

(2007) 05 GAU CK 0065
In the Gauhati High Court

Prafulla Chandra Sarma and Others

APPELLANT

Vs

Gokul Mohan Hazarika and Others

RESPONDENT

Date of Decision : 23-05-2007

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2007) 3 GLT 353

Hon'ble Judges : D. Biswas, J;B.P. Katakey, J

Bench : Division Bench

Judgement

B.P. Katakey, J.—The Government of Assam on 07.03.1984 requested the Assam Public Service Commission (APSC) to make selection for direct recruitment to 30 number of posts in each category of ACS Class-I and ACS Class-II and accordingly an advertisement was issued by the APSC on 02.05.1984 for that purpose. The Government of Assam in the meantime vide communication dated 24.11.1984 informed APSC about relaxation of upper age limit by two years and accordingly a revised advertisement was issued by the APSC on 28.11.1984 incorporating the relaxation of two years in the upper age limit. Pursuant to such process of selection the written test as required under Assam Civil Services (Class-I) Rules, 1960 (in short 1960 Rules) was conducted by the APSC, between the period from 05.06.1984 to 01.08.1985 and declared the result of the written examination on 22.02.1986. The APSC conducted the viva-voice test from 25.04.1986 to 30.05.1986 of those candidates who qualified in such written examination. After such process of interview, the APSC on 27.06.1986 send the list of candidates, to the Government, recommended for appointment as ACS Class-I and ACS Class-II Officers. The Government of Assam thereafter by the notification dated 21.07.1986 amended the proviso to Rule 4 of 1960 Rules, whereby the quota for promotion from ACS Class-II to ACS Class-I was left to the discretion of the Governor and the earlier quota of 50% each between the promotees and direct recruit was done away with. By the said amendment the eligibility criteria for promotion from ACS-II to ACS-I was also reduced from 8 years to 5 years. By notification dated 11.9.86, 129 ACS Class-II officers were

promoted to ACS Class-I, which includes the present private respondents and thereafter during the month of October 1986 the Government appointed 45 selected candidates in ACS Class-I (Jr. Grade) pursuant to the recommendation of the APSC dated 27/6/86. A decision for merger of ACS Class-I and ACS Class-II was thereafter taken by the Government and accordingly on 16/12/89 both ACS Class-I and ACS Class-II were merged into a common class, i.e. ACS Class-I. A draft gradation list was published in the month of June 1993 wherein all 129 ACS Class-II Officers who were promoted to ACS Class-I vide notification dated 11.9.86 were placed above those 45 directly recruited ACS Class-I Officers, who were recruited in the month of October 1986 pursuant to the APSC recommendation dated 27.6.86.

2. The writ appellants, who were directly recruited as Assam Civil Services Class-I Officers in the year 1986 pursuant to the recommendation of the APSC filed the writ petition being Civil Rule No. 1869/95, challenging the said draft gradation list as on 01.01.1993, for placing them below the promotees in that year, i.e. 1986 and also challenging the amended provision of Rule 4 of the 1960 Rules as amended by the Assam Civil Services (Class-I) (amendment) Rules, 1986, notified on 21.07.1986, which writ petition was dismissed by the learned Single Judge vide judgment and order dated 26.03.2002 on the ground that though the process of selection was initiated before the amendment of 1986, the Government had taken a conscious decision not to make any appointment till the Rule is amended. The learned Single Judge while dismissing the writ petition has relied upon the decision of the Apex Court in Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, . The writ petitioners being aggrieved filed the writ appeal No. 5/2004.

3. During the pendency of the writ appeal, the learned Counsel for the appellants has submitted that they do not want to proceed against the respondent Nos. 6, 14, 16, 19, 23, 28, 41, 71, 72 and 77 on the ground that they have either retired from service or died in the meantime, which has been duly recorded in the order dated 07.11.2005. The learned Counsel for the appellants on 03.08.2006 also filed a memo stating that the respondent Nos. 4, 7, 12, 13, 65, 74 and 75 have either been expired or retired from service and, therefore, prays for deletion of their names and accordingly the names of those respondents were deleted from the list of the respondents.

4. The writ appeal was, thereafter, taken up for hearing and accordingly the same was heard and allowed vide judgment and order dated 24.08.2006 by setting aside the judgment and order dated 26.03.2002 passed by the learned Single Judge and directing the State respondents to place all 45 direct recruits including the appellants made in the year 1986, just below the first 45 promotees promoted to ACS Class-I Service on 11.09.1986 in the seniority list.

5. The review petitioners, thereafter, filed the Review Petitions No. 92/2006 and 93/2006, seeking reviews/recalling the said judgment and order dated 24.08.2006 passed in the appeal on the ground that they have not been served

with any notice of the appeal as well as in the writ petition and though in the memo filed by the appellant in the appeal, the respondent No. 12 (petitioner in Review Petition No. 93/2006) was either stated to have retired from service or died in the meantime, he is still alive and in service. It has further been contended in the said review petitions that, though the notices were issued to the respondents in the appeal through the Secretary, Personnel (A) Department such notices had never been served on them. The review petitions, therefore, prayed for rehearing of the appeal on merit by recalling the judgment and order passed in it.

6. This Court, upon hearing the learned senior counsel for the review petitioner, the learned senior counsel for the writ appellants (opposite parties in the review petitions) as well as the learned State counsel, to satisfy itself as to the service of notice, which was issued through the Secretary of the concerned Department, asked the learned State counsel to produce the record of service of such notice, who in turn, produced such record and upon perusal of the same, it was found that though the Secretary of the concerned Department received such notices, those were not forwarded to the respondents in the writ appeal and hence they were ignorant about the appeal filed challenging the judgment and order passed by the learned Single Judge and hence they could not contest the writ appeal. It also appears that the name of the respondent No. 12 in the appeal (review petitioner in Review Petition No. 93/2006) has been deleted from the list of respondents on the basis of the memo dated 03.08.2006 filed by the writ appellants stating that he has either expired or retired from service but the said respondent by the said review petition has made a categorical statement that he is still in service, which fact has not been denied by the appellants by filing any objection. Consequently, as agreed to by the learned Counsel for the parties, it was decided to rehear the writ appeal along with the review petitions. Thereafter, on the basis of the application filed by the writ appellants in Misc. Case No. 4031/2006, notices were directed to be issued vide order dated 27.11.2006 by publication in the newspaper, on all the respondents in the writ appeal and accordingly notices were issued. But except the review petitioners, who are respondent Nos. 12, 20, 32, 38, 44, 47, 52, 55, 67, 69, 76 and respondent Nos. 21, 34, 58, 79, no other respondents entered appearance. Those respondents, in view of the order dated 21.12.2006 have also filed their affidavits in the writ appeal. The state respondents have also filed their affidavit. The review petitions as well as the writ appeal on merit are accordingly heard together.

7. We have heard Mr. V. Hansaria, the learned senior counsel for the review petitioners/respondents in the writ appeal, Mr. A. Das, the learned Counsel for respondent Nos. 21, 58 and 79 in the writ appeal, Mr. Hussain, the learned Counsel for the respondent No. 34, Mrs. B. Goyal, the learned State counsel for the State respondents and Mr. P.K. Goswami, the learned senior counsel for the writ appellant.

8. Mr. Hansaria, the learned senior counsel for the review petitioners/

respondents arguing the appeal on merit has submitted that Rule 4 of the 1960 Rule as stood prior to the amendment of 1986, provides for mode of recruitment to ACS Class-I service and Rule 19 thereof the determination of seniority of officers Rule 4 of the said Rule provides for recruitment to the service from three sources, i.e. (a) by competitive examination conducted by the APSC; (b) by promotion of members of ACS Class-II having requisite qualification and (c) by selection, in special cases from among persons, other than members of the Assam Civil Service (Class-II) serving in connection with the affairs of the Government. The said Rule, prior to 1986 amendment, though provides the quota for recruitment by the competitive examination and by promotion at 50% each in a year, since the dispute is relating to the seniority of direct recruits and promotees, the same has to be fixed in terms of the Rules framed for that purpose, i.e. Rule 19, which provides that the seniority of the members of the service shall be determined according to the order of merit in the list prepared under such Rule (5) of Rule 6, i.e. recruitment by competitive examination or approved under Rule 8, i.e. by promotion and by selection, if the members join their appointment within 15 days of the receipt of the order of appointment and further providing that the members of the service recruited in a year by promotion and by selection under Clauses (b) and (c) of Rule 4 shall be senior to the members recruited in the same year and for the same batch under Clause (a) Rule 4, i.e. by competitive examination conducted by the APSC (direct recruitment). According to Mr. Hansaria, as the respondents in the writ appeal/review petitioners were appointed to Class-I service and became the member of service by virtue of such appointment by promotion under Rule 4(b) on 11.09.1986, i.e. prior to the recruitment of the appellants, who were directly recruited under Rule 4(a) of the Rules, on 22.10.1986, the respondents, i.e. the promotees, by operation of Rule 19 of 1960 Rules are to be held senior than the appellants and accordingly the draft as well as the final gradation list dated 02.07.2002 were rightly prepared and published by the State Government placing 129 promotees over the 45 direct recruits, which includes the appellants. It has further been contended that, in any case, the grounds on which the writ appeal was allowed vide judgment and order dated 24.08.2006, i.e. fixation of seniority, on the basis of the quota fixed for recruitment from both the sources under the proviso to Rule 4 of the 1960 Rules, i.e. 50% each, and by following the quota and rota rules, is not tenable in law as the quota fixed for recruitment from both the sources has been done away with by the 1986 amendment, which came into effect on 21.07.1986, i.e. much prior to the recruitment of the writ appellants as well as the respondents/review petitioners.

9. Mr. Hansaria has further submitted that even if the quota rule is applicable, the process of recruitment having been initiated prior to the 1986 amendment, the said quota rule having not been adhered to for a long period of time, it has broken down, as evident from paragraph 1.12 of the memorandum of appeal and, therefore, the seniority cannot be fixed by applying rota rule. Mr. Hansaria has further submitted that in such an eventually, the seniority has to be on the

basis of the length of service. Referring to the definition of the "member of service" as defined in Rule 3 (f) of 1960 Rules, it has further been submitted by Mr. Hansaria that the respondents/review petitioners became the member of service on the date of their appointment, i.e. on 11.09.1986, and their appointment having not been challenged by any one including the appellants, on the ground of being in excess of quota fixed for promotion and they having been appointed by following the provisions of 1960 Rules, their seniority has to be counted from the date of appointment, i.e. 11.09.1986, and in the event they are pushed down in the seniority list after the appellants, who were appointed on 22.10.1986 on the basis of the quota fixed prior to 1986 amendment, it would amount to wiping out the period of their service from 11.09.1986 to 22.10.1986, which cannot be done. Mr. Hansaria has further contended that as vide order dated 11.09.1986, 129 Assam Civil Services (Class-I) Officers including the respondents/review petitioners were promoted to Class-I, if only 45 Officers out of 129 such officers were held to be senior and the remaining junior to the appellants in the seniority list, it would amount to creating a class within the class and such a course of action is not permissible in law.

10. Mr. Hansaria referring to the decision of the Apex Court in *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, ; *N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others*, ; *Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others*, and *B.L. Gupta v. M.C.D.* reported in (1998) 9 SCC 233, on which the learned Counsel for the appellants has placed reliance while arguing the appeal earlier, and on the basis of which the writ appeal was earlier allowed, has contended that those decisions being related to the initial appointment vis-a-vis the application of Service Rules at the time of such appointments, are not applicable to the present case, which relates to the fixation of seniority, more so, when the statutory rule provides the manner in which the seniority between the direct recruits and the promotees is to be determined. Mr. Hansaria has further contended that in any case, as it is evident from the affidavit filed by the State respondents that the conscious decision was taken not to make recruitment prior to the 1986 amendment, the quota Rule for the purpose of fixation of the seniority between the direct recruits and promotees cannot be applied in the present case, the quota fixed for recruitment from the two sources, having been abolished.

11. Referring to the decision of the constitutional bench of the Apex Court in *Rudra Kumar Sain and Others Vs. Union of India and Others*, , it has been submitted by Mr. Hansaria, that even when the recruitment from one source is made in excess of quota fixed, the excess appointees cannot be pushed down as the said theory has been disapproved by the Apex Court in the said judgment. Mr. Hansaria placing reliance on the decision in *Dr. Chandra Prakash and Ors. v. State of U.P. and Ors.* reported in (2002) 10 SCC 710 has further submitted that the seniority in terms of Rule 19 of the 1960 Rules has to be determined from the date of appointment against the substantive vacancy and, therefore, the respondents"/review petitioners" seniority cannot be pushed down below 45

direct recruits as it would amount to applying the pushed down theory in the matter of fixation of seniority and depriving the respondents/review petitioners from their right to get the seniority in terms of Rule 19 of the 1960 Rules.

12. Mr. Das, the learned Counsel appearing on behalf of the respondent Nos. 21, 58 and 79 as well as Mr. Hussain, the learned Counsel appearing on behalf of the respondent No. 34 have adopted the arguments of Mr. Hansaria, the learned senior counsel for the review petitioners. Mr. Das, the learned Counsel relying on the decision of the Apex Court in Jagdish Ch. Patnaik and Others Vs. State of Orissa and Others, has further submitted that the promotees having been recruited into service and became the member of the service, by operation of Rule 19 of the 1960 Rules, they are to be placed above the direct recruits appellants in the seniority list, they having been recruited in the same year.

13. Mr. Goswami, the learned senior counsel for the appellants (opposite parties in the review petitions), has contended that though he has no objection in giving a hearing to respondents in the writ appeal, in view of non service of notices on them, the judgment passed by this Court on 24.08.2006 in the appeal does not require any interference. According to Mr. Goswami the process of recruitment having been initiated by issuing the advertisement dated 02.04.1984 by the APSC for direct recruitment and also the written as well as the viva-v6ce test having been conducted pursuant to the advertisement and the list of selection having been sent to the Government prior to the amendment of the 1960 Rules in the year 1986, the rules prevailing at that point of time, i.e. the unamended rule has to be applied in the matter of recruitment vis-a-vis the seniority. Mr. Goswami, relying on the record produced by the State has further contended that no decision whatsoever was taken by the State Government, though in the affidavit filed in the writ appeal, after filing of the review petitions, the State has contended that such a conscious decision not to make any recruitment prior to the amendment of the rules in 1986, was taken. It has further been contended that the records produced by the State reveal the initiation of the process for recruitment to Class-I post by direct recruitment as well as by promotion, i.e. under Rule 4 of the 1960 Rules, prior to the 1986 amendment, and proviso to Rule 4, as stood prior to the said amendment, having stipulated the quota fixed for recruitment from both the sources, the inter-se seniority, between the promotees and the direct recruits, under Rule 19 of the said Rule has to be fixed on the basis of said quota and by applying quota and rota rules, as has rightly been directed by this Court vide judgment and order dated 24.08.2006. It has further been contended by Mr. Goswami that the learned Single Judge even without looking into the records and in the absence of any affidavit of the State has dismissed the writ petition on the ground that a conscious decision was taken by the State not to make any recruitment, i.e. by direct recruitment or by promotion, till the 1986 amendment is made and by following the ratio laid down in Dr. K. Ramlu's case, which is not applicable in the facts of the present case.

14. It has further been contended by the learned senior counsel for the

appellants that Rule 4 and Rule 19 of the 1960 Rules have to be read together for the purpose of fixation of seniority and a person, who is recruited to the service in excess of the quota fixed for recruitment from one source, cannot be termed as "member of the service" within the meaning of Rule 19 and the seniority of such person appointed in excess of quota has to be fixed against the posts available to them by applying the quota and rota rule. It has further been contended by Mr. Goswami that even after the 1986 amendment, the quota rule has not altogether been eliminated, as after amendment, it has been provided that the number of persons recruited by promotion in any calendar year shall be such as may be determined by the Governor and, therefore, the Government is to determine the quota for promotion and in the instant case, the record does not reveal the fixation of any quota for recruitment and, therefore, in any case the respondents cannot have the undue advantage from their orders of appointment, which were issued prior to the appointment of the appellants and in excess of their quota fixed. Mr. Goswami has further contended that there is no question of depriving the promotees appointed in excess of quota, from the period of service having rendered between their date of appointment and the date of appointment of the appellants, i.e. the direct recruit, their appointment being irregular on the ground of the same being in excess of the quota and consequently such period of service cannot, therefore, be counted for the purpose of seniority.

15. Refuting to the submission made by the learned senior counsel for the respondents relating to the breaking down of quota, it has been submitted by Mr. Goswami that in paragraph 1.12 of the memo of appeal what sought to be demonstrated is the deprivation of the direct recruits for a long period of time though the quota has been fixed and not to demonstrate that the quota system has been broken down. It is also apparent from the statement made in that paragraph that the quota system had been adhered to in the last two recruitments made prior to the recruitment in question, i.e. 1986, and, therefore, it cannot be said that the quota system has been broken down. In any case, according to the learned senior counsel, Rule 4 having provided for recruitment to the service on the basis of the quota in any calendar year and Rule 19, the fixation of the seniority recruited in the same year and the "year" having been defined under Rule 3(i) as "the calendar year", the seniority of the promotees vis-a-vis the direct recruits has to be fixed on the basis of the quota fixed for recruitment from both the sources in the calendar year, and in the instant case in the calendar year of 1986.

16. Mr. Goswami has further submitted that the decision in Rudra Kr. Sain (supra), referred to by the learned Sr. counsel for the review petitioners/respondents, has been distinguished in a recent decision of Apex Court in D. Ganesh Rao Patnaik and Others Vs. State of Jharkhand and Others, wherein it has been held that the seniority has to be fixed on the basis of the quota fixed for recruitment from two sources, i.e. promotee and direct recruit. Mr. Goswami, in support of his other contentions has placed reliance on the decisions of the

Apex Court in P.S. Mahal and Others Vs. Union of India (UOI) and Others, ; State of U.P. and Ors. v. Rafiquddin and Ors. reported in 1987 Suppl 401; Keshab Ch. Joshi and Ors. v. Union of India and Ors. reported in 1992 Suppl (1) SCC 272; Syed Khalid Rizvi and Ors. v. Union of India and Ors. reported in 1993 (3) SCC Suppl 575 ; M.S.L. Patil, Asstt. Conservator of Forests, Solarpur (Maharashtra) and Others Vs. State of Maharashtra and Others, and Maharashtra Vikrikar Karamchari Sangathan Vs. The State of Maharashtra and Another,

17. Mrs. Goyal, the learned State Counsel supporting the argument of Mr. Hansaria, the learned senior counsel for the review petitioners/respondents, has also contended that by virtue of Rule 19 of 1960 Rules, the seniority of the promotees has to be fixed above the direct recruits as has rightly been done by the State authorities, as the rule provides for fixation of seniority of promotees above the direct recruits made in the calendar year. It has further been contended by Mrs. Goyal that the quota rule in the instant case cannot be applied in the matter of fixation of seniority as the proviso to Rule 4 of 1960 Rules has been amended by 1986 amendment with effect from 21.07.1986 and though the process of recruitment was initiated prior to the said amendment, as the Government has taken a conscious decision not to make any appointment.

18. We have considered the submissions of the learned Counsel for the parties and also perused the materials available on record including the records produced by the State.

19. The facts narrated above are not in dispute. The record produced by the State reveals that the process for recruitment from both the sources, namely by direct recruitment under Rule 4(a) as well as by promotion under Rule 4(b) of the 1960 Rules were initiated much prior to the notification dated 21.07.1986 by which 1960 Rules has been amended. Prior to 1986 amendment by the said notification dated 21.07.1986, Rule 4 stood as under:

4. Method of recruitment to the service:

(1) Recruitment to the service after the commencement of these Rules, shall be by the following methods, namely--

(a) By competitive examination conducted by the Commission;

(b) By promotion of confirmed members of the A.C.S. (Class-II) who have passed the prescribed departmental examination and successfully completed the prescribed training under Sub-rule (3) of Rule 14 of A.C.S. (Class-II) Rules, 1962, and

(c) By selection, in special cases from among persons, other than members of the Assam Civil Service (Class-II) serving in connection with the affairs of the Government.

Provided that the number of persons recruited under Clause (b) shall be 50 percent of the total number of vacancies to be filled in a year and the persons

recruited under Clause (c) shall not in any year exceed two: Provided further that the persons recruited under Clause (c) shall not at any time exceed 5 percent of the total strength of the cadre.

(2) Notwithstanding anything contained in Sub-rule (1), if in the opinion of the Governor, the exigencies of the service so require, the Governor may, after consultation with the Commission, adopt such method of recruitment to the service other than those specified in the said sub-rule, as he may, by regulations made in this behalf, prescribe:

Provided that the number of persons recruited under Sub-rule (2) shall be determined by the Governor from time to time.

20. The Government of Assam vide notification dated 21.07.1986 and in exercise of the power conferred by proviso to Rule 309 of the Constitution of India made certain amendments to the 1960 Rules including the amendment of Clause-(b) of Sub-Rule (1) of Rule 4 relating to the qualifying service for promotion from ACS Class-II to ACS Class-I and also the proviso to Sub-Rule (1) relating to the quota fixed for recruitment from all the sources, namely by direct recruitment, promotion as well as by selection. By the said amendment proviso to Sub-Rule (1) of Rule 4 has been substituted by the following proviso:

Provided that the number of persons recruited under Clause (b) in any calendar year shall be such as may be determined by the Governor. Provided further that the persons recruited under Clause (c) shall not in any year exceed two and shall not at any time exceed 5 per cent of the total strength of the cadre.

21. By the said amendment, the earlier quota fixed for recruitment into the service between the direct recruit and the promotee, which was 50% each, has been altered and by the new amendment it is left to the Government to decide about the number of persons to be recruited by promotion in any calendar year.

22. As discussed above, the process of recruitment from both the sources, i.e. by direct recruitment and by promotion, was initiated much prior to the 1986 amendment effected vide notification dated 21.07.1986. In fact the APSC pursuant to the advertisement dated 02.05.1984 conducted written as well as viva-voce test between August 1985 to May 1986, finalized the list of selected candidates for direct recruitment under Rule 4(a) of 1960 Rules and sent such list to the State Government on 27.06.1986. Record also reveals finalization of the list of ACS Class-II Officers to be promoted to ACS Class-I service under Rule 4(b) of 1960 Rules prior to the said 1986 amendment.

23. The process of recruitment from both the sources having been initiated much before the notification dated 21.07.1986 issued by the State of Assam amending the 1960 Rules, the recruitment from both the sources are to be governed by the 1960 Rules, as stood prior to its 1986 amendment. The record does not reveal taking any conscious decision by the State Government not to make any appointment from any of the sources either by direct recruitment or by

promotion to Class-I service, till the amendment is made. This view has been taken in the judgment dated 24.08.2006 allowing the writ appeal by placing reliance on the decision of the Apex Court in Y.V. Rangaiyah, N.T. Devin Ketti and B.L. Gupta, wherein the Apex Court has held that in the matter of recruitment, the rule applicable at the time of initiation the process of recruitment shall have to be followed with the exception that even where the vacancies arose during the continuance of the unamended Rule, if the Government takes a conscious decision not to fill up any of the pending vacancies until the process for amendment of the rule is completed, those vacancies could not be directed to be filled up in terms of the un-amended rules after the rules have been amended as held in Dr. K. Ramalu's case. The said decision was referred to and relied upon in the judgment dated 24.08.2006 for the sole purpose of deciding the issue as to whether the un-amended 1960 Rule or the rules stood amended by 1986 amendment shall apply in the matter of recruitment to ACS Class-I as in the present case, it has the effect in determining the seniority between the direct recruit and promotees by virtue of Rule 19 of the 1960 Rules. Therefore, the said view taken in the judgment dated 24.08.2006, does not require any alteration or review.

24. Having held so, it is now required to be seen as to whether 129 promotees promoted vide order dated 11.09.1986 are to be placed above the direct recruits, which includes the appellants, recruited vide order dated 22.10.1986, in terms of Rule 19 of the 1960 Rules. For better appreciation Rule 19 of the said Rule is quoted below:

19. Seniority--(1) The seniority of members of the service shall be determined according to the order of merit in the list prepared under Sub-rule (5) of Rule or approved under Rule 8, if the members join their appointments within 15 days of the receipt of the order of appointment:

Provided that in case a member is prevented from joining within the said period of 15 days by circumstances of a public nature or for reasons beyond his control the Governor may extend it for a further period of 15 days. If the period is not so extended and the member of the service joins within the period extended under Sub-rule (2) of the Rule 15, his seniority shall be determined in accordance with the date of joining:

Provided further that the members of the service recruited I a year under Clauses (b) and (c) of Rule 4 shall be senior to members recruited in the same year and in the same batch under Clause (a) of Rule 4.

(2) The members of the service recruited on the same date under Sub-rule (1) of Rule 4 shall be senior to the members of the service recruited under Sub-rule (2) of Rule 4.

(3) The members of the Service recruited on the same date under Sub-rule (1) of Rule 4 shall be senior to the members of the Service recruited under Sub-rule (2) of Rule 4.

(4) If the confirmation of a member of the service is delayed beyond two years of probation on account of his failure to qualify for such confirmation, he shall lose his position in the order of seniority vis-a-vis, such of his juniors as may be confirmed earlier than him. His original position shall, however be restored on his confirmation subsequently.

25. Proviso to Rule 4, as stood prior to 1986 amendment, fixed the quota for recruitment to Class-I service by direct recruitment and also by promotion fixing the quota of 50% each in a calendar year. The second proviso to Rule 19(1) of 1960 Rules provides for fixation of seniority of the officers recruited by promotion and by selection under Rule 4(b) and (c) over the direct recruit under Rule 4(a) in a year and in the same batch. The year has been defined under Rule 3(i) as the "calendar year". Rule 19 provides for seniority of the members of the service. Rule 3(f) of the 1960 Rules defines the "members of the service" as a member of Assam Civil Service (Class-I) recruited to the service either before or after the commencement of these rules.

26. It has been contended by Mr. Hansaria, the learned senior counsel for the respondents that in the matter of fixation of seniority under Rule 19, the Rule 4 has no application at all, which provides for the quota and the promotees in a calendar year shall have to be treated as senior to the members recruited in the same year and in the same batch under Rule 4 (a), i.e. by direct recruitment, and the respondents having admittedly been appointed prior to the appointment of the appellants and in the same year, they have rightly been treated as senior to the appellants and the final seniority list as such has rightly been published by the State authorities.

27. The Apex Court in V.B. Badami and Others Vs. State of Mysore and Others, and its earlier decisions has held that promotion to the vacancies in excess of promotional quota, if made, such promotion may not be totally illegal but be irregular and such promotees cannot claim any right to hold the promotional post unless a vacancy falls within the promotional quota and if the promotees occupy any vacancies, which are within the quota of direct recruits, when direct recruitment takes place, the direct recruits will occupy the vacancies within their quota.

28. The Apex Court in State of U.P. and Ors. v. Rafiquddin (supra) has also observed that only those persons who were appointed in accordance with rules are entitled to the determination of the seniority. In Syed Khalid Rizvi and Ors. (supra) the Apex Court relying on its earlier decision has observed that the appointment to the post in accordance with rules, which provides for quota, is a precondition and the conditions of rules of recruitment cannot be relaxed and the promotees get their seniority only from the date of regular promotion in accordance with rules and within the quota.

29. The Apex Court in Keshab Ch. Joshi (supra) while interpreting the meaning of "members of the service" appearing in U.P. Forest Service Rules, 1952 has

observed that a person do not became the members of the service unless he is appointed in accordance with rules and the length of continuance of services cannot be counted for the purpose of seniority. In *M.S.L. Patil (supra)*, it has been observed by the Apex Court that the promotees, who are appointed in excess of quota cannot get the entire length of service and they are required to be fitted into seniority according to the Rules and as and when the direct recruitment has been made, the direct recruits are entitled to placement of their seniority into the vacancy reserved for them as per ratio and the seniority determined as per the Rules within the respective quota and the promotees appointed in excess of quota cannot be given seniority from the respective dates of promotion and they have to be considered only from the respective dates on which their respective quota is available. It has further been held that merely because of the fact that the State Government could not make direct recruitment due to its inaction, it cannot be said that the Rule of quota has been broken down. In *Maharashtra Vikrikar Karmachari Sangathan (supra)* the Apex Court has held where there is recruitment from one sources in patent violation of the quota rule and even if such recruits, remained in the office for a long period of time, they cannot take advantage of the situation and claim seniority over the recruits from the other source.

30. In *Jagadish Ch. Patnayak (supra)*, on which Mr. Das, the learned Counsel for the respondent has placed reliance, the Apex Court has observed that in the matter of determining the seniority the year in which the vacancy accrues cannot have any relevance, when the Rule relating to the seniority provides for determination of seniority between the direct recruits and promotees made during the calendar year and it is not possible for the Court to import something which is not there in the rule and thereby legislate a new rule of seniority. It has further been observed that unless and until the final selection is made and appropriate orders of appointment is issued no person can said to be recruited in the Service and the Rule 16 of the Rules in question having been provided the manner of determination of seniority between the promotees and the direct recruits during the same year, the crucial date for determination of seniority under the Rule would be date of the order under which the persons are appointed to the post.

31. In *The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others*, , a constitutional bench of the Apex Court has observed that where appointments are made from more than one source, it is permissible to fix the ratio for recruitment from different sources, and if rules are framed in that regard, it must ordinarily be followed strictly, but, in case, quota rule is not followed continuously for a number of years because it was impossible to do so, the inference is irresistible that quota rule has broken down. It has further been observed that where quota rule has broken down and appointments are made from one source in excess of quota, but are made by following the procedure laid down in the rules for the appointment, the appointees should not be pushed down below the appointees from the other

source inducted in service on a later date, in the matter of seniority.

32. The decision in Chandra Prakash (supra), on which the learned Senior Counsel for the review petitioners/respondents has placed reliance, is not applicable in the facts involved in the present case. In Chandra Prakash case the issue involved was determination of seniority amongst the persons recruited directly in differently years, some temporarily against substantive vacancy, some by selection by Departmental Selection Committee and some by Public Service Commission. The question of inter-se-seniority between the promotee and direct recruit and whether persons recruited from one source in excess of quota fixed under the rules gets seniority over the persons recruited from the other source, which is precisely the question in the present case in hand, did not arise in that case. In Chandra Prakash case the Apex Court has observed that the seniority amongst those recruited, either temporarily but against substantive vacancy or by DSC or PSC is to be determined on the basis of their length of service as the temporary appointees against substantive vacancies cannot be termed as ad hoc or fortuitous appointees.

33. A Constitutional Bench of the Apex Court, in Rudra Kumar Sain case, on which much reliance has been placed by the learned Counsel for the review petitioners/respondents, while answering the question arose for decision i.e. "whether in determining inter-se seniority between the promotees and the direct recruits, the guidelines and directions given in the case of O.P. Singla and Another Vs. Union of India (UOI) and Others, has been followed or not" and considering the provisions of Delhi Higher Judicial Service Rules, 1970 (as stood prior to 1987 amendment), has held that the promotion to Delhi Higher Judicial Service under Rule 16 and 17 of the said rules, which provides for temporary appointment, cannot be termed as ad hoc or fortuitous or stop gap, so as to deny such officer, the length of service rendered by them by virtue of such appointment, in determining the inter se seniority between the promotee and direct recruit, provided such promotions are made in accordance with rules and promotees have requisite qualification as envisaged in the Rules. It has further been held that the quota and rota rules envisaged in the Rule will have no application where appointments are made under Rule 16 and 17, the same being for promotion, and, therefore, in the absence of any other mode of fixation of seniority provided in the rule, the length of service would be the criteria for such fixation of seniority. The Apex Court has further observed that when quota rules has broken down, the seniority between the officers appointed in service from different sources, cannot be fixed by applying rota rule. Reiterating the majority judgment in O.P. Singla case, it has further been observed that though proviso to Rule 7 of the Rules prescribes a quota for direct recruits and provides for rotation of vacancies between them and the promotees, that rule must inevitably break down when appointments to promotees are made to the service under Rule 16 and 17. Having held so, it has further been held that such promotees against temporary posts under Rule 16 and 17, would, therefore, be member of service, from the date of their appointment and the seniority has to be fixed accordingly.

Rejecting the submission of the learned Senior Counsel for direct recruit, praying for re-consideration of the judgment in O.P. Singla case and also that until the principle of "quota" provided in Rule 8 is made applicable to appointments under Rules 16 and 17, such appointees, under Rules 26 and 17 cannot claim continuous length of service for their seniority, the Apex Court in para 14 has observed as follows:

14. So far as the contention of Mr. Gopal Subramaniam, the learned Senior Counsel appearing for the direct recruits is concerned, in praying for reconsideration of the judgment of this Court in Singla case the same also cannot be sustained inasmuch as the Court in Singla case did consider the earlier decision of this Court in Chandramouleshwar case and recorded a finding that in that case, it was only a matter of adjustment of seniority between the promotees inter se and not between the promotes and direct recruits and, therefore, the ratio therein is of no application. Further, Justice Mukharji, in his concurring judgment did consider Joginder Nath case and held that the principle evolved therein cannot be applied to the case in hand, where in se seniority between the promotees and direct recruits are going to be decided on equitable consideration. We are also unable to accept the contention of Mr. Subramaniam that until the principle of "quota" provided in Rule 8 is made applicable to appointments under Rules 16 and 17, such appointees, under Rules 16 and 17 cannot claim continuous length of service for their seniority. Such a contention appears to have been considered and negative in Singla case. The judgment of this Court in Singla case is obviously intended to evolve some equitable principle for determination of inter-se- seniority of a group of officers, when the Rule of seniority contained in Rule 8(2) has been held to be not operative because of breaking down of "quota and rota" Rule. To meet the peculiar situation, the Court evolved the principle that continuous length of service should be the criteria for inter-se seniority between the direct recruits and the promotees, provided, the promotees did possess the required qualification as per Rule 7 and the appointments had been made under Rules 16 and 17, after due consultation and/or approval of the High Court, which in our view also is the most appropriate basis, evolved in the fact-situation. This being the position, we see no justification for reconsidering the decision of this Court in Singla case. That apart, the Recruitment Rules have been amended in the year 1987 and the aforesaid principle, which had been evolved in Singla case would apply for determining the inter- se- seniority between the promotees and direct recruits, all of whom had been appointed to the Higher Judicial Service, prior to the amendment of the Rules in question, which was made in the year 1987. We have also considered the arguments advanced by Mr. P.P. Rao, the learned Senior Counsel, appearing for the Delhi High Court and we are unable to persuade ourselves to accept the same inasmuch as it is not a mere question of levelling, as urged by Mr. Rao, but, it is a question which was directly considered by this Court in Singla case and after examining the representative order the Court positively recorded a conclusion that the appointment made under Rule 16 or 17

cannot be held to be alien to the cadre. In fact the Court was persuaded to come to the aforesaid conclusion, as it was found that the persons appointed under Rules 16 and 17 having all the necessary qualifications and having been appointed after due consultation with the High Court, though they had served for more than five to seven years, but yet have been shown junior to the direct recruits, who had come to the service much later than them. It is, therefore, not possible for us to accept Mr. Rao's contention and permit any further scrutiny into such appointments made either under Rule 16 or under Rule 17 of the Recruitment Rules. It is in fact, interesting to notice that the Schedule to the Recruitment Rules, which came into existence in 1971 was amended for the first time only in the year 1991, 20 years after and if a strict construction to the different provisions of the Rules would be given, then all the temporary appointees under Rule 16, who might have rendered 5 to 10 years of service would be denied of their right for the purpose of seniority. It is this impasse created on account of inaction of the authorities and on account of non-adherence to the provisions of the Rules strictly, which persuaded the Court in Singla case to evolve the principles for working out equities and that principle has to be followed by the High Court in drawing up the seniority list. It is not necessary to deal with the contention, raised by Mr. Rakesh Kurnar, appearing for the direct recruits and Shri J.P. Singh, appearing in person, who is a direct recruit also, as well as Mr. R.C. Chopra, appearing in person, who is a promotee, as essentially, they adopted the arguments of either Mr. Dipankar Gupta or Mr. Gopal Subramaniam and Mr. Kapil Sibal.

The decision in Rudra Kumar Sain case has been distinguished by the Apex Court in D. Ganesh Rao Patnaik case.

34. The Apex Court, in the said case, in view of treating the appointment of officers by promotion made under Rule 16 and 17 of the rules as ad hoc/fortuitous, by the High Court, has quashed the seniority list, both provisional and final, further directing to redetermine the seniority of the promotees visa-vis direct recruits, on the basis of continuous length of service in the cadre, as indicated in Singla case.

35. In O.P. Singla case, the Apex Court while rejecting the contention that rotation rules for determining seniority is violative of Article 14 and 16 of the Constitution, has observed that whenever the rules provides for recruitment to a service from different sources, there is no inherent infirmity in prescribing a quota for appointment of persons drawn from those sources and in working out the rule of quota by rotating the vacancies as between them in a stated proposition. Considering the facts of the said case, it has been held that the quota and rota rule has been broken down when appointments of promotees are made to the service under Rule 16 and 17, which rules provides for appointment from amongst the promotees only and, therefore, there cannot be, any quota reserved for direct recruits or rule of rotation of vacancies between the promotee and direct recruit, and hence the quota and rota rule cannot be applied. The

seniority of such officers, therefore, has to be determined on the basis of their dates of appointment either in temporary post created in service or in substantive vacancies to which they were appointed in a temporary capacity, in accordance with rules and having requisite qualification as per rules.

36. In the aforesaid decisions, the question, therefore was, whether the officers appointed by promotion under Rule 16 and 17 of the Delhi Higher Judicial Service Rules, 1970, (prior to 1987 amendment) became the "member of the service" though they were appointed against temporary posts created or against substantive vacancies but on temporary capacity and whether their seniority is to be fixed from the date of their such appointment. The Apex Court, in view of the provisions contained in Rule 16 and 17 of the said rules, has, as discussed above, answered the question in the affirmative. The Apex Court has further held that when quota rule has broken down, the rota rule for the purpose of fixation of seniority between the officers recruited from two sources, cannot be applied. But in the instant case, the appointments by way of promotion, has not been made under any rule for temporary appointment but were made under Rule 4 of the 1960 Rules, which provides for recruitment to service by direct recruitment, promotion as well as by selection, stipulating the quota fixed i.e. 50% each for direct recruitment and by promotion, of the available vacancies in a calendar year. The respondents/review petitioners and others were promoted to ACS Class-I by virtue of the said rules in the year 1986. The appellants and others were directly recruited in the same year i.e. 1986. Rule 19 of 1960 Rules, provides the manner of determining the seniority between the direct recruit and promotee in a year. Second proviso to Rule 19(1) of the said rules, requires fixation of seniority of promotees with selectees over the direct recruits recruited in the same year. "Year" has been defined in Rule 3(i) as the "calendar year". Therefore, the inter-se-seniority between the promotee and direct recruits made in a calendar year, has to be fixed by taking into account both Rule 4 fixing quota, and Rule 19, i.e. seniority rule. The recruitment of promotees and direct recruits, in this case, being in the same calendar year, their inter-se-seniority has to be fixed by rotating the vacancies as per the quota fixed in Rule 4 of 1962 Rules (as stood prior to 1986 amendment), otherwise, it will amount to denying the direct recruits from their legitimate claim, if all the promotees appointed in excess of their quota fixed, in a calendar year, are declared as senior to direct recruits. The same would also be inequitable.

37. The contention of Mr. Hansaria, the learned Senior Counsel for the review petitioner/respondents that their appointments having not been fortuitous or ad hoc or stop gap, having made in accordance with rule and fulfilling the requisite qualification and also their promotion having never been challenged on the ground of being in excess of quota, the promotees promoted in excess of quota cannot be pushed down below the in direct recruits appointed against their quota in the matter of seniority, cannot be accepted, in view of the aforesaid discussion. The appointments of the promotees in excess of quota, though not illegal would be irregular and hence they cannot have advantage of such

promotion and claim seniority over direct recruit, made within the quota.

38. In this case, the provisional seniority list was published in June, 1993 and the appellants have challenged the same in the year 1995 by filing the writ petition. The final seniority list, during the pendency of the writ petition has been published on 02.07.2002,. which fact was not brought to the notice of the Court before disposal of his writ petition. However, the status of the appellants vis-a-vis the respondents have not in the meantime, changed as no further promotion has been affected. Moreover, in 1989, the ACS-I and Class-II posts were merged in the common ACS Class-I post and there was neither any direct recruitment nor promotion to ACS Class-I post, between 1986 and 1989. Mr. Hansaria and Ms. Goyal, the learned Counsel though have submitted that the final seniority list has not been challenged, they have submitted that as the said final seniority list is same as the provisional one, the matter of inter-se seniority between the promotee and direct recruit may be decided on merit, by ignoring the technicality.

39. In view of the aforesaid discussion, we are of the view that the promotees, who were appointed against the quota fixed for them, by virtue of Rule 4(1), shall be senior to the direct recruits made in the year 1986, by virtue of the second proviso to Rule 19(1) of the 1960 Rules. The promotees, who were appointed in excess of their quota, cannot claim seniority over the direct recruits of that year.

40. The next question, therefore, arises in the present case, is, whether the quota rule as envisaged in Rule 4 has been broken down, so as not to follow the quota and rota rules in the matter of fixation of seniority between the promotees and direct recruits, made in a calendar year. As discussed above, proviso to Rule 4(1) of 1960 Rules (as stood prior to 1986 amendment) stipulates that vacancies occurred in any calendar year is to be filled up by direct recruitment and by promotion in the ratio of 50:50. Second proviso to Rule 19(1) stipulates fixation of seniority of the promotees over the direct recruits, made in a calendar year. It is a settled position of law that when a rule or a section is a part of an integral scheme, it should not be considered or construed in isolation. One must have regard to the scheme of the entire Rule in order to determine the true meaning of any or more of the rules contained therein. An isolated consideration of a provision leads to the risk of some other interrelated provision becoming otiose or devoid of meaning. In the present case in hand, taking into account the scheme of the 1960, which provides for year wise recruitment, reservation of quota in respect of vacancies arose in a calendar year for direct recruitment and promotion as well as fixation of inter-se-seniority between the promotees and direct recruits, made in a calendar year, both the Rule 4 and Rule 19 of the 1960 Rules are to be read together, those being interrelated and if that is not done, the purpose of fixation of quota and consequent seniority would become meaningless. Therefore, the inter-se seniority between the promotees and direct recruits under Rule 19, made in a calendar year, in the absence of breaking down of quota rules, has to be fixed on the basis of quota by applying quota and rota

rules. Mr. Hansaria, the learned Senior Counsel, though referring to para 1.12 of the memo of appeal has submitted that the quota rule has been broken down and therefore, while fixing seniority, quota and rota rule cannot be applied, it appears from the chart given in the said para that in the last two years of recruitment i.e. in the year 1980 and 1985, prior to the present year of recruitment in question, i.e. 1986, the quota rule has been strictly followed. The respondents/review petitioners could not place anything on record, apart from the aforesaid contention, to show that the quota rule has not been adhered to for a long time and as such has broken down. That apart, Rule 4(1) envisages reservation of quota against year wise vacancies. Therefore, the quota rule, in our considered opinion, has not been broken down.

41. Having held that the seniority between the promotees and direct recruits are to be determined on the basis of the quota fixed for recruitment from each source under Rule 4 of 1960 rules, on the basis of the vacancies available in the calendar year, by applying quota and rota rule, the next question which requires consideration is, how many vacancies were available in the calendar year 1986 and the vacancies to be filled up by direct recruits and promotees. In the judgment dated 24.08.2006, the authority was directed to fix the seniority of 45 promotees over the direct recruits, however, upon hearing the learned Counsel for the parties and on perusal of the records as discussed above, it appears that though the Government on 07.03.2004 requested the Assam Public Service Commission to make selection against 30 Nos. of posts, 45 persons have been appointed from out of the list prepared by the A.P.S.C. in the month of October, 1986 by direct recruitment. On the other hand, 129 ACS Class-II Officers were promoted to Class-I on 11.09.86. The records produced before this Court do not conclusively reflect the total numbers of vacancies available for promotions and by direct recruitment in that year. Therefore, this Court finds it difficult to ascertain the exact number of vacancies available to each of the sources of recruitment under Rule 4 of 1960 rules, which also provides for recruitment to ACS Class-I by selection apart from promotion and by direct recruitment. The authority is, therefore, required to ascertain the vacancies available in the year 1986 for recruitment from each of the sources in terms of the quota fixed by Rule 4 of 1960 Rules (as stood prior to 1986 amendment) and to recast their seniority by rotating the vacancies i.e. by following the quota and rota rules. It is also made clear that by virtue of second proviso of Rule 19(1) of 1960 Rules, the promotees and selectees to the extent of the vacancies in their quota, as envisaged in proviso to Rule 4(1) of the said Rules (as stood prior to 1986 amendment), shall have to be placed over the direct recruits to the extent of the vacancies in their quota appointed in the calendar year 1986. The direction contained in the earlier judgment and order dated 24.08.2006 stands modified accordingly.

42. In view of the aforesaid discussion, we maintain the earlier judgment and order dated 24.08.2006, in setting aside the impugned provisional seniority list as well as the final seniority list of ACS Class-I Officers, with the aforesaid

modification and direct the authorities to recast the seniority in accordance with the aforesaid directions.

43. The review petitions as well as the writ appeal stand disposed of in terms of the aforesaid directions. No cost.