The Union Public Service Commission, who were consulted in this respect, have advised that any officiation of
- D** State Civil Service/State Police Service officers included in the fit for trial list should not be taken into account to determine their seniority in the Indian Administrative Service/Indian Police Service."

The Central Government further stated :

- E** "The Government of India have accordingly decided that wherever such lists have been prepared in some States, the officiation in the senior posts of the State Civil Service/State Police Service officers included in the 'fit for trial' list cannot be counted for the purpose of determining the seniority of such officers, under the Indian Administrative Service/Indian
- F** Police Service (Regulation of Seniority) Rules, 1954.

On July 10, 1957, the petitioner was appointed to the Indian Police Service. On July 22, 1958, the Government of India wrote to the Government of Orissa regarding the seniority of the petitioner. It stated :

- G** "The approved continuous officiation of these officers counting for seniority commenced from the 10th February, 1956—the date on which the Union Public Service Commission approved the 'fit for continuous officiation list' containing their names. This date being later than the date i.e. 7-9-55 on which Shri S. S. Padhi (1951 R.R.) started officiating in the senior posts but earlier than the date on which regular recruits of 1952 started officiating it has been decided that these officers may be finally allotted to 1951 and placed
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en-bloc below Shri S. S. Padhi (1951-R.R.) and above Shri B. N. Misra (1952-R.R.).”

It is this order which has been quashed by the High Court.

The learned Attorney General, who appears for the appellant, urges that the case of the petitioner is covered by the second proviso to r. 3(3) of the Seniority Rules and is not governed only by r. 3(3)(b). He urges that the lists of 1951, 1952 and 1954, mentioned above, were not Select Lists within the meaning of the second proviso, and it is only the Select List which was made on February 15, 1957, which is the Select List within the second proviso, and that there has been no discrimination or breach of art. 14, as held by the High Court.

The learned counsel for the petitioner on the other hand contends that the second proviso does not govern r. 3(3)(b) but in fact governs the first proviso only. He says that the Select List of 1951 was a Select List within the meaning of the second proviso and the seniority of the petitioner should be counted from that date. In the alternative he contends that the petitioner's officiation in senior posts prior to July 10, 1957, had in fact been approved and was approved officiation within the second proviso. He further contends that the date, February 10, 1956, mentioned in the order dated July 22, 1958, is an arbitrary date and the Government has, in fact, not applied its mind to the question. He further says that there has been discrimination and one Singhdeo has been given benefit which has been denied to the petitioner.

The main point that arises in this case is whether the Select Lists of 1951, 1952 and 1954 can be deemed to be treated as Select Lists within the second proviso. It is necessary to set out rule 3 of the Seniority Rules in order to deal with this point.

Rule 3 reads thus :

“3. Assignment of Year of Allotment—(1) Every officer shall be assigned a year of allotment in accordance with the provisions hereinafter contained in this rule.

(2) The year of allotment of an officer in service at the commencement of these rules shall be the same as has been assigned to him or may be assigned to him by the Central Government in accordance with the orders and instructions in force immediately before the commencement of these rules:

Provided that where the year of allotment of an officer appointed in accordance with rule 9 of the Re-

- A** recruitment Rules has not been determined prior to the commencement of these Rules, his year of allotment shall be determined in accordance with the provision in clause (b) of sub-rule (3) of this rule and for this purpose such officer shall be deemed to have officiated in a senior post only if and for the period for which he
- B** was approved for such officiation by the Central Government in consultation with the Commission.

(3) The year of allotment of an officer appointed to the Service after the commencement of these rules, shall be—

- C** (a) where the officer is appointed to the Service on the results of a competitive examination, the year following the year in which such examination was held;
- D** (b) where the officer is appointed to the Service by promotion in accordance with rule 9 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the Service in accordance with rule 7 of those Rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former;

E Provided that the year of allotment of an officer appointed to the Service in accordance with rule 9 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service, in accordance with rule 7 of those Rules, so started officiating shall be determined *ad hoc* by the Central Government in consultation with the State Government concerned;

F Provided further that an officer appointed to the Service after the commencement of these Rules in accordance with rule 9 of the Recruitment Rules shall be deemed to have officiated continuously in a senior post prior to the date of the inclusion of his name in the Select List prepared in accordance with the recruitment of the Indian Police Service (Appointment by Promotion) Regulations framed under rule 9 of the Recruitment Rules, if the period of such officiation prior to that date is approved by the Central Government in consultation with the Commission.

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H Explanation 1—An officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation in the senior grade he continues to

hold without any break or reversion a senior post otherwise than as a purely temporary or local arrangement.

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Explanation 2.—An officer shall be treated as having officiated in a senior post during any period in respect of which the State Government concerned certifies that he would have so officiated but for his absence on leave or appointment to any special post or any other exceptional circumstance.”

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It seems to us that the 1951, 1952 and 1954 lists cannot be deemed to be Select Lists within the second proviso because, as a matter of fact, the Selection Committee did not select names for the purpose of substantive appointment but only selected names for the purpose of officiation in the senior posts of the Indian Police Service. Regulation 5(1) of the Promotion Regulations *inter alia* provided :

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“5. Preparation of a list of suitable officers.—(1) The committee shall prepare a list of such members of the State Police Service as satisfy the condition specified in regulation 4 and as are held by the committee to be *suitable for promotion to the Service*”

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Now this clearly means that the Committee should think of substantive appointments in the service and not officiating appointments.

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Similarly, the draft rule 2, which was being acted upon before the Promotion Regulations came into force, provided :

“A committee shall be constituted by the State Government composed . . . (for the Indian Police Service) of the Chief Secretary, the Inspector General of Police and Deputy Inspectors General of Police. This Committee shall prepare a select list of State . . . Police Service Officers *who are considered suitable for promotion*. The list will be renewed and revised annually.”

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Draft rule 3 provided that “the State Government should invite the Union Public Service Commission to depute one of their members to preside at the meetings of the Committee.” Draft rule 4 provided that “in preparing this list, the Committee shall be guided by the suitability of the officers for appointment to the . . . Indian Police Service. No officer shall be included in the list who has not definitely proved his fitness for such appointment”

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It seems to us that the Public Service Commission and the Government of India were quite right in deciding that the ‘fit for

- A trial' lists could not be deemed to be select lists made within the draft rules or the Promotion Regulations.

B In view of this conclusion it is not necessary to decide the question, which was raised by the learned Attorney General, that in any event the second proviso is only dealing with select lists made after the Promotion Regulations came into force and not with select lists made under the so-called draft rules. We are assuming, without deciding, that if a proper select list had been made under the draft rules it would be a select list within the meaning of the second proviso.

C This takes us to the next point whether the petitioner is governed by the main portion of rule 3(3)(b) and not by the second proviso. In our opinion, the object of the second proviso is to cut down the period of officiation which would be taken into consideration under rule 3(3)(b). It is common ground that the case of the petitioner is not covered by the first proviso. We are unable to agree with the learned counsel for the petitioner that the only object of the second proviso is to limit the operation of the first proviso.

D Explanation I really explains the expression "officiated continuously" occurring in rule 3(3)(b). But it does not mean that where Explanation I applies the second proviso does not apply. The object of Explanation I is to deal with the problem arising in the case of officers holding appointments as a purely temporary or local arrangement.

E If the second proviso applies, as we hold it does, it was for the Central Government to approve, or not to approve, the period of officiation prior to the date of inclusion of the petitioner in the Select List. As observed by this Court in *D. R. Nim v. Union of India*⁽¹⁾ "the first period (*i.e.* period before the date of inclusion of an officer in the Select List) can only be counted if such period is approved by the Central Government in consultation with the Commission." They have approved the period from February 10, 1956 to July 10, 1957. No material has been brought to our notice to show that the Central Government did not apply its mind to the problem.

G The learned counsel for the petitioner contends that in the letter dated July 22, 1958, a list called the "fit for continuous officiation list" is mentioned which is said to have been approved by the Public Service Commission. The learned counsel rightly points out that no such list exists. Apparently this is an expression coined by the draftsman to express the views of the Public Service Commission which clearly stated in the letter dated February 10, 1956, that they approved the recommendation of

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⁽¹⁾ [1967] 2 S.C.R. 325, 329.

the Selection Committee which met at Cuttack for the selection of police officers for promotion to the Indian Police Service in an officiating capacity.

There is no doubt from the correspondence we have set out above that the Government of India were quite aware of the requirements of a Select list.

We are unable to agree with the learned counsel that February 10, 1956, is an arbitrary date. It has definite relation to the question of approved period of officiation because it is on this date that the Public Service Commission approved the inclusion of the petitioner in the list for officiating appointment for the first time after the Promotion Regulations had come into force.

The next point which we may now consider is whether the officiation period prior to February 10, 1956, was, as a matter of fact, approved by the Government of India. The learned counsel has taken us through the correspondence. He has been able to point out some letters written by the State Government on the point but no letter from the Government of India has been shown which could possibly be read as approving his period of officiation prior to February 10, 1956. At any rate the approval of Government of India has to be accorded after the appointment to I.P.S. and not before.

The only point that remains now is the question of discrimination. Singh Deo was an officer who was appointed on June 1, 1955, after the Seniority Rules had come into force and he seems to be governed by the first proviso. We have not been able to appreciate how this case has any relationship to the case of the petitioner.

The learned Attorney General had raised the point that all the officers who were likely to be affected by the decision of the writ petition had not been impleaded as parties to the petition, and he referred to us the decision of this Court in *Padam Singh Jhina v. Union of India*⁽¹⁾, where Shah, J., speaking for the Court observed :

"But we are unable to investigate the question whether there has been infringement of the rules governing fixation of seniority, for a majority of those who were placed above the appellant in the seniority list are not impleaded in the petition before the Judicial Commissioner and are not before this Court. It is impossible to pass an order, assuming that the appellant is able to convince us that a breach of the rules was committed, altering the list of seniority, unless those who are

(1) Civil Appeal No. 405 of 1967; Judgment dated August 14, 1967

- A** likely to be affected thereby are before the Court and have an opportunity of replying to the case set up by the appellant."

B This is a salutary rule and should be observed. But the learned counsel for the petitioner says that he was concerned with his year of allotment and in that question no body else was interested directly. Each officer has to have a year of allotment and no other officer is directly interested in it. But as we are allowing the appeal it is not necessary to finally decide whether the petition should have been dismissed only on this ground.

- C** In the result the appeal is allowed, the judgment and order of the High Court set aside and the petition dismissed, but there will be no order as to costs here and in the High Court.

V.P.S.

Appeal allowed.