
(2005) 03 GAU CK 0025

In the Gauhati High Court

Case No : Writ Petition (C) No. 890 (A.P.) of 2001

Om Prakash Pathak and Another

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 04-03-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 187(3), 226, 309

Citation : (2006) 1 GLT 28

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : P.K. Tiwari, for the Appellant; B.L. Singh and R. Deka, for the Respondent

Judgement

I.A. Ansari, J.—With the help of the present application made under Article 226 of the Constitution of India, the Petitioners, who are reporters in Arunachal Pradesh Legislative Assembly, have sought for issuance of appropriate writ/writs quashing the orders, dated 31.05.2001, 21.06.2001 and 23.07.2001, passed by the Respondent No. 2, namely, Secretary, Legislative Assembly, Arunachal Pradesh, keeping in abeyance the seniority list, dated 04.07.97 and commanding the Respondent Nos. 2 and 3 to rectify/amend the seniority list of the reporters issued vide order, dated 23.07.2001, restoring the Petitioners' seniority to their rightful place and to put them in the seniority list above the Respondents No. 4, 5 and 6.

2. I have heard Mr. P.K. Tiwari learned Counsel for the Petitioners and Mr. B.L. Singh, learned senior Govt. Advocate, appearing on behalf of the State Respondents Nos. 1, 2 and 3. I have also heard Mr. R. Deka, learned Counsel, appearing for the private Respondents Nos. 4, 5 and 6.

3. Shorn off the legal rhetorics and complicated but immaterial details, what eventually emerges as the undisputed case of the parties may, in brief, be set out as follows:

(i) While serving as Stenographer Grade-I in the General Administrative Department (hereinafter referred to as "the GAD") of the Arunachal Pradesh Civil Secretariat, services of the private Respondents were placed, on deputation, with the Arunachal Pradesh Legislative Assembly Secretariat (hereinafter referred to as "the Assembly Secretariat"). Having been so placed on deputation, while Respondent Nos. 4, 5 and 6 were serving in the Assembly Secretariat, an order was passed by the Speaker of the Assembly Secretariat relaxing, for the purpose of appointment as reporters, the age in respect of the departmental candidates by raising the bar of age from 33 to 40 years.

(ii) For recruitment to the post of reporters in the Assembly Secretariat, the Rules framed by the Governor of Arunachal Pradesh in exercise of his powers under Article 187(3) of the Constitution of India came into force on 16.08.1991, the rules being called Legislative Assembly Reporters Group "B" (Gazetted) Recruitment Rules, 1991, ("hereinafter referred to as the Recruitment Rules of 1991") which superseded the Arunachal Pradesh Legislative Assembly Group "B" (Gazetted) Rules, 1987. Under the Recruitment Rules of 1991, two different modes of recruitment have been prescribed for recruitment to the posts of English and Hindi reporters; but for the English reporters, recruitment as to be made 50% by selection and 50% by direct recruitment. There is, thus, no provision, in the Recruitment Rules of 1991, for promotion to the post of English reporter from any post. The Rules also lay down that the selection has to be made, on the basis of merit-cum-seniority, from amongst the Stenographer Grade-I under the Arunachal Pradesh Government, who have put in not less than three years of continuous service. This shows that for appointment to the post of English reporter, an exercise for selection, on the basis of merit-cum-seniority, from amongst Stenographer Grade-I under Arunachal Pradesh Government has to be undertaken and for a Stenographer Grade I to become eligible for such consideration, he or she must have put in three years of continuous service as Stenographer Grade-I. It is also clear that every Stenographer Grade-I, who has put in not less than three years of continuous service in any department of the Government of Arunachal Pradesh, shall be eligible for consideration if he or she has not completed 33 years of age. As regards the recruitment to the post of Hindi reporter, Recruitment Rules of 1991 prescribe two different modes of recruitment, namely, (i) direct recruitment and (ii) either by transfer or deputation the direct recruitment to be made being from amongst the graduates, who qualify in the speed test of 150 words per minute in shorthand with preference being available to persons experienced as reporter/stenographer.

(iii) While the private Respondents were serving as Stenographer Grade-I in the Assembly Secretariat, an order was passed by the Speaker of the Assembly Secretariat, on 29.06.92, relaxing the age in respect of the departmental candidates for appointment as reporter by raising, as indicated hereinabove, the bar of age from 33 to 40 years. On 01.07.92, Respondent No. 2, namely, the Secretary, Assembly Secretariat, placed a note before the Speaker stating to the effect that Respondents Nos. 4, 5 and 6 had not completed three years of

continuous service in the grade of Stenographer Grade-I and that the shortfall in the three years of continuous service of these Respondents were of few months only and that the Speaker was competent to relax the shortfall in the requisite length of service and the Speaker might, therefore, like to relax the shortfall in the length of service of Respondents Nos. 4, 5 and 6 in order to appoint them to the posts of reporter (English). At the bottom of this note, the Speaker recorded his approval, on 01.07.92, relaxing thereby the shortfall in the service of Respondents No. 4, 5 and 6 for appointing them as reporters (English) in the Arunachal Pradesh Assembly Secretariat. In short, the eligibility criteria for selection to and appointment as, reporters in English were relaxed for enabling the Speaker to appoint the Respondent Nos. 4, 5 and 6 as reporters (English).

(iv) By his letter, dated 21.07.92, the Deputy Secretary, GAD, informed Respondent No. 2, namely, Secretary, Assembly Secretariat, Arunachal Pradesh, Itanagar, to the effect that serious objections had been raised by Senior Stenographers with regard to selection and appointment of Respondents Nos. 4, 5 and 6, who were Stenographers Grade-I, as the reporters (English) in the Assembly Secretariat. It was also clarified in this letter that only Respondents Nos. 4, 5 and 6 had been considered and selected, while others had been ignored and that while carrying out the process of selection, ACRs had not been considered nor had the vigilance clearance been asked for. The Respondent No. 2 was, therefore, requested by the Deputy Secretary, GAD, to cancel the selection of Respondents Nos. 4, 5 and 6. It was further clarified in the aforementioned letter that a fresh panel/list of Stenographers Grade-I would be forwarded to the Assembly Secretariat, if required.

(v) Notwithstanding the objections so raised by the parent Department of the private Respondents, an order was passed, on 20.01.93, by the Respondent No. 2, namely, Secretary, Assembly Secretariat and by this order, Respondent Nos. 4 and 5, who were till then Stenographer Grade-I of the Arunachal Pradesh Secretariat Service (General Cadre), were appointed to the posts of reporter (English) Group "B" (Gazetted) in the Assembly Secretariat, the appointments being on probation for a period of two years. By another order, dated 20.01.93, Respondent No. 6 was also, similarly, appointed as reporter (English) and on the following day, i.e., on 21.01.93, Respondent Nos. 4 and 5 joined the posts as reporter (English) and on 01.02.93, Respondent No. 6 also joined the said post in the Assembly Secretariat. Thereafter, an order was issued, on 09.03.93, by the GAD, Govt. of Arunachal Pradesh, placing with the establishment of the Assembly Secretariat, on temporary transfer basis, the services of Respondent Nos. 4, 5 and 6, who were, according to this order, Stenographer Grade-I in the Arunachal Pradesh Secretariat Service (General Cadre), the placing of the services of Respondents Nos. 4, 5 and 6, being for a period of two years only with effect from the date their joining as reporters (English), making it clear therein that on completion of the said period, Respondents Nos. 4, 5 and 6 would have to revert back to their parent department or resign from the posts of Stenographer Grade-I meaning thereby that even after their appointment, on 20.01.93, as reporters

(English) in the establishment of the Assembly Secretariat, the GAD in the Arunachal Pradesh Civil Secretariat remained essentially the parent department in respect of the Respondent Nos. 4, 5 and 6 though their services were placed with the Assembly Secretariat by way of transfer, this placement was nothing, but placing of the services of these Respondents, on deputation, with the Assembly Secretariat.

(vi) Thereafter, following an advertisement published inviting applications for selection and appointment, by way of direct recruitment, to the post of reporter (Hindi) Group "B" (Gazetted), Petitioner No. 1 applied and following a selection process, he came to join the post of reporter (Hindi), on 30.09.93, on the strength of an order of appointment issued, in this regard, by competent authority on 14.09.93. The Petitioner No. 2 also joined the post of reporter (English) Group-B (Gazetted) on being recruited directly through the process of selection and joined the post accordingly, on 23.12.94, on the strength of order of appointment, which was passed on 01.12.94. On 27.01.95, a letter was issued by the Deputy Secretary, Assembly Secretariat addressed to the Deputy Secretary, General Administration, Govt. of Arunachal Pradesh, stating to the effect that the Respondents Nos. 4, 5 and 6 were appointed as reporters, on temporary transfer basis, in the establishment of the Assembly Secretariat for a period of two years from the date of their appointment and on completion of the said period, they would have to revert back to their parent department or resign from the post of Stenographer Grade-I, Arunachal Pradesh Secretariat Service (General Cadre). It was further stated therein that the Respondents Nos. 4, 5 and 6 had intimated to their parent department their option for absorption as reporters in the Assembly Secretariat with effect from the date of completion of probationary period, which would expire during the month of January-February, 1995.

(vii) By the office memorandum, dated 22.04.96, a seniority list in respect of reporters of the Assembly Secretariat was published, in this provisional seniority list, the Petitioner Nos. 1 and 2 were placed at serial No. 5 and 6 respectively and Respondents No. 4, 5 and 6 were placed at serial No. 1, 2 and 3 respectively. A representation was made, on 07.05.96, by the Petitioner No. 1 raising his objection against the Respondents No. 4, 5 and 6 being treated senior in the provisional seniority list to the Petitioner No. 1. After the objection so raised by the Petitioner No. 1, an order was passed, on 09.06.97, by the Secretary, Assembly Secretariat, stating, inter alia, that the private Respondents, whose services had been placed by the Government of Arunachal Pradesh vide Government order, dated 09.03.93, (already mentioned hereinbefore), on temporary transfer basis, with the Assembly Secretariat for a period of two years and who had subsequently opted for absorption as reporters (English) in the Assembly Secretariat, were absorbed on completion of two years with effect from 21.01.95 so far as Respondent No. 4 and Respondent No. 5 were concerned and with effect from 01.02.95 so far as Respondent No. 6 was concerned.

(viii) However, by office memorandum, dated 04.07.97, a final seniority list in respect of reporters (Gazetted) of the Assembly Secretariat was published and in this final seniority list, Petitioner Nos. 1 and 2 were placed at serial No. 2 and 3 respectively, whereas Respondents No. 4, 5 and 6 were placed at serial No. 5, 6 and 7 respectively. The private Respondents submitted, on 17.06.98, their representations against the seniority list, so published, on 04.09.97; an order was passed, on 12.04.99, by the Respondent No. 2 rejecting the representations of the private Respondents and justifying the publication of the said final seniority list, the order having clarified that the entire case was submitted to the Speaker and after studying the records, the Speaker had observed that the action taken by the Assembly Secretariat with regard to the fixing of the final seniority was perfectly justified and that there was no reason for further re-consideration/review of the matter.

(ix) However, after more than two years, i.e. on 31.05.2001, an order was, suddenly, passed by the Respondent No. 2 namely, Secretary, Assembly Secretariat, keeping in abeyance the final seniority list of the reporters, which had been published, as indicated hereinabove, as far back as on 04.07.97, placing the Petitioner Nos. 1 and 2 above the private Respondents. This order was followed by several orders in quick succession. Soon after making of the order, dated 31.05.2001, aforementioned keeping in abeyance the final seniority list, which was published as far back as on 04.07.97, an order was passed, on 31.05.2001 itself, by the Respondent No. 2 aforementioned withdrawing the order, dated 09.06.97, whereby the Respondents No. 4, 5 and 6 had been absorbed. Thereafter, an order was passed afresh by the Respondent No. 2 aforementioned, on 21.06.2001, regularizing the services of Respondent No. 4 with effect from 21.01.93 as reporters (English) under the establishment of the Assembly Secretariat. This was followed by yet another office memorandum, dated 23.07.2001, issued by the Respondent No. 2 publishing the final seniority list of the reporters of the Assembly Secretariat in supersession of the office memorandum, dated 04.07.97, aforementioned, whereby the said final seniority list had been, as indicated hereinabove, published earlier. In the seniority list, so published on 23.07.2001, Respondent Nos. 4, 5 and 6 were placed at serial Nos. 1, 3 and 5 respectively, whereas Petitioner Nos. 1 and 2 were placed at serial Nos. 4 and 6 respectively. It was at this stage that the Petitioners approached this Court by means of the present writ application.

4. Before proceeding any further, it needs to be carefully noted and emphasized, as already indicated hereinabove, that the Recruitment Rules of 1991 prescribe two different modes of recruitments for the post of English reporter, one, by way of selection and the other, by way of direct recruitment, the selection process, however, not being confined to Stenographer, Grade-I of the Assembly Secretariat, but that every Stenographer, who has put in three years of continuous service, in the Assembly Secretariat, Civil Secretariat and/or in any other department of the Government of Arunachal Pradesh, is eligible for such selection and it is from amongst them that the selection has to be made on the

basis of merit-cum-seniority. Admittedly, the Respondent Nos. 4, 5 and 6 are not direct recruits. In the present case, however, no process for selecting candidates on the basis of merit-cum-seniority was followed and Respondent Nos. 4, 5 and 6 came to be, thus, appointed de hors the rules as it the Recruitment Rules of 1991 stood suspended.

5. Notwithstanding the fact that in the affidavits-in-opposition filed by the State Government as well as the private Respondents resisting the prayers made by the Petitioners and contending therein to the effect, inter-alia, that the appointments of the private Respondents were in accordance with the Recruitment Rules of 1991 and that these private Respondents were members of the Assembly Secretariat, when they were recruited to the posts of reporter (English) it was, to the pointed queries made by this Court, eventually, conceded, in no uncertain words, the both Mr. R. Deka, learned Counsel for the private Respondents, as well as the learned Senior Govt. advocate that no selection process, as envisaged by the Recruitment Rules of 1991, had been followed, while selecting and appointing the Respondent Nos. 4, 5 and 6 as reporters (English).

6. Unable to show that the private Respondents were appointed by following any selection process in terms of the relevant Recruitment Rules, the private Respondents have filed an additional affidavit, after the writ petition had been heard at some length, alleging therein, inter-alia, that while appointing even the present two Petitioners, relevant Recruitment Rules had not been followed inasmuch as none of the two Petitioners, contrary to what was required, could fulfill the requisite speed of 150 words per minute in shorthand and yet they were recruited on the ground that the services of reporters were urgently required. Filing of this additional affidavit has been resisted by the Petitioners by filing a counter-affidavit thereto, wherein they have contended to the effect inter alia, that no foundation for such submissions were made before hearing of the writ petition and, hence, such a belated plea challenging the legality of the appointments of the two Petitioners cannot, now, be taken. In order to substantiate his plea that the contents of the additional affidavit should not be taken into consideration, Mr. Tiwari has placed reliance on *Municipal Corporation of the City of Jabalpur v. State of Madhya Pradesh and Anr.* (AIR 1966 SC 83 7). This apart, points out Mr. Tiwari, the appointment of the Petitioners has come to be challenged after 11 years and that too, by way of an additional affidavit-in-opposition and when there is no writ petition till today challenging their appointments, such a belated plea raised by the Respondents, pleads Mr. Tiwari, may not be taken into account.

7. Notwithstanding what has been submitted by Mr. Tiwari, the fact remains that the Court has the power, in an appropriate case, to allow a party to file an additional affidavit at any stage. This position could not be disputed by Mr. Tiwari. At any rate, when the private Respondents have brought to the notice of the Court that the selection and appointment of the present Petitioners too suffer

from some infraction of the relevant rules of recruitment, the Court cannot keep its eyes shut and refuse to examine such a plea, though belatedly raised by the private Respondents.

8. While dealing with the above aspect of the matter, it may be mentioned, if I may borrow the language used in *Dr. M. Laitphlang and Others Vs. State of Meghalaya and Others*, that the concept of appointment, absorption and promotion in service, in relaxation of the recruitment rules, has undergone a prominent development. The present view is that there can be no relaxation of the basic and fundamental rules of recruitment. Thus, the service jurisprudence, now, makes a distinction between conditions of recruitment and conditions of service. While condition of service may be relaxed, condition of recruitment cannot be relaxed subject, however, to the condition that if the recruitment rules in themselves, provide for relaxation of the condition of recruitment, the condition of recruitment may be relaxed provided that such relaxation does not render the conditions of recruitment, as a whole, nugatory and/or non est in its entirety. In *Dr. M. Laiphlang (supra)*, a Division bench of this Court, relying upon a number of authorities, culled out the parameters of the law of relaxation in the following words:

25. While considering the above aspects of the matter, it needs to be pointed out, at the very outset, that the concept of appointment, absorption and/or promotion in service in relaxation of relevant recruitment rules has undergone a prominent development. The present view is that there can be no relaxation of the basic and fundamental rules of recruitment. Moreover, strict conformity with the recruitment rules is insisted both for direct recruits as well as promotees. (Ref. *Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others*, Thus the service jurisprudence, now, clearly draws a distinction between the conditions of recruitment and conditions of service. In other words, in the realm of service jurisprudence, a distinction is, now, drawn between the conditions of recruitment and the conditions of service. While the conditions of services may be relaxed, conditions of recruitment cannot be relaxed. In other words, the provisions for relaxation in general contained in recruitment rules cannot be resorted to for relaxing the conditions of recruitment. The minimum period of qualifying service for promotion, which recruitment rules impose, is really a condition of recruitment and such a condition not being condition of service cannot generally be relaxed unless the Rules in themselves provide for otherwise. *J.C. Yadav and others Vs. State of Haryana and others*, A Division Bench of this Court have set the matter at rest in the case of *Ananda Ram Baruah v. State of Assam*, reported in 2003 (2) GLT 78, by observing and laying down as follows:

...The question, which call for determination by this Court is, whether the power to relax the Rule would go to the extent of relaxing conditions of recruitment also or it can be only to the extent of relaxing the conditions of service? Can a direct recruit for recruitment to the post of LDA avoid Competitive examination? Can the Government exercise power of relaxation of Rule of recruitment requiring a

direct recruit to appear in the competitive examination and such relaxation of the recruitment Rules is permissible. In *Aslam Babalal Desai Vs. State of Maharashtra*, the Apex Court has emphasized the need of strict compliance of the recruitment Rules for both direct recruits and promotees. It is held that there cannot be any relaxation of the basic or fundamental Rules of recruitment. That was a case where the Rule permitting relaxation of conditions of service came for consideration and it was held by a three Judges Bench that the Rule did not permit relaxation of the recruitment Rules. In *Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others*, the Apex Court observed "The condition precedent, therefore, is that there should be an appointment to the service in accordance with Rules and by operation of the Rules, undue hardship has been caused...it is already held that the condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed.

Thus, according to the Apex Court there is distinction between the conditions of recruitment and conditions of service. Appointment has to be made in accordance with the recruitment Rules and, thereafter, there may be a relaxation in the service condition. Similarly, in *State of Orissa and others Vs. Smt. Sukanti Mohapatra and others*, it was held that though the power of relaxation stated in the Rule was in regard to "any of the provisions of the Rules" this did not permit relaxation of the Rule of direct recruitment without consulting the Commission and the entire ad-hoc service of a direct recruit could not be treated as regular service. In *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, and in *J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.*, it has been emphatically laid down that the Rule relating to recruitment could not be relaxed. The judgment in the matter of *Suraj Prakash Gupta (supra)* has also reiterated the principle laid down by the Apex Court that there cannot be any relaxation of the conditions of recruitment. The conditions of recruitment and conditions of service are distinct. The Government has the power to relax conditions of service, whereas the conditions of recruitment cannot be relaxed even though the Rule intends to do so. (Emphasis is supplied).

26. We express our complete agreement with the position of law laid down in *Amanda Ram Baruah (supra)* subject to only one clarification that if the recruitment rules, in themselves, provide for relaxation of conditions of recruitment, the conditions of recruitment may be relaxed, provided that such relaxation does not make the conditions of recruitment nugatory and that interpretation of such provisions of relaxation contained in the recruitment rules must not be liberal, but very strict.

9. For reaching the above conclusions, the Division Bench of this Court has relied upon, amongst others, the decisions in *J.C. Yadav and others Vs. State of Haryana and others*, , *Aslam Babalal Desai Vs. State of Maharashtra*, , *Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others*, , *State of Orissa and others Vs. Smt. Sukanti Mohapatra and*

others, , Dr M.A. Haque and Others Vs. Union of India (UOI) and Others, , J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., and Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others,

10. In the case at hand, it is Rule 5 of the Recruitment Rules of 1991, which makes provisions for relaxation. This Rule states, "Where the Governor of Arunachal Pradesh is of opinion that it is necessary or expedient so to do, he may, after consultation with the Speaker of the Legislative Assembly of Arunachal Pradesh, by order and/or reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons."

11. In the light of the law laid down in Dr. M. Laiphlang (supra), one can safely hold that even if, in the light of the language used in Rule 5, the conditions of recruitment, contained in the Recruitment Rules of 1991, can be relaxed, such relaxation cannot be to such an extent that it makes the whole provisions for recruitment imbecile, purposeless and nugatory. In short, Rule 5 does not conceive of recruitment de hors the rules of recruitment.

12. The decisions, referred to by the Division Bench in Dr. M Laiphlang (supra), make it clear that even if the Rules contain the provisions for relaxation of the Rules of recruitment, such relaxation cannot be to such an extent that it makes the whole scheme of recruitment meaningless nor can the provisions of relaxation be interpreted in such a manner that it enables the Government to throw away the rules of recruitment lock, stock and barrel or make the same non-existent as if the Rules, as a whole, do not exist or as if the Rules, in their entirety, stand suspended.

13. From what has been discussed above, it is abundantly clear that though Rule 5 provides for relaxation of any rule and even if the expression "any of the provisions of these rule is interpreted to include the rules of recruitment or conditions of the recruitment, relaxation cannot be to such an extent that the Rules of Recruitment are rendered facile. On this aspect of law, I may refer to State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, wherein the Apex Court has, taking note of its earlier decision in R.N. Nanjundappa v. T. Thimmaid, reported in (1992) SCC 409, clarified the law, on the subject, as follows:

8. The Rules were made under the proviso to Article 309 for regulating the method of recruitment to the posts of Lower Division Assistants in the offices of the Heads of Departments. ***Counsel for the regular recruits contend that what the Government has done in exercise of power under Rule 14 is to set at naught the entire body of the Rules as if they never existed. The power of relaxation, contend Counsel, cannot be so used as to render the Rules non est. In support of this contention strong reliance was placed on the following observations in the of R.N. Nanjudappa v. T. Thimmiah : (SCC pp. 416-17para 26)

...If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or

regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

In the present case also the appointments of the employees whose services are sought to be regularized were dehors the Rules. Rule 14 merely permits relaxation of any of the provisions of the Rules in public interest but not the total shiving of the rules. The orders do not say which rule or rules the Government considered necessary and expedient in public interest to relax. What has been done under the impugned orders is to regularize the illegal entry into service as if the Rules were not in existence. Besides the reason for so doing are not set out nor is it clear how such regularization can sub-serve public interest. Rule 14 has to be strictly construed and proper foundation must be laid for the exercise of power under that rule. The Rules have a limited role to play, namely, to regulate the method of recruitment and Rule 14 enables the Government to relax any of the requirements of the Rules pertaining to recruitment. The language of Rule 14 in the context of the objective of the Rules does not permit total suspension of the Rules and recruitment dehors the Rules. In the present case the recruitments had taken place years back in total disregard of the Rules and now what is sought to be done is to regularize the illegal entry in exercise of power under Rule 14. Rule 14, we are afraid, does not confer such a blanket power; its scope is limited to relaxing any rule, e.g. eligibility criteria, or the like, but it cannot be understood to empower Government to throw the Rules overboard. If the rule is so construed it may not stand the rest of Article 14 of the Constitution. The proviso to Rule 13 can come into play in the matter of fixation of seniority between candidates who have successfully cleared the examination and a candidate who cleared the examination after availing of the benefit of relaxation. We are therefore, of the opinion that the Tribunal committed no error in understanding the purport of Rule 14.

10. Now even though the Tribunal came to the conclusion that Rule 14 did not permit regularization made under the impugned orders of January 3, 1985 and February 14, 1985, it, having regard to the long service put in by the employees named in the same two orders and on compassionate considerations, has supported the regularization under Article 162 of the Constitution. It has moulded the relief on such considerations. Since that part of the order has not been assailed and since the Appellants cannot be worse off by appealing, we cannot interfere with that part of the order. It will, therefore, be worked out as directed by the Tribunal but we may clarify that it will not have the effect of disturbing the seniority of irregular appointees who will rank senior to their regular appointees under any interim orders contrary to the relief moulded by

the Tribunal shall be adjusted and brought in tune with the said relief. The benefit of this relief, to the extent relevant, will be given to irregular appointees covered under both the impugned orders of January 3, 1985 and February 14, 1985.

14. Applying the law laid down in *Sukanti Mahapatra* (supra) to the factual matrix of the present case, one can unhesitatingly, hold that the Recruitment Rules of 1991 have been made under Article 187(3) for regulating the method of recruitment to, amongst others, the posts of reported and Rule 5 of the Rules provide for relaxation. Even if the power given under Rule 5, to the Government can be interpreted to empower the Government to relax not only the conditions of service but also the conditions of recruitment, the fact remains that what the Government has done, in the present case, in exercise of powers under Rule 5, is to virtually set at naught the entire body of the Rules as if the Rules never existed. The power of relaxation, as the decision in *R.N. Nanjundappa* (supra) reflects, does not empower appointments in defiance of the Rules. As held in *R.N. Nanjundappa* (supra), if the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized; ratification or regularization is possible of an act, which is within the power and province of the authority or where there has been some non-compliance with the procedure or the manner, which does not go to the root of the appointment; regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules, for, it may have the effect of setting at naught the rules.

15. In the present case too, if the appointments of the private Respondents is upheld, it will be tantamount to regularizing their services though their appointments were de hors the Rules. Rule 5 merely permits relaxation of any of the provisions of the Rules, but not the total shelving of the rules. Even, if, for a moment, one were to hold that the recruitment of the private Respondents was in deemed relaxation of the conditions of recruitment, one has to ascertain and be satisfied as to which rule, in this regard, was relaxed. Since the recruitment of the private Respondents shows that their recruitment was by entirely shelving the Rules, the question of resorting to the doctrine of "deemed relaxation" does not arise at all, for if it is permitted, it would amount to regularizing the illegal entry into service as if the Recruitment Rules of 1991 did not exist for making recruitment to the posts of the reported (English), though the recruitment of the private Respondents was projected to have been made under the Recruitment Rules of 1991. The Recruitment Rules of 1991 have a limited role to play, namely, to regulate the method of recruitment and Rule 5, at best, enables the Government to relax any of the requirements of the Rules pertaining to recruitment of reporters. The language of Rule 5, in the context of the objective of the Rules, does not permit total suspension of the Rules and recruitment de hors the Rules. Rule 5, I am afraid and if may borrow the language used in *Sukanti Mahapatra* (supra) does not confer such a blanket power; its scope is limited to relaxing any rule, e.g. eligibility criteria, or the like, but it cannot be

understood to empower Government to throw the Rules overboard. If the rule is so construed, it may not stand the test of Article 14 of the Constitution". In the case at hand, it is not any particular Rule, which is claimed to have been relaxed. The Rules were, as a whole, shelved, while recruiting the private Respondents as if the Rules did not exist.

16. What emerges from the above discussion is that the recruitment of the private Respondents was made by throwing into the wind the entire scheme of recruitment envisaged under the Recruitment Rules of 1991. In a situation, as the present one, there can be no escape from the conclusion that the appointment of the private Respondents was de hors the Rules and if the same is not to be interfered with by this Court, such non-interference will not be and cannot be on account of the fact that the relevant Rules of recruitment were relaxed or deemed to have been relaxed, while recruiting them., rather, such non-interference would be and can be on sheer sympathetic consideration that the private Respondents have put in service for a long period.

17. Unable to assert that any selection process was followed, while appointing the Respondent Nos. 4, 5 and 6, the learned Senior Government Advocate and also Mr. R. Deka, learned Counsel for the private Respondents, candidly concede that the appointment of the private Respondents to the posts of reporters was de hors the Recruitment Rules of 1991. They, however, react by submitting that even the appointment of the present two writ Petitioners were also without completely following the provisions of the recruitment rules, for point out the learned senior Government Advocate and Mr. R. Deka, the present two writ Petitioners did not have the speed of 150 words per minute in shorthand and this requirement was relaxed. Having not followed the Recruitment Rules, it is clear, contend the learned Senior Government Advocate and Mr. R. Deka, that the appointments of the Petitioners too were de hors the Recruitment Rules of 1991.

18. While dealing with the above submission, it is pertinent to note that it was, at one stage, submitted by Mr. P.K. Tiwari by placing reliance on Keshav Chandra Joshi and others etc. Vs. Union of India and others, that the requirement of speed as envisaged by the Recruitment Rules of 1991 is a condition of service and not a condition of recruitment and, hence, it was within the ambit of the powers of the Speaker to relax the same and this relaxation cannot be said to have led to the appointment of the Petitioners de hors the rules.

19. While considering the case of Keshav Chandra Joshi and Ors. (supra), it is pertinent to note that the qualification required to be satisfied, in the case of Keshav Chandra Joshi and Ors. (supra) was in respect of the period of probation and not in respect of a stage preceding the appointment on probation. The period of probation starts after the recruitment is made and, hence, the requirement of successful completion of the period of probation forms part of the conditions of service and not the conditions of recruitment.

20. In the case at hand, the Recruitment Rules of 1991 make it clear that for the

purpose of direct recruitment, the candidate must qualify in the speed test of 150 words per minute in shorthand. This requirement is, undoubtedly, one of the conditions of recruitment. The question, therefore, is as to whether this condition could have been relaxed.

21. What is, now, of paramount importance to note is that while making appointment of the private Respondents to the posts of reporter, not even the semblance of the relevant recruitment rules was followed inasmuch as no selection process for this purpose was at all resorted to. Thus, while giving appointment to the private Respondents, the State Respondents acted as if the relevant rules stood suspended. As against this, in the cases of the Petitioners, a regular recruitment process was, admittedly, followed. What is, now, of paramount importance to note is that in the case of selection of Stenographers, the candidates are, as correctly points out by Mr. Tiwari, never informed as to what their speed has been found to be. This apart, a candidate may be able to satisfy the test of speed of 150 words per minute, but he may not have been able to take the dictation correctly. As against this, there may be a candidate, whose speed might not have been of the requisite standard, but he might have taken the dictation correctly. Thus, the Recruitment Rules of 1991 show that a candidate must not only prove that he can take dictation at the speed of 150 words per minute in shorthand, but that he must be shown to have taken the dictation correctly and transcribe the same correctly. However, when a candidate is not informed as to what his speed has been found to be and he is appointed, by relaxing the requisite speed, his appointment cannot be questioned after a lapse of as correctly contends Mr. P.K. Tiwari, more than 10 years and, that too, by way of an additional affidavit-in-opposition.

22. I find considerable force in the submission of Mr. P.K. Tiwari that the legality and correctness of appointment of the Petitioners is not under challenge in the present writ petition and if such a challenge was posed by way of a writ petition, the writ petition might have been defeated on the ground of delay or laches. Having raised this plea by way of additional affidavit-in-opposition filed in the writ petition, wherein their own appointments are under challenge, the private Respondents cannot ask this Court to treat the appointment of the Petitioners as de hors the rules. I find great substance in the submissions made on behalf of the Petitioners that the Petitioners are not in a position to even boldly admit or deny as to whether their requisite speed was relaxed. If such a belated plea is allowed to be taken against the Stenographers, no Stenographer would be able to defend his appointment, for he would not be knowing as to what his speed had been found to be at the time of his selection and/or appointment. Had he known that he did not have the requisite speed and that the appointment offered to him was in infraction of the relevant recruitment rules, he might not have accepted the appointment. If the belated plea, which the private Respondents have raised and that too, without offering any explanation for such a belated plea, is accepted, it would cause irreparable loss to the Petitioners, which in my opinion, the Respondents cannot be allowed to do.

23. At any rate, what surfaces from the discussion of the materials on record is that the appointment of the private Respondents were entirely de hors the rules, for, not even a semblance of the recruitment rules were followed and the private Respondents knew that their appointments were without following any selection process and that the same were wholly de hors the rules as if the rules did not exist at all. The appointment of such a person cannot be equated, in equity, with the appointment of persons, such as the writ Petitioners, who were appointed by a regular selection process consistent with the rules except for the fact that in one particular aspect, one of the conditions of recruitment was not adhered to and the writ Petitioner did not even know that they had not been found to have the requisite speed of 150 words per minute. Thus, two appointees, namely, Petitioners, on the one hand, and the private Respondents, on the other, cannot be said to stand on the same footing and belong to the same stream.

24. In the context of the facts of the present case, the reference made by Mr. Tiwari to the case of State of U.P. Vs. Rafiquddin and Others, is not entirely misplaced. In Rafiquddin (supra), the Apex Court was confronted with a situation in which while, on the one hand, a Batch of persons was appointed in the judicial service of the State in violation of the relevant Rules of recruitment, another batch of persons was, on the other hand, appointed in the same service in accordance with the Rules, the irregular appointees having, however, been accorded seniority over the regular appointees on the ground that the irregular appointees were selected from the selection test held in the year 1970, whereas the regular appointees were selected from the selection test held in the year 1972. Dealing with such a situation, the Apex Court observed and held as follows:

13. ...The appointment of unplaced candidates made in pursuance of the decision taken by the high level committee is not countenanced by the Rules. There is no escape from the conclusion that the unplaced candidates were not appointed to the service on the basis of the result of the competitive examination of 1970. Their appointment was made in breach of the Rules, in pursuance to the decision of the high level committee. It is well settled that where recruitment to service is regulated by the statutory rules, recruitment must be made in accordance with those Rule, any appointment made in breach of rules would be illegal. The appointment of 21 "unplaced candidates" made out of the third list was illegal as it was made in violation of the provisions of the Rules. The high level committee which took decision for recruitment of candidates to the service on the basis of the 40 percent aggregate marks disregarding the minimum marks fixed by the Commission for viva voce test had no authority in law, as the Rules do not contemplate any such committee and any decision taken by it could not be implemented.

14. We are surprised that the Chief Justice, Chief Minister or as well as the Chairman of the Commission agreed to adopt this procedure which was contrary to the Rules. The high level committee even though constituted by highly placed persons had no authority in law to disregard the Rules and to direct the

Commission to make recommendation in favour of unsuccessful candidates disregarding the minimum marks prescribed for the viva voce test. The high level committee's view that after the amendment of Rule 19, the minimum qualifying marks fixed for viva voce could be ignored was wholly wrong. Rule 19 was amended in January, 1972, but before that 1970 examination had already been held. Since the amendment was not retrospective the result of any examination held before January, 1972 could not be determined on the basis of amended Rules. The Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. It secures efficiency in the public administration by selecting suitable and efficient persons for appointment to the services. The Commission has to perform its functions and duties in an independent and objective manner uninfluenced by the dictates of any other authority. It is not subservient to the directions of the Government unless such directions are permissible by law. Rules vest power in the Commission to hold the competitive examination and to select suitable candidates on the criteria fixed by it. The State Government or the high level committee could not issue any directions to the Commission for making recommendation in favour of those candidates who failed to achieve the minimum prescribed standards as the Rules did not confer any such power on the State Government. In this view even if the Commission had made recommendation in favour of the unplaced candidates under the directions of the Government the appointment of the unplaced candidates was illegal as the same was made in violation of the Rules.

15. ...But even if the Commission had agreed to the Government's suggestion, their appointments continued to be illegal, as the same were made in breach of Rules. There was no justification for the appointment of the unsuccessful candidates in 1975, because by that time result of 1972 examination had been announced and duly selected candidates were available for appointment.

16 ...If selected candidates are available for appointment on the basis of the competitive examination of subsequent years, it would be unreasonable and unjust to revive the list of earlier examination by changing norms to fill up the vacancies as that would adversely affect the right of those selected at the subsequent examination in matters relating to their seniority under Rule 22. The 1970 examination could not be utilized as a perennial source or inexhaustible reservoir for making appointments indefinitely.

19. The unplaced candidates were appointed to the service in breach of the Rules and they form a separate class, they cannot be equated with those who were appointed to the service from the first and second list of 1970 examination as their appointment was made on the recommendation of the Public Service Commission. They remain unchallenged. Similarly, candidates appointed to the service on the basis of the result of the competitive examination of 1972 before the unplaced candidates were appointed, formed separate class as they were

also appointed in accordance with the Rules. The "unplaced candidates" of 1970 examination cannot claim seniority over them on the basis of Rule 22 as their appointment was not made on the basis of the list approved by the Commission under Rule 19. In *Shitla Prasad Shukla Vs. State of U.P. and Others*, this Court held that an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those who may have been regularly and properly appointed.

20. ...But we are also of the view that having regard to the period of 12 years that have elapsed, we do not propose to strike down their appointments.

21. Now the question arises as to when seniority should be assigned to the unplaced candidates. Their claim for assigning them seniority on the basis of the competitive examination of 1970 is not sustainable in law as discussed above. They were appointed to service after five years of the examination and before their appointment, competitive examination of 1972 had taken place and candidates selected under that examination had been appointed to service prior to their appointment. The directions issued by the High Court for rearranging the merit list of 1970 examination seriously affect the seniority of those who were regularly selected in accordance with the norms prescribed by the Commission. Having regard to these facts and circumstances of the case we are of the opinion that the view taken on by the High Court on its administrative side and the State Government that the unplaced candidates of 1970 examination should be assigned seniority below the last candidate of 1972 examination appointed to the service is just and reasonable. In our opinion it would be just and proper to assign seniority to the unplaced candidates of 1970 examination at the bottom of the line of 1972 candidates. There were 37 unplaced candidates of 1970 examination who were included in the third list, of them 16 candidates appeared in the 1972 examination and they were successful and their names were approved by the Commission in the list prepared under Rule 19. The State Government appointed them in service. Under Rule 22 they are entitled to seniority of 1972 examination but in view of the judgment of the High Court in *Rafiquddin's* case their seniority has been determined on the basis of their recruitment to service under the 1970 examination. We have already recorded findings that unplaced candidates of 1970 examination (as included in the third list) have not been recruited in service according to the Rules and their recruitment to service cannot be treated under 1970 examination for purposes of determining their seniority under Rule 22. We have further directed that 21 unplaced candidates of 1970 examination should be placed below the candidates of 1972 examination. But so far as 16 remaining candidates are concerned, they were appointed to the service on the result of 1972 examination and their appointment does not suffer from any legal infirmity. They are therefore entitled to seniority of 1972 examination on the basis of their position in the merit list of that examination. They are however not entitled to the seniority of 1970 on the basis of the examination of that year as held by the High Court.

25. One of the underlying principles of the decision in Rafiquddin (supra) is that even when, on account of lapse of a long period, appointment made to a service in breach of the relevant recruitment rules is not set aside and quashed, such irregular appointee shall not be allowed to steal a march over the regular appointees, for as reiterated in Rafiquddin (supra), "an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those, who may have been regularly and properly appointed."

26. Following the principle of law as indicated hereinabove, it is possible that without setting aside and quashing the appointment of an irregular appointee, the Court or Tribunal may direct the appointing authority to treat a regular appointee in service, though appointed later in point of time than the irregular appointee, as senior to the irregular appointee. In other words, an irregular appointee particularly, if his appointment suffers from arbitrariness, malafide and colourable exercise of powers, cannot be allowed to gain seniority over the regular appointee, for, they cannot be said to belong to the same stream even if the appointment of the irregular appointee is prior in point of time and is not disturbed on account of long period of service, which the irregular appointee might have put in.

27. In the present case, though the appointments of the two groups, namely, the present Petitioners, on the one hand and the private Respondents, on the other, suffered from infraction of the rules of recruitment, the fact remains that while appointing the private Respondents, the rules were, within the knowledge of the Petitioners, completely thrown to the wind; while in the case of private Respondents, the rules were followed except for the fact that they were not found to have the requisite speed in shorthand and this deficiency was never revealed to the Petitioners, in a situation, such as the present one, the private Respondents cannot be allowed to steal a march over the Petitioners.

28. Because of what has been, as a whole, discussed and pointed out above, this Court is firmly of the view that though the appointments of the private Respondents may not be set aside and quashed, they may still be directed to be treated as junior to the Petitioners in the grade of the reporters.

29. In the result and for the reasons discussed above, this writ petition succeeds and the impugned orders, dated 31.05.2001, 21.06.2001 and 23.07.2001, are hereby set aside and quashed and the Respondents are hereby directed to treat the final seniority list, dated 04.07.1997, as valid and subsisting till date so far as the same reflects the seniority position of the Petitioners vis-a-vis the private Respondents.

30. With the above discussions and directions, this writ petition shall stand disposed of.

31. No order as to costs.

32. Hand over the records to the learned Senior Government Advocate.