
(1993) 01 SC CK 0069

In the Supreme Court Of India

Case No : Civil Appeal No's. 185-187 of 1993

Prafulla Kumar Swain

APPELLANT

Vs

Prakash Chandra Misra and Others

RESPONDENT

Date of Decision : 18-01-1993

Acts Referred:

Constitution of India, 1950 — Article 162, 166, 309
Forest Service (Appointment by Promotion) Regulations, 1966 — Regulation 12, 5, 5(3)
General Clauses Act, 1897 — Section 6
Orissa Forest Service Class II Rec

Citation : (1993) 1 JT 360 : (1993) LabIC 853 : (1993) 1 LLJ 749 : (1993) 1 SCALE 162 : (1993) 3 SCC 181 Supp : (1993) 1 SCR 241

Hon'ble Judges : L. M. Sharma, C.J;S. P. Bharucha, J;S. Mohan, J

Bench : Full Bench

Final Decision : dismissed

Judgement

1. Leave granted in all the matters.
2. All these appeals can be dealt with under a common judgment since they are directed against the judgment and order dated August 5, 1991 passed by the Orissa Administrative Tribunal, Bhubaneswar in Original Application No. 679 of 1988.
3. Prakash Chandra Misra (Respondent 1 in all these appeals) was directly recruited to the Orissa State Forest Service Class II by the Orissa Public Service Commission in the year 1979. After completion of training for two years at Forest Service College, Burnihat, Assam he was appointed as an Assistant Conservator of Forests. He moved the Administrative Tribunal challenging the seniority of the Forest Rangers who were members of Orissa Subordinate Forest Service and were promoted as Assistant conservators of Forests, between his recruitment and the joining of service after training, according to first respondent, the promotees who were promoted in the years 1981 and 1982 ought to have been assigned a place below him as per recruitment rules. The seniority of direct

recruits vis-a-vis the promotees required to be decided on the basis of the Orissa forest Service Class II Recruitment Rules, 1959.

4. It was further urged that he was recruited in the year 1979 through Public Service Commission. He had to undergo training for two years and thereafter he was appointed in the year 1981.

5. Therefore, the short question was whether the respondent was to be assigned seniority from the year 1979 (the year of recruitment) or from the year 1981 (the year of appointment). The Tribunal observed that Rule 9(a) of 1959 Rules read with Rule 6 would point out that the promotee officers were to be on probation for a period of two years like the direct recruits. Such direct recruits were also sent for training to the Forest Training College. The 1959 Rules used the word "recruited", the 1984 Rules used the word "appointed". These words must be assigned proper meaning. Inasmuch as the direct recruits were to be treated as seniors to promotees *ven bloc* the first respondent must be treated as a recruit of 1979 and ought to be treated as senior to promotees.

6. The next question that came up for consideration was to the application of quota rule. On this, the Tribunal held that both in the 1959 Rules as well as in the 1984 Rules, the promotees and direct recruits will be in the proportion of 1/3rd and 2/3rd. In the present case, 1959 Rules being applicable there was no doubt that promotees have substantially encroached upon the quota for direct recruits. In view of that, promotions which have been made more than the quota prescribed in the rules have to be either adjusted against future vacancies in the promotion quota or reverted. Such promotions beyond the prescribed quota are illegal.

7. In view of these findings, the Tribunal held that the first respondent was entitled to be treated (i) as a direct recruit of 1979 and (ii) he shall be confirmed and promoted on the basis of being direct recruit of 1979. His seniority was to be fixed on the basis of being a direct recruit of 1979 within the 2/3rd quota for direct recruits. These direction were to be implemented within six months from the date of the order. On these terms, the petition of the first respondent came to be allowed.

8. Aggrieved by this judgment, SLP (C) No. 615 of 1992 has come to be preferred by Prafulla Kumar Swain, a promotee (Respondent No. 91 before the Orissa Administrative Tribunal).

9. SLP (Civil) No. 1604 of 1992 has come to be preferred by Bijay Kishore Mohanty and 10 others (respondents before the Orissa Administrative Tribunal).

10. The State has preferred SLP (C) NO. 4186 of 1992.

11. Mr. Raju Ramachandran, learned Counsel for the appellant in SLP (C) No. 1604 of 1992 would submit that the first respondent was selected for undergoing superior Forest Service Course at the Forest Service College, Burnihat, Assam in the year 1979. Having regard to the terminology of the order which says "he was

selected", it cannot be held that he could lay a claim to the post. The Orissa Forest Service Class II Recruitment Rules, 1959 govern the case in question.

12. The Tribunal had gone wrong in its interpretation of the various rules. First of all, it is incorrect to hold that they are merely administrative instructions. On the contrary, they are rules framed under proviso to Article 309 of the Constitution of India, as a result of which, they have statutory force. Having held that both the direct recruits as well as the promotees undergo probation for a period of two years, properly speaking, the period of training for the direct recruits could not count as service. That is precisely that is stated in Clause (c) of Regulation 12. If under the said Regulation the appointment to service is to commence only after the successful completion of training there is no justification whatever to conclude that the date of recruitment could be the relevant date for the purposes of reckoning the seniority. Recruitment in the submission of the learned Counsel would merely mean enlistment or selection. That is why Regulation 13 says the "selected candidates". Even Rule 9 has not appreciated in its proper prospective.

13. As regards the ratio of 2/3rd and 1/3rd between direct recruits and promotees the relevant rule that is applicable is Rule 5(3). That sub-rule contains a provision: "Save as otherwise decided by Government". If, therefore, it has been otherwise provided by the Government, this ratio of 2/3rd and 1/3rd does not apply. In other words, there is overriding power vested in the Government. Hence, the ratio is flexible and contemplates a departure whenever the Government otherwise decides. Here again, the Tribunal has gone wrong. In *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, this Court has taken the view that where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule. In any event, the placement of Respondents 42 to 94 as per Civil List corrected upto 1982 was published in the year 1985 by the State Government. They are the promotees from amongst the various Rangers in Subordinate Service Class II as Assistant Conservator of Forests in 1980. This was at a time when the first respondent was undergoing training at Burnihat, Assam. If really, therefore, the graduation list was published as early as 1985, there is absolutely no justification for the first respondent to approach in the year 1988. The judgment of the Tribunal has resulted in unsettling the settled matters. For these reasons, it is prayed that the order of the Tribunal may be reserved.

14. Mr. A.K. Panda, learned Counsel for the State adopts the arguments of Mr. Raju Ramachandran, learned Counsel for the appellant.

15. Mr. Shanti Bhushan, learned Counsel appearing for the first respondent would submit that recruitment is different from appointment. The definition of the service is contained under Rule 3(e) which states "service" means Orissa Forest Service Class II. The service consists of Officers of Class II who are designated as Assistant Conservator of Forests. Rule 5(c) talks of recruitment to Class II. In

Sub-rule (a) a reference is made to Regulation. What is contemplated hereunder is nothing more than the competitive examination prescribed under Regulation. Therefore, Regulation 12 cannot be pressed into service. When an officer is recruited to Class II Service it does not mean that only from the date of appointment his seniority to be reckoned. The very fact that his recruitment to the service is enough. The argument of the other side that the period of training will have to be excluded merely because both the direct recruits as well as the promotees undergo probation is untenable. The question is, whether the direct recruits who are definitely superior could be pushed lower down to the promotees. In Service Law the direct recruits are always treated on a better footing than the promotees.

16. Even though the relevant years of recruitment and promotion of persons involved are essentially of the years 1979 to 1984, yet it is 1984 Rules which will govern.

17. Rule 24 of the 1984 Rules contains the repeal and saving clauses. That says that all the officers who were appointed prior to the repeal shall be deemed to have been appointed under the provisions of 1984 Rules. If that be so, the aforesaid Explanation to Rule 16 must apply. Thus it is clear as on today the seniority by the 1984 Rules. The same has clearly provided that the date of appointment of direct recruits for the purposes of seniority will be deemed to be 2 years prior to the date of appointment to a working post. Since the normal period of training is 2 years this cannot but mean that the date of appointment of direct recruits for the purposes of seniority will be the date of selection. If seniority is not a vested right it is well-open to the Government to alter the same by making a departure from 1959 Rules and providing for the same in the amended 1984 Rules.

18. Learned counsel draws our attention to Indian Forest Service (Appointment by Promotion) Regulations of 1966. In the said Regulations, Regulation 5 in its Explanation II states that in computing the period of continuous service the period of training which an officer had undergone is to be included. If that is the intention for Grade I Service, certainly a different intention cannot be spelt out under the 1959 Rules for Grade II Service. This is also evident when the 1984 Rules are looked at. There the rules clearly lay down in Rule 16 in its Explanation that the training period is not to be excluded.

19. When rules specifically prescribe the quota as 2/3rd and 1/3rd the Government cannot wriggle out of the situation that a saving provision had been made which is factually not so in this case. For this purpose, the Government has relied upon the proceedings held on 5.1.80 and 7.1.80. The proceedings of Departmental Promotion Committee will not constitute the Government order. All Government orders must be issued under the signature of the Minister according to the Rules of Business. In the present case, no such order of the Minister regarding the alteration of quota is produced. The statutory rules lay down a clear legislative policy with regard to fixation of quota so that the brightest talent

be made available for the service. As to what would be the consequence of violating a statutory rule has come to be laid down in Keshav Chandra Joshi and others etc. Vs. Union of India and others, . That ratio squarely applies to the facts of the case.

20. The point relating to laches was never argued before the Tribunal. Therefore, the appellant cannot be allowed to argue at this stage.

21. We will now proceed to set out the necessary factual background. The Orissa Public Service Commission through an advertisement dated 8.10.64 invited applications from open market for admission of candidates to a competitive examination for selection to the posts of Orissa Forest Service Class II service. 18 candidates were selected. They were sent for training at Indian Forest College, Dehra Dun during the year 1965-67. Only on successful completion of the training they could be appointed to Class II service. One of the candidates who was successful in completion of training and who received the posting Order 233/67 came forward with a writ petition before the Orissa High Court that he had been assigned in the list of graduation a rank junior to the promotees who were confirmed by Service Commission after the recruitment of the petitioner. The scope of 1959 Rules came up for consideration and the High Court concluded that the recruitment to Class II Service was complete only after successful completion of two years training in the Forest College. Relief was granted on that basis. That came up in appeal to this Court in Civil Appeal Nos. 2051-52 of 1974 (State of Orissa v. Manorajan Rath and Ors.). By an order dated 7th of January, 1988, finding that there was no ground to interfere with the judgments the High Court, the appeals came to be dismissed

22. While the matter stood thus one of the directly recruited officers (Prakash Chandra Misra, respondent No. 1) filed a petition before the Tribunal challenging the seniority. He contended that the promotees who were promoted in the year 1981-82 ought to have been assigned a place lower than him as per recruitment rules. Two main contentions were:

1. His services should be reckoned from the date of recruitment itself and not from the date of actual appointment. Therefore, the exclusion of the period of two years' training for the purposes of reckoning the seniority was illegal.

2. The promotees had been appointed in excess of the quote which the rules had prescribed. There is no specific order of Government providing otherwise.

23. The Tribunal accepted these contentions and held that the petitioner before it being a direct recruit of the year 1979 must be treated as such and had to be confirmed and promoted on the basis of being a direct recruit of the year 1979. This should be done within the 2/3rd quota for direct recruits. Accordingly the petition was allowed. It is under these circumstances, special leave petitions have come to be preferred. Having regard to the arguments two points arise for our determination:

(1) Whether the direct recruits are to be considered as recruited in the year in which they were selected by the Service commission and sent for training into the Forest College or in the year in which they were actually appointed to a working post on completion of training?

(2) Whether there was a quota fixed for promotees in the Orissa Forest Service during the relevant years.

24. Even at the outset, we may point out that the Tribunal has grossly erred in holding that the Orissa Service Class II recruitment Rules of 1959 are mere administrative instructions. On the contrary, these rules were framed under the proviso to Article 309 of the Constitution and they are statutory in character.

25. Section 3(e) of 1959 Rules says "Service" means the Orissa Forest Service Class C. Rule 5 reads as under:

5. (1) Recruitment to Class II service shall be made-

(a) by direct recruitment on the result of competitive examination as per Regulation-I appended to this rule;

(b) by promotion as per the Regulation II appended to this rule governing promotions to the Orissa Forest Service, Class II;

(2) Government shall decide from time to time the number of vacancies in Class II Service to be filled by direct recruitment and by promotion.

(3) Save as otherwise decided by Government, number of posts of the service filled up by promotion shall not exceed one-third of the total number of such posts in the cadre." Rule 9 is as follows:

9(a) When officers are recruited by promotion and by direct recruitment during the same year the directly recruited members shall be considered senior to the promoted members irrespective of their dates of appointment.

(b) In case of promotion, seniority may be determined in accordance with the positions the promoted officers held in the recommendation of Public Service Commission made according to merit.

(c) In case of direct recruitment, seniority may be determined according to the achievements in the examination in the Forest College.

26. Besides these rules there are also Regulations dealing with direct recruitment. It may be stated that the Regulations prescribe the condition of eligibility (Regulation 1(2)), educational qualification (Regulation 1(6)), written test by means of a competitive examination (Regulation 18(a)) and a viva voce test. The candidates are to be summoned for viva voce test on securing the minimum qualifying marks prescribed by the Commission. Thereafter the Commission prepares its list of successful candidates provided they are found fit in the physical test as prescribed under Regulation 1(5). The list of successful candidates is to be forwarded to the Government for approval.

27. Regulation 12 is important for our purposes. Under that Regulation the finally selected candidates are required to undergo two years training. During the period of pendency a consolidated monthly allowance of Rs. 150/- as stipend is paid. Under Clause (6) of that Regulation he is required to execute a bond provided for in Appendix A. Regulation 12(c) in unmistakable terms says the period of training will not count as service under Government. Such service will count only from the date of appointment to the service after successful completion of the course of training. (Emphasis supplied) We must give full meaning and effect to this Regulation.

28. At this state, we will proceed to decide as to the meaning and effect of the words "recruitment" and "appointment". The term "recruitment" connotes and clearly signifies enlistments, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradistinction the word "appointment" means an actual act of posting a person to a particular office.

29. Recruitment is just an initial process. That may lead to eventual appointment in the service. But, that cannot tantamount to an appointment. No doubt, Rule 5 talks of recruitment to Class II service. We consider these are two sources of recruitment. Nowhere in the Recruitment Rules of 1959 it is specified that the services of a direct recruit under the Government shall be reckoned from the date of selection in the competitive examination. On the contrary, Regulation 12(c) is very clear that the period of training is not to be reckoned as Government service. It is admitted before us that after the successful completion of training when the appointment order is issued the direct recruits are put on probation. Similar is in the case of the promotees. Both of them undergo probation. Therefore, in the light of these provisions it is not possible for us to accept the contention advanced on behalf of the direct recruits that their seniority must be reckoned from the date of their recruitment.

30. This is why Mr. Shanti Bhushan, learned Counsel for the direct recruits, respondents, would urge that 1984 Rules would govern. Rule 16 in Explanation provides thus:

Explanation - For the purpose of Clause (a), the year of appointment of direct recruits shall be deemed to be the year arrived at after deducting two years from the date of successful completion of the training in the Forest College.

31. He would urge that in view of Rule 24 all the appointments must be deemed to have been made under these Rules. Rule 24 reads thus:

24. All rules and orders corresponding to these rules and in force immediately before the commencement of these rules are hereby repealed:

Provided that nothing in these rules shall be construed as affecting or invalidating the appointments already made or orders issued in accordance with the provisions of any rules or orders in force immediately before the commencement

of these rules and that all such appointments and orders shall continue in force and shall, as far as may be, be deemed to have been made and issued under the appropriate provisions of these rules:

Provided further that Government may, by order, direct that any of the provisions of these rules shall not apply to the Officers already appointed under the rules and orders in force immediately before the commencement of these rules or shall apply to them with such modifications as the Government may specify in that order.

32. Therefore, according to him, the benefit of Explanation to Rule 16 quoted above must apply. We find it impossible to accept this contention for the following reasons:

1. Since the appointments in question have been made under 1959 Rules, 1984 Rules will be inapplicable.

2. The 1984 Rules came into force only when they were published in the Official Gazette on December 21, 1984.

3. Explanation under Rule 16 is a substantive provision. Therefore, it cannot be retrospective.

4. As regards Rule 24, the proviso clearly states that the Rules cannot be construed as affecting or invalidating the appointments already made.

33. Therefore, if any right has been acquired or any privilege had accrued that would remain unaltered. Therefore, these appointments which are governed by the 1959 Rules will continue notwithstanding the repeal. Clauses (a) and (e) of Section 6 of the General Clauses Act, 1897 also point this position:

6. Effect of repeal: where this Act, or any (Central Act) of Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b).....

(C).....

(d).....

(e) effect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.

34. Coming to the deeming clause, that creates a legal fiction; the Court is to ascertain for what purpose the fiction is created. In Justice G.P. Singh Principles of Statutory Interpretation (Fourth Edition 1988) at page 208 it is stated thus:

As was observed by James, L.J.: "When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what person the statutory fiction is to be resorted to". "When a legal fiction is created", stated S.R. Das, J. "for what purpose, one is led to ask at once, is it so created?"

35. Therefore, by the operation of deeming clause it only enables appointments made under 1959 Rules to be continued under 1984 Rules. Certainly, by the repeal of 1959 Rules it cannot mean all those appointments cease. Nor again, the substantive provision of Rule 16, as stated above, would govern. Therefore, Rule 24 has no application. Thus, we conclude that the seniority of direct recruits will have to be reckoned only from the date of appointment and not from the date of recruitment.

36. The gradation list which was impugned by the first respondent before the Tribunal was prepared in pursuance of the order of this Court read with the aforementioned judgment of the Orissa High Court and this is so stated in a letter dated 4th January, 1989 written by the Deputy Secretary to the Government of Orissa, Forest, Fisheries and Animal Husbandry Department, Bhubaneshwar to the Principal Chief Conservator of Forest, Orissa, Bhubaneshwar (Annexure- II to the SLP in SLP (C) NO. 1604 of 1992). That this gradation list had been framed upon the aforesaid basis also does not appear to have been brought to the attention of the Tribunal.

37. The gradation list has been in operation over several years. We see no reason to unsettle the settled position. In this behalf we draw support from the judgment of this Court in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, . We may also note that though the same question was before this Court a little before the petition was made by the first respondent before the Tribunal, no effort was made by the first respondent to intervene and place before this Court his point of view. It is inconceivable that he would not have known that the same question was before this Court.

38. Turning to the quota rule the records reveal that the Government had clearly taken a decision to increase the number of posts to be filled up by promotion in excess of the 1/3rd of total posts in the cadre on administrative grounds connected with nationalisation of Kendu Leaf Trade in 1972-73 in the interest of public due to non-availability of direct candidates trained in the Indian Forest College, Dehradun. It is not correct to say that Government have decided that the quota of direct recruitment which will be encroached upon by the promotees will be released as and when direct recruits are available. In fact, it was decided that the 4 direct candidates who were by then under diploma course Training in Forestry at Dehradun in the event of their coming out successful during 1974 from the training College may be appointed and in consequence, the junior most promotee officers who were appointed on ad hoc basis as aforesaid pending concurrence of Orissa Public Service Commission will have to be reverted to

make room for them. No promotion to Orissa Forest Service Class II could be made on regular basis without obtaining concurrence of the Orissa Public Service Commission as per Clause 2(h) of Regulation II appended to the Orissa Forest Service Class II Recruitment Rules, 1959. In view of the urgency to implement the Kendu Leaf Scheme in 1973, 39 Forest Rangers were appointed to Class II Forest Service on an 'ad hoc' basis for a period of six months or till concurrence of the Commission is received for their final appointment. The 39 Forest Rangers had already been promoted to Orissa Forest Service Class II on regular basis on the recommendation of the Orissa Public Service Commission. In view of this, it is not correct to say in that the decision taken by Government for promoting excess promotees in the year 1972 was only to promote them on an ad hoc basis within that quota. Hence, to contend that the promotees would obviously have to yield to direct recruits who came in subsequently within their quota and would consequently also not be eligible for seniority above direct recruits, is untenable.

39. We may also add that there were earlier proceedings in Transfer Application No. 147 of 1986 before the Orissa Administrative Tribunal. The decision was rendered on 3.7.87. SLP (C) No. 1624 of 1988 filed against the said decision was dismissed by this Court on 18.1.89. There was also an application, O.J.C. No. 588 of 1972 before the Orissa High Court in Manorajan Rath v. State of Orissa and Ors. The decision was rendered on 10.6.74. Against the said decision Civil Appeal Nos. 2051-52 of 1974 were preferred to this Court which were dismissed on 7.1.88. The Tribunal in the above judgment had held on perusal of the departmental file that the Government had taken decision to increase the number of posts to be filled up by promotion on administrative grounds. This was necessitated because of the nationalisation of Kendu Leaf Trade. Action to fill up the posts by promotion of Forest Rangers in excess of 1/3rd of the total posts in the cadre was taken in pursuance of the decision of the Government. Though the actual decision of the Government is not produced before us yet the proceedings of the meetings of the Departmental Committee held on 5.1.80 and 7.1.80 to select Forest Rangers suitable for promotion took note of Rule 5(3) which contains the saving clause:

Save as otherwise decided by Government, number of posts of the service filled up by promotion shall not exceed one-third of the total number of such posts in the cadre.

40. These proceedings speak volumes. The proceedings were given effect to by promotions. Such promotions in excess of the prescribed quota had to be made since no more directly recruited candidates were available during that year. The Government did not want its work to be hampered by allowing the posts were to remain vacant. While seeking the concurrence of Orissa Public Service Commission to the decision taken by the Departmental committee held on 5.1.80 and 7.1.80, the proceedings of the Committee explain the circumstances under which the Government decision was taken. From the point of view, we find the decision in Keshav Chandra Joshi's cases (supra) has no application here.

Therefore, the promotions give in excess of 1/3rd quota are valid. There is no justification to push down the promotees in seniority. The promotion in excess of the prescribed quota was necessitated by the exigencies and in the interest of the public. It is supported by the conscious decision of the Government which is permissible under Rule 5(3). Therefore, we reject the arguments advanced on behalf of the direct recruits in this regard.

41. A reference was made to the Indian Forest Service (Appointment by Promotion) Regulations, 1966, particularly Regulation 5. It is also urged that from the post of Class II, promotion is to be made to Class I. We are of the view that since the appointments in question are regulated under Orissa Forest Service Class II Recruitment Rules, the said Regulations of 1966 have no application. Further, as pointed out above, the Orissa Rules v/ere framed under proviso to Article 309 of the Constitution of India and have statutory and binding force.

42. Now comes the proverbial last straw on the camel's back.

43. There have been laches on the part of the direct recruits in seeking the remedy. When the list was published in 1985 nothing prevented them to approach earlier. This is the point to be put against them.

44. That this position was known to the direct recruit (Prakash Chandra Mishra) is clear from paragraph 18 of his petition before the Tribunal. It reads thus:

18. Therefore, placement of Respondent Nos. 42 to 94 as per Civil List corrected upto 1982 published in the year 1985 by the State Government who are promotees from amongst the Forest Rangers insubordinate Service to Class II Service as Assistant Conservator of Forests in the year 1980 when this applicant was undergoing training at Burnihat, Assam, is patently illegal and an act without jurisdiction by the State Government of Orissa.

(Emphasis supplied)

45. We do not want to unsettle settled matters which will lead to several complications.

46. In view of the foregoing discussion, we set aside the judgment of the Tribunal. The appeals will stand allowed. However, there shall be no order as to costs.