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(2010) 01 AHC CK 0237

In the Allahabad High Court

Girish Chandra — APPELLANT

Vs

Aligarh Gramin Bank and Others — RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:
Constitution of India, 1950 — Article 14, 16, 32

Citation : (2010) 01 AHC CK 0237

Hon'ble Judges : V.K. Shukla, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Shukla, J.—Present writ petition has been filed by the petitioner for declaring Regulation 13 (3) of Chapter III of Aligarh Gramin Bank (Staff) Service Regulations, 1981 as invalid and further for issuing a writ in the nature of certiorari for quashing of the memo dated 13.07.1991 and the seniority list dated 31.12.1990 and 08.03.1990, in so far as they relate to the petitioner and respondent Nos. 4 to 7, and also for according consequential benefits.

2. Brief background of the case as mentioned in the writ petition, is that the petitioner had been performing and discharging duties as clerk-cum-cashier at Pilkhana Branch of Aligarh Gramin Bank. Petitioner has contended that a general seniority list was published under the signature of respondent No. 2 on 01.01.1986 with covering memo dated 30.07.1986, wherein, petitioner was placed in the seniority list of Senior Clerk -cum- Cashier at serial No. 26 above respondent Nos. 4 to 7, who were placed at serial Nos. 27 to 30 respectively. Petitioner has stated that the said seniority list was drawn up in accordance with Aligarh Gramin Bank (Staff) Service Regulations, 1981. However, on 31.12.1989 list was revised and the petitioner was placed below respondent Nos. 4 to 7 at serial No. 16 in the seniority list of Senior Clerk -cum- Cashier. The petitioner objected to the said seniority list, and thereafter another seniority list was published on 08.03.1990, then again petitioner objected to. Petitioner has stated that no decision was taken then memo dated 12.06.1990 was sent and petitioner

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again sent letter dated 28.07.1990. Petitioner has stated that he kept on representing the matter but nothing was done and totally on illegal criteria seniority has been determined, and then present writ petition has been filed.

3. Counter affidavit has been filed on behalf of Bank and therein it has been stated that terms and conditions of service of the officers and employees of the Bank in question are governed by the Aligarh Gramin Bank (Staff) Service Regulations, 1981, and the action has been taken strictly as per Regulations 8, 9 and 13 of the said Regulations. Regulations 8, 9 and 13, which deal with probation, confirmation and seniority, are excerpted below:

8. (1) Every officer on his appointment in a post in the Bank shall be on probation for a period of two years which shall be extendable up to a period not exceeding one year.

(2) Every employee on his appointment in a post in the Bank shall be on probation for a period of one year which shall be extendable up to a period not exceeding six months.

(3) Where during the period of probation including the period of extension of probation, if any, the appointing authority is of the opinion that the officer or employee is not fit for confirmation in the said post:

(a) In the case of direct appointee, the services may be terminated by one month''s notice or payment of one month''s emoluments in lieu thereof; and

(b) In the case of promotee from the Bank''s service, he may be reverted to the grade or cadre from which he was promoted.

9. An officer or employee shall be confirmed in the service of the Bank, if in the opinion of the appointing authority the officer or employee has satisfactorily completed his probation.

13 (1) (a) Seniority of an officer of employee of the Bank in a grade or scale shall be reckoned with reference to the date of his appointment in that grade or scale;

(b) Where there are two or more officers of the same length of service in that grade or scale shall be reckoned with reference to their seniority in the immediately preceding grade or scale or the previous cadre to which they belong in the Bank''s service;

(c) Where there are two or more officers of the same length of service of such grade or scale or such previous cadre, their seniority shall be determined with reference to their seniority in the immediately preceding grade or cadre, as the case may be;

(2) The interse seniority of officers or employees directly recruited in a batch to any grade or scale shall be reckoned with reference to rank allotted to them at the time of such recruitment.

(3) In the case of an officer or employee whose probation has been extended, his

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seniority shall be reckoned just below all the officers of employees, if any, recruited or promoted in the same batch along with him.

4. It has been stated that the action, which has been taken, is strictly in accordance with law and further rational behind Regulation 13 (2) of the Regulations referred to above arose out of the very nature of the probation which, needless to add, does not bestow any right of confirmation and confirmation can only be claimed, if in the opinion of the authority, the officer or the employee has satisfactorily completed specified period of service. Seniority list in the present case has been prepared having regard to the Notification issued by NABARD dated 09.12.1986, and it was issued on 01.01.1988, and the petitioner never filed any objection to the said seniority list. On representation of the same, it has been stated that subsequent seniority list contains some placement of the petitioner with effect from 01.01.1988, and same has attained finality.

5. Rejoinder affidavit has been filed, and therein the contents of the counter affidavit have been sought to be refuted and that of writ petition reiterated. In this background, it has been sought to be contended that writ petition deserves to be allowed.

6. Sri J.J. Munir, learned Counsel for the petitioner, contended with vehemence that Regulation 13 (3) of Chapter III of the Aligarh Gramin Bank (Staff) Service Regulations, 1981 is totally arbitrary and unreasonable, as It has the tendency to create class amongst class in the garb of confirmation and classification based on probation/extended probation cannot be the relevant criteria for determination of seniority, as no nexus, whatsoever, is established nor is any object sought to be achieved, in this background said Regulation is liable to be struck down being ultra vires and consequential benefits are liable to be accorded to the petitioner.

7. Countering the said submissions, Sri Jayant Banerji, Advocate, appearing for the respondent Bank, on the other hand, contended that the petitioner and respondent Nos. 4 to 7 had been selected in the same and one selection. Once incumbent is on probation, he merely merely as probationer and is not at all member of the service till he is confirmed, and there is reasonable classification and nexus is also there which clearly provides that the incumbent who has completed his probationary period, he can be confirmed and the incumbent who was still continuing in extended period of probation and was subsequently confirmed, as such Rules are valid and are not liable to be struck down.

8. After respective arguments have been advanced, factual position which emerges in the present case is that Aligarh Gramin Bank (Staff) Service Regulations, 1981 have been framed by the Bank for governing the terms and conditions of Bank Staff in exercise of the authority vested under the aforesaid Regulations. Regulations 8, 9 and 13 being relevant are being looked into: deals with probation and it clearly provides that every officer on his appointment in a post in the Bank shall be on probation for a period of two years which shall be

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extendable up to a period not exceeding one year, and in respect of employees, appointment in a post in the Bank shall be on probation for a period of one year, the same shall be extendable up to a period not exceeding six months. During the period of probation including the period of extension of probation, if any, the appointing authority is of the opinion that the officer or employee is not fit for confirmation in the said post, in the case of direct appointee, the services can be dispensed with by one month''s notice or payment of one month''s emoluments in lieu thereof; and in the case of promotee from the Bank''s service, he may be reverted to the grade or cadre from which he was promoted.

9. Regulation 9 provides that an officer or employee shall be confirmed in the service of the Bank, if in the opinion of the appointing authority the officer or employee has satisfactorily completed his probation. Regulation 13 (1) (a) talks of seniority of an officer or employee of the Bank in a grade or scale shall be reckoned with reference to the date of his appointment in that grade or scale; Regulation 13 (2) provides that interse seniority of officers or employees directly recruited in a batch to any grade or scale shall be reckoned with reference to rank allotted to them at the time of such recruitment. Regulation 13 (3) clearly provides that in the case of an officer or employee whose probation has been extended, his seniority shall be reckoned just below all the officers or employees, if any, recruited or promoted in the same batch along with him.

10. Sri J.J. Munir, Advocate, has placed reliance on paragraphs 13 and 44 of the judgment of Hon''ble Apex Court in the case of The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others, to reiterate that confirmation should not be the criteria in the matter of seniority, the aforesaid paragraphs 13 and 44 are being extracted below:

13. When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in S.B. Patwardhan and Another Vs. State of Maharashtra and Others, was unsound and fit to be overruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned Counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a Government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of Government services depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Arts. 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal ''Which

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would violate the equality clause. But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority, Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold other wise will be discriminatory and arbitrary This principle has been followed in innumerable cases and has been further elaborated by this Court in several judgments including those in Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, and Delhi Water Supply and Sewage Disposal Committee and Others Vs. R.K. Kashyap and Others, with which we are in agreement. In Narender Chadha and Others Vs. Union of India and Others, the officers were promoted although, without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.

44. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure

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prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the; subject.,

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinized for finding out any possible error. It is not in the interest of service to unsettle a settled position.

With respect to writ petition No. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principle of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final.

In view of the above and other findings recorded earlier, we do not find any merit in any of the civil appeals, writ petitions and special leave petition, which are accordingly dismissed. There will be however, no order as to costs.

11. Reliance has also been placed by the petitioner on the judgment of Andhra Pradesh High Court given on Review W.PM.P. No. 220 of 1999 in W.P. No. 10500 of 1995 decided on 31.12.1998 in the case of Chaitanya Gramin Bank, Tenali v. S.V.L. Narayana and Ors. that similar contention has been accepted. Relevant extract of the judgment contained in paragraphs 11, 12, 13, 14 and 15 are being quoted below:

11. The next question for consideration is whether the Review Petitioner is justified in fixing the seniority of an officer whose probation is extended below the seniority of all the officers recruited in the same batch under Rule 13 (3) of the Rule., At this stage, it is necessary to refer to Rule 13 (2), which provides for inter se seniority of officers directly recruited in a batch to any grade or scale shall be reckoned with reference to the rank allotted to them at the time of such recruitment. In other words, ranking given at the time of selection process shall determine the seniority of an Officer. However, under Rule 13 (3), it is open to

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the employer to alter the seniority on the ground that an Officer''s probation has been extended and place him below the seniority of all those Officers recruited in the same batch. I am of the view that Rule 13 (3) confers a power inconsistent with the rule of seniority. The normal principled of seniority is the length of service on the ranking obtained at the time of selection. In other words, the length of service of an employee determines his seniority in a particular grade or scale. The length of service cannot be altered on the ground that the probation of the Officer has been extended. There is no nexus between the length of service and the extension of probation. If the probation of an Officer is extended, that means he is inefficient in service. The fact that an Officer is inefficient does not automatically result in reduction of the length of service. He continues to work from the date of his first appointment though inefficiently. The inefficiency determines his fitness for further promotion, but, does not reduce the length of service. Therefore, in the case of an Officer whose probation is extended, his seniority cannot be reduced by placing him below the Officers who were recruited in the same batch. The same reasoning applies to the determination of Seniority on the basis of ranking. As pointed out by the Supreme Court in Chairman, Puri Gramya Bank''s case (1 supra), if once the merit list on the basis of the ranking secured at the time of the selection is prepared, it cannot be altered on the ground that the probation of an Officer is extended. Extension of probation of an Officer has no relevance as the said extension cannot alter the ranking. In this context, the observations made by the Supreme Court in The Direct Recruit Class-II Engineering Officers'' Association''s case (4 supra) are relevant, which are as under:

Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

12. The judgment is by a Bench consisting of five Judges, viz. Sabyasachi Mukherji, C.J., Lalit Mohan Sharma, S. Ratnavel Pandian, P .B. Sawant and K. Ramaswamy, JJ.

13. In addition, if the probation of an Officer is extended, it indicates his inefficiency in the said post. Therefore, when the case of such an inefficient Officer comes up for consideration for promotion to the next higher post, because of his unsatisfactory performance, his case will be overlooked and his juniors having better record of service will be considered for promotion. For instance, the case of the respondent-petitioner Mr. Balaji Rao whose probation was extended and confirmed on 30.6.1997. When his case comes for promotion to the next higher post along with others, his case will be overlooked and his juniors who have satisfactory service or who have better record of service will be preferred for promotion. It is now settled in the service jurisprudence that performance of the officers is categorized as ''Outstanding'', ''very good'', ''good'', ''average'' and ''bad''. If the promotion to the next higher post is on the basis of seniority-cum-fitness, a person whose probation is extended is

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undoubtedly a person not fit to be promoted and, therefore, though he is senior, he will not be considered for promotion to the next higher post, whereas in case of promotion on the basis of selection, his extension of probation will categorize him to lower rank than the other officers in the same batch whose probation has not been extended.

14. From the above, it follows that Rule 13 (3) of the Rules is contrary to the reason and arbitrary. It is true in M.P. Chandoria''s case (2 supra) a Division Bench of Supreme Court consisting of K. Ramaswamy and G.B. Pattanaik, JJ. held that in the case of an Officer seniority was counted with effect from the date of his passing the test under Rule 12(a) (ii) is valid. As pointed out above, the judgment in Direct Recruit Class II Engg. Officers'' Association''s case (4 supra) ix by a Bench consisting of five Judsges to which K. Ramamswamy, J. is party. However, judgment in Direct Recruit Class II Engineering Officers Association''s case (4 supra) was not brought to the notice of learned Judges in M.P. Chandoria''s case (2 supra). The principle laid down in M.P. Chandoria''s case (2 supra) runs counter to the judgment in Direct Recruit Class II Engg. Officers'' Association''s case (4 supra).

12. Reliance has also been placed by Sri Jayant Banerji on the judgment of Hon''ble Apex Court in the case of M.P. Chandoria Vs. State of M.P. and others, by contending that said judgment holds the field and no further arguments are required. Relevant extract of the judgment contained in paragraphs 4, 5 and 6 are being quoted below:

4. The learned Counsel for the appellant has contended that since he has been appointed w.e.f. the date of joining of duty, his seniority should be reckoned from the date of his starting discharging duty of the post, viz., February 15, 1967. As he has not been discharged from service due to his failure to pass the test, though he passed his test at later, he must be deemed to have been confirmed w.e.f. the date of his joining the duty. Therefore, the seniority is required to be confirmed from that date. We find no force in the contention. Indisputably, the appellant is governed by the Madhya Pradesh Civil Services [General Conditions of Service] Rules, 1961 [for short, the ''Rules'']. Clause 2[g] defines ''service'' to mean a service of group of posts in connection with the affairs of the State other than the Indian Administrative Service and the Indian Police Service, organised as such by the Government. Rule 4 classifies the post with which we are not concerned. Rule 8 prescribes probation. Rule 8[1] envisages that a person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed. The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year. The probationer has to undergo such training and pass such departmental examination during the period of his probation as may be prescribed. Sub-rules (4) and (5) are not relevant and are omitted. Sub-rule (6) of Rule 8 is relevant for the purpose of the case which envisages that on successful completion of probation and passing the prescribed departmental

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examination, if any, the probationer shall, if there is a permanent post available, be confirmed in the service or post to which he has been appointed. Otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post. As soon as a permanent post becomes available, he will be confirmed. Under Sub-rule (7), a probationer, who has neither been confirmed nor a certificate issued in his favour under Sub-section (6), nor is he discharged from service under Sub-rule (4), he shall be deemed to have been appointed as a temporary Government servant w.e.f. the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government Servants [Temporary and Quasi - Permanent Service] Rules, 1960.

5. Under Rule 12, the seniority of the members of the service of a district branch or group of posts of that service shall be determined in accordance with the principles laid down therein. Sub-clause (i) of Clause (a) envisaged that the seniority of a directly recruited Government servant appointed on probation shall count during his probation from the date of his appointment; the proviso is not relevant. Sub-clause (ii) envisages that the same order of inter se seniority of direct recruits maintained by confirmation of the normal period of probation. If, however, the period of probation of any direct recruit is extended, the appointing authority should determine the date from which the candidate should be assigned seniority. Until the probation is declared and he was confirmed in the post, he does not become a member of the service (sic) successful completion of the probation and pass of the prescribed tests or conditions precedent to declare the probation. So, mere passage of time one year does not entitle a probationer to be a member of the service. He remains to be on temporarily service. On declaration of probation, the appointing authority should confirm in a pending post available or to grant quasi-permanent status. As soon as the post is available, he should be confirmed. In view of the admitted position that he did not pass the test, the appointing authority considered that his seniority would be counted w.e.f. the date of his passing the test. Rule 12(a)(ii) clearly empowers the appointing authority to assign, in these circumstances, the seniority in lower level than the one assigned by the Public Service Commission. We do not find any illegality committed by the authorities in giving seniority from the date of his passing the test.

6. The appeal is accordingly dismissed. No costs.

13. Reliance has also been placed on the judgment of Hon''ble Apex Court in the case of State of M.P. Vs. Ramkinkar Gupta and Others, Relevant extract of the judgment contained in paragraphs 5, 6, 7, 8, 9, 10 and 11 are being quoted below:

5. The point in issue, as we shall presently see, is no longer res integra. It is not in dispute that the said Respondent 1 had not passed his departmental examination till after Respondent 2-38 had passed their examination. Rule 8 of the Madhya Pradesh Civil Service (General Conditions of Service) Rules, 1963,

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relates to probation of officers and the said rule is as under:

8. Probation - (1) A person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed.

(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

* * *

(3) A probationer shall undergo such training and pass such departmental examinations during the period of his probation as may be prescribed.

(4) The service of a probationer may be terminated during the period of probation if in the opinion of the appointing authority he is not likely to shape into a suitable government servant.

(5) The services of a probationer who has not passed the departmental examinations or who is found unsuitable for the service or post may be terminated at the end of the period of his probation.

(6) On the successful completion of probation and passing of the prescribed departmental examination, if any, the probationer shall if there is a permanent post available, be confirmed in the service or post to which he has been appointed, otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and that as soon as a permanent post becomes available he will be confirmed.

(7) A probationer, who has neither been confirmed, nor a certificate issued in his favour under Sub-rule (6), nor discharged from service under Sub-rule (4), shall be deemed to have been appointed as a temporary government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960.

6. Rule 13 of Madhya Pradesh Civil Services (Executive) Classification, Recruitment and Conditions of Services Rules, 1975 (in short ''Executive Rules'') reads as under:

13. Probation- (1) Every person directly recruited to the service shall be appointed on probation for a period of two years.

(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

(3) The probationer shall undergo the prescribed training and pass the prescribed departmental examination by the higher standard during the period of his probation.

(4) The services of the probationer may be terminated during the period of

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probation, if in the opinion of the appointing authority, he is not likely to shape into suitable government servant.

(5) The services of a probationer who does not pass the prescribed departmental examination or who is found unsuitable for the service also be terminated at the end of the period of probation.

(6) On successful completion of probation and the passing of the prescribed departmental examinations, the probationer shall be confirmed in the service provided permanent vacancies exist for him otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and as soon as permanent post becomes available he will be confirmed. The probationer shall not draw any increments until he is confirmed. On confirmation his pay will be fixed with reference to the total length of service. If the probationary period is extended, government will decide at the time of confirmation whether arrears of increments shall be paid or not. Such arrears shall ordinarily be paid when the extension of the probationary period is due to no fault of the probationer.

(7) A probationer who has neither been confirmed, nor a certificate issued in his favour under Sub-rule (6) above, nor discharged from service under Sub-rules (4) and (5) above, shall be deemed to have been appointed as a temporary government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh (Temporary and Quasi-Permanent Service) Rules, 1960.

7. It is quite evident that Respondent 1, who had neither been confirmed, nor had certificate been issued in his favour under Sub-rule (6), nor was he discharged from service under rule (4) would fall within the category of those officers referred to in Sub-rule (7) of Rule 8. In other words, he was to be deemed to be a temporary government servant with effect from the date of expiry of probation.

8. Rule 12 of the said Rules deals with the question of fixation of seniority. The relevant portion of the said rule is as under:

Seniority - The seniority of the members of service of a district branch or group of posts of that service shall be determined in accordance with the following principles, viz. -

(a) Direct recruits: (i) The seniority of a directly recruited government servant appointed on probation shall count during his probation from the date of appointment, viz.:

* * *

(ii) the same order of inter se seniority shall be maintained on the confirmation of such direct recruits if the confirmation is ordered at the end of the normal

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period of probation. If, however, the period of probation of any direct recruits is extended, the appointing authority shall determine whether he should be assigned the same seniority as would be assigned to him if he had been confirmed on the expiry of the normal period of probation or whether he should be assigned a lower seniority.

9. According to Sub-clause (ii) of Clause (a) of Rule 12 in a case like the present where a person had been allowed to continue in service after the period of probation and had been completed and he is confirmed subsequently, it is for the appointing authority to decide as to from what date he should be assigned seniority. In the present case the decision of the State Government was that he should be assigned seniority w.e.f. 19-1-1984. The aforesaid rules have been considered by this Court in the case of M.P. Chandoria Vs. State of M.P. and others, The principle laid down by this Court in Chandori case was that if a person does not pass the test then the appointing authority is empowered to assign seniority in a lower level than the one which was assigned by the Public Service Commission. That being so the decision to assign seniority to Respondent 1 w.e.f. 19-1-1984 is in accordance with rules.

10. Mr. Verma, however, contends that Rule 12 Clause (a) (ii) postulates a speaking order being passed in order to assign a lower seniority to Respondent 1 not w.e.f. 11.2.1982 but w.e.f. 19.1.1984. It appears that a representation was made for the first time by Respondent 1 on 5.12.1990. Apart from the fact that the said representation was very belated, nearly six years after the fixation of seniority, the State Government rejected that representation vide order dated 20.5.1993. This shows that when called upon, the State Government had once again applied its mind and had substantially complied with the provisions of Rule 12. We do not, therefore, find any reason as to why Respondent 1 should be assigned seniority w.e.f. 11.2.1982. This being so, this appeal is allowed, the judgment of the High Court and that of the Administrative Tribunal are set aside and we hold that the seniority of Respondent 1 fixed from 19.1.1984 is in order. However, there will be no order as to costs.

14. Reliance has also been placed on the judgment of Hon''ble Apex Court in the case of Om Prakash Shrivastava Vs. State of M.P. and Another, . Relevant extract of the judgment contained in paragraphs 5, 6, 7, 8, 9, 10 and 11 are being quoted below:

8. Rules 8 and 12 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1963 (in short the ''Rules'') throw considerable light on the present controversy. They read, so far as relevant as follows:

8. Probation - (1) A person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed.

(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

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(3) A probationer shall undergo such training and pass such departmental examinations during the period of his probation as may be prescribed.

(4) The service of a probationer may be terminated during the period of probation if in the opinion of the appointing authority he is not likely to shape into a suitable government servant.

(5) The services of a probationer who has not passed the departmental examinations or who is found unsuitable for the service or post may be terminated at the end of the period of his probation.

(6) On the successful completion of probation and passing of the prescribed departmental examination, if any, the probationer shall if there is a permanent post available, be confirmed in the service or post to which he has been appointed, otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and that as soon as a permanent post becomes available he will be confirmed.

(7) A probationer, who has neither been confirmed, nor a certificate issued in his favour under Sub-rule (6), nor discharged from service under Sub-rule (4), shall be deemed to have been appointed as a temporary government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960.

12. Seniority - The seniority of the members of service of a district branch or group of posts of that service shall be determined in accordance with the following principles, viz. - (a) Direct recruits:

(i) The seniority of a directly recruited government servant appointed on probation shall count during his probation from the date of appointment, viz.:

* * *

(ii) the same order of inter se seniority shall be maintained on the confirmation of such direct recruits if the confirmation is ordered at the end of the normal period of probation. If, however, the period of probation of any direct recruits is extended, the appointing authority shall determine whether he should be assigned the same seniority as would be assigned to him if he had been confirmed on the expiry of the normal period of probation or whether he should be assigned a lower seniority.

9. Rule 13 of Madhya Pradesh Civil Services (Executive) Classification, Recruitment and Conditions of Services Rules, 1975 (in short ''Executive Rules'') reads as follows:

13. Probation- (1) Every person directly recruited to the service shall be

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appointed on probation for a period of two years.

(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

(3) The probationer shall undergo the prescribed training and pass the prescribed departmental examination by the higher standard during the period of his probation.

(4) The services of the probationer may be terminated during the period of probation, if in the opinion of the appointing authority, he is not likely to shape into suitable government servant.

(5) The services of a probationer who does not pass the prescribed departmental examination or who is found unsuitable for the service also be terminated at the end of the period of probation.

(6) On successful completion of probation and the passing of the prescribed departmental examinations, the probationer shall be confirmed in the service provided permanent vacancies exist for him otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and as soon as permanent post becomes available he will be confirmed. The probationer shall not draw any increments until he is confirmed. On confirmation his pay will be fixed with reference to the total length of service. If the probationary period is extended, government will decide at the time of confirmation whether arrears of increments shall be paid or not. Such arrears shall ordinarily be paid when the extension of the probationary period is due to no fault of the probationer.

(7) A probationer who has neither been confirmed, nor a certificate issued in his favour under Sub-rule (6) above, nor discharged from service under Sub-rules (4) and (5) above, shall be deemed to have been appointed as a temporary government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh (Temporary and Quasi-Permanent Service) Rules, 1960.

10. A bare reading of Sub-clause (ii) of Clause (a) of Rule 12 makes the position clear that the appointing authority has to decide as to from what date the direct recruit is to be assigned. It has to be decided whether seniority as assigned to him if he had been confirmed on the expiry of the normal period of probation or whether he should be assigned a lower seniority. The original probation period is two years. Therefore, a combined reading of Rules 8, 12 of the Rules and 13 of Executive Rules makes the position clear that seniority can be assigned by taking the relevant date to be the date of expiry of normal period of probation. In the case of Ram Rao Bhosley, it was 8.5.1992. So far as the appellant is concerned, the appointing authority has been given power to determine the date from which the candidate should be assigned seniority if the period of probation of any direct

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recruit is extended depending on the date of his passing the departmental examination. As was noted in M.P. Chandoria''s case (supra), until the probation period is completed, and he is confirmed in the post, the employee does not become a member of the service on successful completion of the probation and passing of the prescribed tests or conditions precedent to declaration of completion of the probation period. Mere completion of one year period does not entitle the person to be a member of the service. He continues to be in temporary service on the completion of probation period. The appointing authority is to confirm him in a pending post available or grant him a quasi-permanent status. Unless he passes departmental examination, there is no question of completion of probation and for all practical purposes the employee continues to be in temporary service.

15. Judgment which has been relied on by Andhra Pradesh High Court in the case of Chaitanya Gramin Bank, Tenali v. S.V.L. Narayana and Ors. is primarily based on the judgment of Apex Court in the case of The Direct Recruit Class-II Engineering Officers'' Association and Ors. v. State of Maharashtra and Ors., and therein Court has further proceeded to mention that in the case of M.P. Chandoria Vs. State of M.P. and others, Division Bench of Apex Court has not at all considered the The Direct Recruit Class-II Engineering Officers'' Association and Ors. v. State of Maharashtra and Ors. and position of law mentioned therein runs counter to the law enunciated therein.

16. The case of The Direct Recruit Class-II Engineering Officers'' Association and Ors. v. State of Maharashtra and Ors., was not a case of probationer, rather it was case of incumbents who were officiating and were subsequently confirmed. Hon''ble Apex Court in paragraph 4 of the judgment in the case of K. Thimappa v. Chairman, Central Board of Education AIR 2001 SC 467 , has held that the judgment in the case of The Direct Recruit Class-II Engineering Officers'' Association and Ors. v. State of Maharashtra and Ors., is on different footing, and it does not apply to the cases were Statutory Rules and Regulations are there covering the field of probation, confirmation and seniority. Andhra Pradesh High Court had not been apprised of the judgment and in the said background, the Andhra Pradesh High Court proceeded to mention that the case of M.P. Chandoria Vs. State of M.P. and others, will not apply. Relevant extract of said judgment (K. Thimappa v. Chairman, Central Board of Education AIR 2001 SC 467) is being quoted below:

4. In view of the submissions of the counsel for the parties, the first question, that arises for consideration is whether merely because the officers of Grade I have been placed in two different newly created grades, on the basis of their confirmation, would constitute discrimination amongst the same group or not? The petitioners contention is based upon the observations of this Court in S.B. Patwardhan and Another Vs. State of Maharashtra and Others, as well as The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others, to the effect that confirmation being one of the

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inglorious uncertainties of Government service, could not have formed the basis for placement in two different grades. In Patwardhan''s case, the inter se seniority between the direct recruits and promotees was being determined on the basis of the date of their respective confirmation. Under the rules in question, a ratio between the direct recruits and promotees to the cadre was being maintained at 34:66, and confirmation, necessarily, depended upon the availability of the posts in the cadre in the respective quota. Further, the promotees were to depend on the availability of substantive vacancies and then on the arbitrary discretion of the Government to confirm or not to confirm them in those vacancies. It is in the situation, when the rule of seniority was related to the date of confirmation, the Court had observed that the confirmation being one of the inglorious uncertainties of Government Service, could not have become a reasonable basis for determination of inter se seniority. This decision in S.B. Patwardhan and Another Vs. State of Maharashtra and Others, was reaffirmed in the Constitution Bench decision in The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others, and the Court reiterated and upheld the decision of the Court in Patwardhan. But what has been stated in relation to a rule for the purpose of determination of inter se seniority, may not be applicable to all contingencies and it cannot be said that the confirmation of an employee in a particular cadre cannot form a rational basis for any purpose whatsoever. In the case in hand, under the Conditions of Service Order, a person appointed as a probationary officer or a trainee officer, is required to be on probation for a period of two years. An employee of the bank when promoted as an officer to the Junior Management Grade is required to be on probation for a period of one year. In accordance with paragraph 16 of the said Conditions of Service Order, such officers on probation, shall be confirmed in the service of the bank, if the Competent Authority is of the opinion that the employee has satisfactorily completed the period of probation. The said Competent Authority also has a right to extend the period of probation, if in his opinion, the officer has not satisfactorily completed the probationary period. In paragraph 16(3), on the end of the period of probation, including the period of extension, if any, if the Competent Authority is of the opinion that the officer is not fit for promotion, then the service of the direct appointee is liable to be terminated and in case of a promotee, he is liable to be reverted to his substantive cadre. In view of the aforesaid statutory provision dealing with confirmation and probation, the observation made by this Court in S.B. Patwardhan and Another Vs. State of Maharashtra and Others, or The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others, will have no application. The question of inglorious uncertainties in the matter of confirmation, does not arise in the case in hand, in view of the aforesaid statutory provisions. Consequently the main argument of the petitioner counsel and their reliance on the two decisions, referred to earlier, will have no application and the contention on this score accordingly fails.

17. The case in hand is squarely covered by the judgment of Hon''ble Apex Court

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in the case of K. Thimappa v. Chairman, Central Board of Education AIR 2001 SC , wherein the case of The Direct Recruit Class-II Engineering Officers'' Association and Ors. v. State of Maharashtra and Ors., has been considered, including its background, and M.P. Chandoria Vs. State of M.P. and others, reckoning of seniority based on confirmation has been approved of.

18. On the parameters as set out above, a probationer is on trial and confirmation is a positive act which is to be performed and without this performance, one is not permanent member of the service, then in this background from one''s own act, there is reasonable classification with nexus that one has to get himself to the mark. Regulations in question have been framed by competent authority, and there is no shortcoming in the Regulations, as such they are held to be intra vires.

19. There is one more aspect of the matter. In the present case seniority list was published on 01.01.1988, and it was clearly mentioned therein that any one who had any objection to the said seniority list should prefer his objection. Admittedly, the petitioner did not chose to prefer any objection within the time frame provided for, and permitted to the said seniority list to attain finality. In this background, then even on merit, seniority claim of the petitioner has got no force.

20. Consequently, writ petition lacks substance and the same is dismissed.

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