

(1998) 07 PAT CK 0021
In the Patna High Court
Case No : C.W.J.C. No. 8305 of 1989

Sanjay Kumar Sinha-II and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-07-1998

Acts Referred:

Bihar Forest Service Rules, 1953 — Rule 29, 3, 30, 35, 36
Constitution of India, 1950 — Article 309

Citation : (1998) 3 PLJR 121

Hon'ble Judges : N.K. Sinha, J;B.P. Singh, J

Bench : Division Bench

Advocate : B.K. Kanth, Ajit Ranjan Kumar, Hirdya Ranjan Pd. and Mukul Sinha, for the Appellant; B.N. Singh and Dilip Kr. Sinha and Sadanand Jha, Chakrapani and Anil Kumar Upadhyay, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Singh, J.—The Petitioners herein are the members of Bihar Forest Service (hereinafter referred to as "Service"), who were appointed by the method of direct recruitment to the posts of Assistant Conservator of Forests(on probation) by notification dated 14.12.1987 (Annexure-4). The post of Assistant Conservator of Forests is the initial post in Service, being the point of entry which is filled up by direct recruitment as well as by promotion of Range Officer of Forests in accordance with the rules. The instant writ petition was filed by them on 14.9.1989 challenging the validity of the final gradation list of Assistant Conservator of Forests issued on 24th July, 1989(Annexure 6). They have prayed for quashing of the said final gradation list on the ground that they have been illegally shown as junior to Respondent Nos. 4 to 46, who have been promoted to the post of Assistant Conservator of Forests from the post of Range Officer of Forests by two notifications dated 6.10.1987 and 23.11.1987 with effect from 20.6.87 and 17.10.1987 respectively. Those two notifications are annexed to the writ petition as Annexures 2 and 3 respectively, and it is not in dispute that promotions granted to the promoters" are effective from the dates on which the

Departmental Promotion Committee made recommendations in their favour. The Petitioners have further prayed that the Respondents be directed to grant to the Petitioners their due place in the gradation list in accordance with law. It would thus appear that in the writ petition filed by the Petitioners, the only relief sought for was in relation to their seniority over Respondent Nos. 4 to 46 and the legality of the appointments of Respondent Nos. 4 to 46 was not in issue.

2. In the writ petition it was averred that the Respondent State of Bihar through the Public Service Commission advertised 40 permanent posts of Assistant Conservator of Forests on 24.7.1985 for being filled up by direct recruitment. The advertisement stated that the selection of the candidates was to be for the training session 1986-88. The Petitioners took the written test and faced the interview board and ultimately a final result was published on 19.4.1987. Though the formality of medical examination of the selected candidates was complete and vigilance reports in relation to them were available to the State of Bihar by the end of May 1987, the Petitioners were not appointed soon thereafter. The State of Bihar with a view to help the promotes proceeded in haste to consider their cases for promotion rather than issuing letters of appointment to the Petitioners. Obviously, the action of the State was mala fide, inasmuch as the State under the influence of the promotes intended to confer undue benefit on them. With this in view a Departmental Promotion Committee was called on 20th June, 1987 for considering the cases of Range Officer of Forest for promotion to the posts of Assistant Conservator of Forests. The first Departmental Promotion Committee recommended the names of Respondents 4, 6 to 20, 35 to 37, 39 to 41 and 45 for promotion to the post of Assistant Conservator of Forests. The report of the Departmental Promotion Committee was sent to the Bihar Public Service Commission which by its recommendation dated 2nd July, 1987 recommended that the aforesaid Respondents be promoted to the posts of Assistant Conservator of Forests. Consequently by notification dated 6.10.1987 (Annexure-2) the aforesaid Respondents were granted promotion to the posts of Assistant Conservator of Forest with effect: from 20th June, 1987, the date on which the Departmental Promotion Committee recommended their cases to the Bihar Public Service Commission.

3. Soon thereafter on 17.10.1987 the Departmental Promotion Committee held its second meeting and recommended the cases of Respondent Nos. 5, 21 to 34, 38, 42, 43, 44 and 46 for promotion and sent its recommendation to the Bihar Public Service Commission. The Bihar Public Service Commission by its recommendation dated 27.10.1987 recommended to the State Government that the aforesaid Respondents be promoted to the posts of Assistant Conservator of Forests and, accordingly, a notification granting them promotion with effect from 17.10.1987 was issued on 23.11.1987.

4. Thereafter by notification dated 14.10.1987 the Petitioners were also appointed by the process of direct recruitment to the posts of Assistant Conservator of Forests. On 1st March 1988, they were deputed for training at the

State Forest Service College, Coimbatore, and after a year's training at Coimbatore they were deputed for further training at the State Forest Service College, Dehradun on March 1, 1989.

5. On 7.3.1989 while the Petitioners were undergoing their training at Dehradun, the State of Bihar issued a tentative gradation list of the officers of Bihar Forest Service on 7.3.1989. In the tentative gradation list the Petitioners had been shown as senior to Respondent Nos. 36 to 46, but had been illegally shown as junior to Respondent Nos. 4 to 31. Since objection were invited to the tentative gradation list within a period of three weeks from the date of issuance of said gradation list, some of the Petitioners sent their objections even though the tentative gradation list reached some of them after expiry of three weeks and in some cases only few days before the expiry of three weeks from the date of issuance of gradation list. Their case is that without applying its mind to the objections raised by the Petitioners the State of Bihar with a malafide intention, and with hot haste, brought the final gradation list on 24.7.1989. In this list the position of the Petitioners became worse, as they were shown as junior to all the Respondent Nos. 4 to 46. The Petitioners challenged the gradation list as being illegal since the Petitioners could not be made to suffer, for the laches on the part of the State of Bihar. According to them, once the procedure for direct recruitment was over in May 1987, it was incumbent upon the Respondent-State to issue forthwith the necessary appointment order, so that the Petitioners could join the service and proceed on field training. With a view to avoid this, the State of Bihar did not issue appointment order till such time as the aforesaid Respondents were not promoted. There was no justification for this inaction on the part of the State which delayed the issuance of letters of appointment in favour of the Petitioners with the oblique purpose of benefiting the Respondents-promoters. It was, therefore, submitted that the Petitioners were entitled to seniority from the date the list of finally selected and recommended candidates was prepared by the Respondent-State in May and June 1987. The Petitioners were entitled under the law to retrospective seniority and great hardship had resulted by appointing the promotes earlier than the finally selected direct recruits even though their cases for promotion were considered after the Petitioners has been finally selected/recommended for appointment. It was further averred that the number of promotees in the service was thrice the number of direct recruits, and as on date the number of promotes in the service is much more than the direct recruit, and the promotes had at all times occupied more than 50 percent of the posts in the service. On such facts it was prayed that the final gradation list (Annexure-6) be quashed and the Petitioners be given their due seniority.

6. The writ petition was admitted for hearing on 15.12.1989, and notices issued to the Respondents. On 14.5.1990 a counter-affidavit was filed on behalf of some of the private Respondents, namely, Respondent Nos. 23 and 26 to 28. In the said counter-affidavit the aforesaid Respondents averred that the terms and conditions of service are governed by the Bihar Forest Service Rules, 1953. The

initial post in the Service is known as Assistant Conservator of Forests which is filled up by way of direct recruitment as also by promotion of Range Officers of Forests. Rule 4 of the Rules lays down that the Governor of Bihar shall decide from time to time the number of vacancies that has to be filled up by direct recruitment and/or by promotion respectively. The Governor of Bihar has issued a general administrative instruction in accordance with Rule 4 of the Rules to the effect that a minimum of 50 percent of the posts of the Service (Assistant Conservator of Forests) should be filled up by promotion. No maximum limit has been prescribed by the Respondent State/Governor.

7. According to these Respondents, promotions were last given against the promote quota of the Service in the year 1983, but in the years 1984, 1985 and 1986 no promote belonging to the general category was given promotion to the Service. The answering Respondents were initially appointed as Range Officers of Forest between 1968 and 1970. It was also prescribed that for promotion to the higher post, Range Officer of Forest must perform the duties of the post for a minimum period of ten years, which was later reduced to eight years. Keeping in view the said period, known as kalawadhi the answering Respondents and other Respondents became eligible for promotion to the higher post of Assistant Conservator of Forests by the year 1980. In the year 1984 the Forest and Environment Department of State of Bihar issued a letter to the Chief Conservator of Forest in connection with the promotion of Range Officers to the higher post of Assistant Conservator of Forests, a post in the Service. From the said letter it would appear that 61 vacancies were anticipated in the cadre of Assistant Conservator of Forests. Out of them, 33 posts were to be filled up by promotes belonging to the general category while the remaining 28 were to be filled up by promotes belonging to reserved category. The aforesaid letter (Annexure R/A) dated 22.8.1984 also mentioned that since there was a ban on grant of ad-hoc promotion for six months, and the meeting of the Departmental Promotion Committee was likely to be held in the office of Bihar Public Service Commission, list of 66 candidates belonging to the general category was being forwarded. Similarly, a list of 31 candidates belonging to the reserved category was also being forwarded. A request was made to the Chief Conservator of Forest to forward the annual confidential record/departmental proceeding etc. in relation to the persons whose names were included in the lists so that those documents could be forwarded to the Bihar Public Service Commission for consideration by the Departmental Promotion Committee for grant of regular promotion. Since vigilance clearance had also be obtained, necessary particulars with regard to the three earlier posting may also be sent. The names of replying Respondents as well as other Respondents were included in the lists forwarded under the said letter.

8. The grievance of the replying Respondents is that despite the aforesaid letter issued as early in August 1984, the Respondent-State did not take prompt steps for promotion of Range Officer of Forests to the post of Assistant Conservator of Forests, and the matter remained pending, for a long period, with the result that

large number of posts of Assistant Conservator of Forests belonging to the quota of promotes for the year 1985 and onwards remained unfilled. Ultimately, on 22nd December, 1986 the cases of different Range Officers Including the replying Respondents were placed for consideration before the Departmental Promotion Committee headed by the Secretary to the Government, Department of Forest and Environment. The cases of all the Respondents including the replying Respondents were considered for promotion to the higher post of Assistant Conservator of Forests and all the Respondents were found fit for promotion. The Departmental Promotion Committee decided that whenever promotions would be given to the candidates found eligible, that will be given from the date on which the vacancies occurred. The minutes of the proceeding of the Departmental Promotion Committee has been annexed as Annexure R/B. From the recorded proceeding it also appears that the Committee calculated the total number of posts In the service as 234 which included 172 sanctioned posts and 49 ex-cadre posts of Divisional Forest Officers held by the officers of the Service. Out of these posts 122 posts were held by the officers of the service and 112 posts had to be filled up by direct recruitment/promotion. The Committee observed that 47 posts were to be filled up by direct recruitment and 65 by promotion. Of the 65 posts to be filled up by promotion, 20 were kept reserved for being filled up on the basis of 1987 examination and against the rest it was decided to grant ad-hoc promotion. Out of the 45 posts, 12 were reserved for candidates belonging to reserve category which together with carry forward vacancies totaled 20. It is the case of the replying Respondents that though the question of grant of promotion of Range Officer of Forest to the post of Assistant Conservator of Forest was under consideration since as far back as 22nd August, 1984, the State took no concrete steps to get the recommendation of Bihar Public Service Commission. On the other hand, the Respondent-State took steps to fill up some of the posts of Assistant Conservator of Forest by direct recruitment, and the Bihar Public Service Commission issued an advertisement on 24th July, 1985 (Annexure-1). Despite the recommendation of the Departmental Promotion Committee dated 22nd December 1986, the matter relating to promotion of Range Officers, including the replying Respondents, was kept pending, and on the other hand steps were taken to fill up the posts by direct recruitment. Even the final result of the written test was published on 19th April 1987. It was then found by the State of Bihar that the matter relating to promotion of Forest Rangers to the higher post of Assistant Conservator of Forests a post in the Bihar Forest Service had remained pending despite the fact that the matter had engaged the attention the State Government since 22nd August, 1984. Despite the decision of the Departmental Promotion Committee on 22nd December, 1986 no concrete steps had been taken to grant promotion to the Range Officer of Forests who were eligible for promotion. It was in these circumstances that the first Departmental Promotion Committee met on 20th June, 1987 and the, second on 27th October, 1987, and made its recommendations which were forwarded to the Bihar Public Service Commission, and after full consideration of all relevant matters, two notifications promoting the private Respondents to the posts of Assistant

Conservator of Forests were issued on 6.10.1987 and 23.11.1987. It is stated that the Chairman of the Departmental Promotion Committee was a member of the Bihar Public Service Commission and consisted of several other members.

It was only later on 14th December 1987 that the Petitioners were appointed as Assistant Conservator of Forests by direct recruitment. The Respondents justified their earlier appointment on the ground that the question relating to grant of promotion to them was taken up as far back as in August 1984 while the posts were advertised for direct recruitment on 24.7.1985. The Respondents were waiting for their promotion since the year 1980, but had been deprived of such promotion in time on account of laches on the part of the State machinery. It is, therefore, submitted on behalf of the Respondents that their promotion being prior in point of time to the appointment of the Petitioners, they have rightly been shown as senior to the Petitioners in the final gradation list.

9. It is also argued in the counter-affidavit that in accordance with the resolution of the Finance Department dated 30th December 1981 every State Government employee is entitled to at least one promotion after completing ten years of service, and a second promotion on completion of 25 years of service. The Respondents, therefore, were entitled to such time bound promotion in the year 1980 or at least from 1st April 1981 when the aforesaid resolution took effect. This plea has been urged only to justify the promotion being granted to the promotes before the appointment of direct recruits. The Respondents have further averred that in the facts and circumstances of the case, it could not be said that the action of the State was vitiated by malafide. The seniority list on the basis of date of entry in service is therefore, justified and lawful. It is also submitted that the Petitioners being direct recruits, for purpose of seniority they cannot reckon any date prior to the date of their actual appointment to the service. There is therefore, no justification in the contention of the Petitioners that they should be given seniority from any date earlier than the date of their actual appointment.

10. A counter-affidavit has also been filed on behalf of Respondent Nos. 1 to 3, the State of Bihar and its officers on 5.11.1993. After referring to the admitted facts of the case it has been stated that the conditions of service, including matters relating to appointment and seniority, are regulated by the rules, known as Bihar Forest Service Rules, 1953. After referring to Rules 3, 29 and 35 of the rules it is stated that before a direct recruit can be appointed to the Service as Assistant Conservator of Forests he is required to be examined by Medical Board convened by the Director of Health Services and only those found medically fit can be appointed. Apart from obtaining vigilance clearance in respect of the candidates selected, the candidates are also required under Rule 30 to execute a bond and agreement. The list of successful candidates was received from the Bihar Public Service Commission in April 1987, and after obtaining clearance from the Vigilance Department and the execution of bonds and agreements, the notification appointing the Petitioners was issued in December 1987. There was

no intentional delay on the part of the State of Bihar and the delay caused was not malafide, but mere procedural delay in making the appointments. It is denied that the final gradation list was published in hot haste and it is asserted that the same was published after due consideration in accordance with law. It is further submitted that since all the candidates were appointed in the same year, under Rule 35(ii) of the Rules, the promoted members of the Service have been made senior to the members directly recruited. In any case the Petitioners are not entitled to any relief in view of the provision of Rule 35 which provides that seniority of an officer appointed to the service shall be determined with respect to the date of his substantive appointment to the service.

11. It appears from the record that the Petitioners filed their reply to the counter-affidavit filled on behalf of the Respondent-State which was affirmed on September 20, 1994. The date of filing is not very clear from the record. In this reply the Petitioners stated that the police verification reports as regards the Petitioners had been received in the Department-wide letters dated 15.7.1989 and 27.8.1989, while the medical reports were received vide letter dated 8.6.1987 in respect of 34 candidates and on 29.7.1989 in respect of four candidates. After August 1989 therefore there was no reason to delay the issuance of letters of appointment in favour of the Petitioners. It is then stated that in June 1987 there were no vacancies available for promotion from the cadre of Ranger to the cadre of Assistant Conservator of Forest, and the vacancies were created for the first time in August 1987, and the number of officers in the cadre was increased from 172 to 277 by creation of 105 more posts. The posts were created without the approval of Council of Ministers or of the Finance Department, but a letter was issued regarding enlargement of the cadre on 12.8.1987. In these circumstances, the Petitioners claim that they are entitled to reckon their seniority in the cadre of Assistant Conservator of Forests from the date the entire procedure of their appointment was completed i.e., when the report regarding medical fitness was submitted. A further new plea has been raised in paragraph No. 4 of the rejoinder in which it has been stated that the appointment of the Respondent's in October/November 1987 was in violation of the rules, No Board, as contemplated under Rule 36(a), as it then existed, was constituted to consider and recommend their cases for promotion. Moreover, all the members had not signed the minutes of the proceeding on the same day. This apart, as on 20.6.1987 there was no vacancy against which the Respondents could be promoted. It is also submitted that under Rule 35(ii) of the rules, a principle for determination of seniority between the promoters and direct recruits has been laid down where the appointment is made at the same time and in the same transaction. In the instant case, though the appointment was made in the same calendar year, it was not made at the same time and in the same transaction and, therefore, Rule 35(ii) was not attracted.

It will thus appear that though the legality of the promotions granted, to the private Respondents was not the subject matter of the main writ petition filed by the Petitioners, for the first time in the rejoinder filed by the Petitioners in reply

to the counter-affidavit filed on behalf of the State, a plea was taken that even the promotions granted to the private Respondents was illegal for various reasons, including non-existence of vacancies and improper constitution of the Departmental Promotion Committee.

12. The Petitioners filed another reply to the counter-affidavit filed on behalf of Respondent Nos. 23 and 26 to 28. It may be noticed that the counter-affidavit was filed as early as on 14.5.90, but the reply thereto by way of rejoinder was filed by the Petitioners in the year 1995. It is not clear on which date the said rejoinder was filed, but the affidavit was affirmed by Petitioner No. 12 on 15.2.1995. It is, therefore, apparent that the rejoinder was filed almost five years after the filing of the counter-affidavit. In this rejoinder the Petitioners have again attempted to enlarge the scope of the writ petition. It is sought to be urged by the Petitioners that as per Rule 4 of the Bihar Forest Service Rules a decision was taken in the year 1985 to fill up 40 posts of Bihar Forest Service by the method of direct recruitment. Though the quota of promotes in the service prior to the year 1975 was only 25 percent, which was subsequently raised to 50 percent, but this did not mean that all the posts in the service could be filled by promotion. At the time of recruitment of the Petitioners the strength of promote officers in the cadre was more than 50 percent.

13. It is then asserted that promotions were given to 54 promotes who were much senior to the Respondents against the promote quota of the year 1981 and again in the year 1983 on temporary ad-hoc basis, since no permanent regular vacancy was available at that time. Only in the year 1985 those ad-hoc promotes were regularized by Government notification dated 11.12.1985 when the vacancies were available. Again in the year 1986, 12 Range Officers belonging to general category were promoted to the post of Assistant Conservator of Forest vide Government notification dated 10.2.1986. In these circumstances, there was no question of the Respondents being promoted till the cadre strength was enhanced to 277 in the year 1987. It is also submitted that the Respondents who were promoted as Assistant Conservator of Forests in 1987 had hardly completed the prescribed period of Kalavdhi and were therefore, not eligible for promotion prior to 1987. Reliance is then placed upon the letter written by the Chief Conservator of Forest to the Secretary, Department of Forest and Environment dated 22.9.1985 in which he had clearly mentioned that the existing vacancies were earmarked for direct recruitment and, therefore, no appointment should be made by the method of promotion. The Petitioners have asserted that there were no vacancies existing in the cadre which could be filled up by private Respondents.

14. In paragraph No. 15 of the rejoinder it is stated that under Rule 36, as it then existed in the year 1987-88, a Board comprising the Forest Secretary, Chief Conservator of Forest, Deputy Chief Conservator of Forest and three Senior Conservator of Forests had to be constituted for considering and making recommendation for promotion of Range Officers to the post of Assistant

Conservator of Forests. Such a Board was never constituted and some kind of Departmental Promotion Committee was constituted in hot haste which unauthorized made recommendation for promotion of the private Respondents to the post of Assistant Conservator of Forests. Moreover, the proceedings of the Committee were not signed by all the members present on the same date. As it appears they signed on different dates which is clearly in breach of established practice and rule, it is the case of the Petitioners that no vacancy existed against which the private Respondents could be promoted and even though vacancies were sought to be created on 12th August, 1987 by addition of posts, the same was neither approved by the Finance Department of the State nor was it approved by Council of Ministers. Merely on the signature of Minister concerned the resolution of 1987 was issued which was in clear violation of the rules of executive business. It is, therefore, submitted that the promotion of the private Respondents was de hors the rules and they cannot be said to have become the members of the Service, as their promotion was fortuitous in nature.

15. The State of Bihar has filed reply to the rejoinder filed by the Petitioners, in paragraph No. 5 it is stated that Rule 36(ka) of the Bihar Forest Service Rules was amended by the Government by its resolution dated 6/7 September, 1977 in accordance with the resolution of Personnel Department dated 27.11.1976. According to the amended rule, the Departmental Promotion Committee was to consist of Member of the Public Service Commission as Chairman and Secretary, Forest Department, Chief Conservator of Forest, Director of Welfare Department and an officer belonging to S.C. and S.T. category as members. The Departmental Promotion Committee constituted in the year 1387 held its meeting on 20.6.1987 and 17.10.1987.

The notification dated 6/7th September, 1987, published in the Bihar Gazette (Extraordinary) on 12th September, 1987 has been annexed as Annexure-A to the affidavit from which it appears that the notification has been issued under order of Governor of Bihar.

16. A further supplementary affidavit has also been filed on behalf of Respondent Nos. 23 and 26 to 28 bringing to the notice of this Court that vide resolution dated 21.2.1973 of the State Government published in the Extraordinary Gazette of Government of Bihar dated 22nd February 1973 all posts of Rangers till then in the non-gazetted rank were declared to be gazetted and the posts predestinated as Range Officer of the Forests. The said notification has been annexed as Annexure R/C. After the posts had become gazetted, the Departmental Promotion Committee was constituted in accordance with the resolution of the Government dated 6/7 September, 1977, published on 12th September, 1977. It has further been brought to the notice of the Court the fact that on 12th August, 1987 the cadre strength of Bihar Forest Service was determined and the same was published in the Bihar Gazette on 14th October, 1987. A copy of the said gazette notification has been annexed as Annexure-R/D from which it appears that the total strength of the cadre was fixed at 277. The

aforesaid notification dated 12th August, 1987 published on 14th October 1987 in the gazette has also been issued under the order of the Governor of Bihar. The notification states that the matter relating to determination of the total strength of Bihar Forest Service was under consideration of the State of Bihar for a considerable period. As a result difficulties were faced in the matter of grant of promotion, direct recruitment, grant of junior selection grade, senior selection grade, supertime scale etc. The State Government had, therefore, determined the strength of Bihar Forest Service as 277. The manner of calculation has been shown in the notification. The resolution dated 21st July, 1983 published in the Bihar gazette on 11th July, 1984 has also been annexed to show that the Departmental Promotion Committee was constituted and the earlier member Sri Bajpayee, IAS belonging to Scheduled Caste, Scheduled Tribe category was substituted by Sri M. Patra, IAS belonging to the same category.

17. The Petitioners thereafter filed another reply to the second counter-affidavit filed on behalf of the Respondent Nos. 1 to 3 on 5th February, 1986. In this affidavit it was stated that Rule 36(Ka) of the Bihar Forest Service was not amended by Government's resolution dated 6/7 September, 1977, as a rule made under the proviso to Article 309 of the Constitution of India could not be substituted by a Government resolution issued in exercise of executive power. The Government resolution dated 6/7th September, 1977 had been issued pursuant to executive instruction as contained in resolution of the Department of Personnel dated 27.11.1976 which laid down that every Department will constitute Departmental Promotion Committee/Committees according to its needs by issuance of executive orders. It is further stated that the resolution dated 12.9.1977 nominated on the Departmental Promotion Committee one Sri K. Bajpayee, IAS officer belonging to Scheduled Caste/Scheduled Tribe category which itself demonstrated that the resolution was not a rule. It was only later on 26.12.1989 that Rule 36(Ka) was amended in exercise of power under proviso to Article 309 of the Constitution of India. Thus the Departmental Promotion Committee which recommended the cases of Respondent Nos. 4 to 46 was not duly constituted in accordance with the rules. Moreover, neither Director of Welfare nor Sri Bajpayee was a member of the Departmental Promotion Committee. A copy of the resolution of the Department of Personnel dated 27th November, 1976 has been annexed as Annexure 12.

18. Another supplementary affidavit was filed on behalf of the Petitioners on 6th February, 1995 reiterating some of the facts stated in the earlier affidavit just noticed by me. Such is the state of pleadings on record. The writ petition came up for hearing before a Division Bench of this Court. By its judgment and order dated 3rd April 1996 this Court dismissed the writ petition holding that:

(a) The Petitioners could not be permitted to plead at a belated stage that the appointment of the Respondents was illegal, when the writ petition was filed only for quashing of the seniority list. The Petitioners had claimed seniority over the promotes in the writ petition on the ground that the State Government had with

malafide intention delayed the appointment of direct recruits and in the meantime promoted the promotes to the post of Assistant Conservator of Forest. It was, therefore, held that the challenge to the validity of the appointment of the private Respondents urged much later could not be entertained.

(b) In appointing the private Respondents earlier by promotion to the posts of Assistant Conservator of Forests the State had not acted malafide, and the delay, if any, was merely procedural.

(c) Under Rule 35 of the Rules the seniority of officers appointed to the Service has to be determined with respect to the date of their substantive appointment to the Service. Since the Respondents were appointed earlier in point of time than the Petitioners, they were entitled to seniority over the Petitioners.

19. It appears that another batch of writ petitions concerning the appointment of Assistant Conservator of Forests had also been filed before this Court being C.W.J.C. Nos. 1634 of 1986, 159, 4963, 9225 and 9226 of 1991 and 319 of 1992. Those writ petitions were disposed of by another Division Bench of this Court by judgment and order dated 9th February, 1996. The Petitioners in the instant writ petition preferred an appeal before the Supreme Court of India against the judgment and order of this Court dated 3rd April 1996. The Supreme Court by its order dated 6.5.1996 dismissed the SLP preferred against the judgment of this Court in C.W.J.C. No. 1634 of 1996 and analogous cases by its order dated 6.5.1996. The SLP against the judgment and order of this Court in the instant writ petition was disposed of by the Hon'ble Supreme Court in the following terms:

Special Leave granted.

Heard learned Counsel for the parties as well as the caveat or. It appears that the pendency of the matter has given rise to the present appeal. The High Court in its judgment dated 9.2.1996 disposed of C.W.J.C. No. 1634/86 and other connected matters. That is because when the impugned order and judgment was passed the benefit of the judgment dated 9.2.96 was not available to the Division Bench. This has raised certain conflicts and we, therefore, consider it appropriate in the facts and circumstances of the case to remit the matter to the High Court for a fresh decision after hearing all the parties concerned. This will be without prejudice to the rights and contentions of the parties which they may urge before the High Court. The High Court may expedite the matter and try to dispose it of as early as possible preferably within six months. Status quo will continue till then.

20. From the order of the Supreme Court it appears that the writ petition has been remitted to this Court for fresh decision in view of the fact that the judgment and order of this Court dated 9.2.1996 in C.W.J.C. No. 1634 of 1686 and other connected matters was not available when the judgment in the instant writ petition was delivered by a Bench on 3rd April, 1996. Apparently the Petitioners before the Supreme Court contended that the principles laid down in

the judgment dated 9th February 1996 had a material bearing on the result of this writ petition and if the same was available to the Hon'ble Judges disposing of the writ petition, the result may have been otherwise. Their Lordships, therefore, remitted the matter to this Court for a fresh decision after hearing all the parties concerned without prejudice to the rights and contentions of the parties which may be urged before the High Court. This matter was listed before other Division Benches of this Court and ultimately was listed before this Bench for disposal.

21. At the threshold I may notice the serious dispute between the parties as to the scope of the instant writ petition. While the Petitioners contend that in view of the order of the Supreme Court it is open to the Petitioners to urge all contentions before this Court, and also to urge additional grounds in support of the writ petition, the Respondents contend that the Supreme Court has only observed that the parties may urge all contentions before this Court, which only means that they are not prevented from urging any contention which they could have urged in support of the writ petition before the High Court. The order of the Supreme Court should not be construed as to widen the scope of the writ petition. While the Petitioners are free to urge all submissions which they could urge in support of the writ petition, equally the Respondents are entitled to urge all objections which they could have urged in the writ petition. In my view, the Respondents are right in contending that the order of the Supreme Court does not have the effect of widening the scope of the writ petition. No doubt, the Petitioners have been allowed to amend their Writ petition after the matter was remitted to this Court, but that does not mean that the Respondents are not entitled to object to the entertainment of fresh issue which has been raised by the Petitioners after the matter has been remitted to this Court. I must, therefore, hold that the scope of the writ petition is the same as it was when the writ petition was first disposed of by a Division Bench of this Court on 3rd April, 1996, and the Petitioners cannot urge on the basis of the order of the Supreme Court that the scope of the writ petition has been enlarged so as to permit the Petitioners to urge fresh grounds in support of their case.

22. Before advertng to the submissions urged before this Court I shall consider whether any principle of law has been laid down in the judgment of this Court in C.W.J.C. No. 1634 of 1996 and analogous matters, disposed of by this Court on 9.2.1996 which has a bearing on the questions involved in the instant writ petition. As would be apparent from the pleadings of the parties the real dispute in the instant writ petition is between the promotes promoted earlier and direct recruits appointed later, to the Bihar Forest Service on the post of Assistant Conservator of Forests. In the main writ petition the dispute related primarily to the question of seniority inter se of direct recruits and promotes. From the judgment in C.W.J.C. No. 1634 of 1986 and analogous cases, to which one of us (B.P. Singh, J.) was a party, it would appear that no such question arose for consideration in that batch of writ petitions. Primarily the question which arose for consideration in those cases was with regard to the scope and ambit of

amended Rule 3(aa) of the Bihar Forest Service Rules which conferred certain benefits on Forest Rangers who had passed the Rangers course examination with honors. According to the amended rule the Range Officer of Forests who passed the Rangers course securing honors were eligible for admission to the second year of the State Forest Service course in Forestry conducted by the Government of India. They were to be treated as direct recruits to the Bihar Forest Service as Assistant Conservators of Forests. This rule was to be deemed to have been always inserted. In one of the writ petitions before this Court the grant of promotion with retrospective effect to the post of Assistant Conservator of Forests from the date of joining the training college was challenged by other Forest Rangers who claimed to be senior to the Respondents so promoted. In the other writ petitions the grant of such promotion to the aforesaid Respondents was challenged by others including the Association of Range Officers and other direct recruits who were adversely affected by the grant of promotion with retrospective effect to the aforesaid Respondents. Two of the writ petitions were filed by the persons so promoted who were subsequently sought to be reverted. It would thus be seen that the issue involved in the aforesaid batch of writ petitions was quite different and distinct from the issues involved in the instant writ petition, and there is nothing common between the two. This Court upheld the validity of the amended Rule 3(aa) of the rules, but only with prospective effect as it held that the said rule could not be amended retrospectively. From the judgment of this Court it also appears that some promotions were granted in defiance of the order of status quo passed by this Court on 11st August, 1987, and some of them were inequitably reverted. The Court set aside all those notifications relating to the appointment and reversion of the concerned Petitioners and Respondents because the same had been issued in defiance of an order of this Court. It, however, in clear terms directed the State Government to issue formal appointment letters again in favour of the Petitioners in C.W.J.C. No. 1634/96 for their posting as Assistant Conservator of Forests. Appropriate directions were made in regard to other Respondents as well in the light of the fact that the amended rule would not be given retrospective effect. In view of this finding the seniority list was quashed with a direction for a fresh preparation of the seniority list by the State Government.

It would thus appear that there is nothing in the aforesaid judgment of this Court which may support the case of the Petitioners in the instant writ petition, and the Petitioners derive no advantage from the aforesaid judgment.

23. Mr. Binod Kanth, senior advocate appearing on behalf of the Petitioners in the instant writ petition has urged the following contentions:

(i) The cadre strength of the Bihar Forest Service (Assistant Conservator of Forest) was increased without following the due procedure and, therefore any promotion given against the so called vacancies which did not In fact exist, were illegal.

(ii) The two Departmental Promotion Committees which recommended the cases

of the Respondents were constituted only to grant ad-hoc promotion to the post of Assistant Conservator of Forest and, therefore, grant of temporary promotion against the substantive vacancies did not have the sanction of law. The proceeding of the two Departmental Committees were therefore illegal.

(iii) The Departmental Promotion Committees were not constituted in accordance with law.

(iv) While the Petitioners were duly appointed under the rules, the appointment of Respondent Nos. 4 to 46 was de hors the rules and, therefore, the Petitioners must rank senior to the aforesaid Respondents.

(v) The quota of promotes could only be 50 percent and, therefore, any promotion granted beyond the quota was bad.

(vi) Since the Petitioners and Respondents were not appointed in the same transaction, the direct recruits, namely, the Petitioners must rank senior to the promotes.

24. On the other hand counsel for the State and the private Respondents contended:

(a) The Petitioners cannot be permitted to challenge the legality of the appointment of the Respondents as Assistant Conservator of Forest, since that was not the case pleaded by them in the writ petition. They cannot be permitted to widen the scope of the writ petition by making belated attack on the validity of the appointment of the concerned Respondents.

(b) This Court should not entertain the ground on which the Petitioners have belatedly attempted to challenge the legality and validity of the appointment of the Respondents who were appointed before the Petitioners entered the Bihar Forest Service. Since the concerned Respondents were already members of the Bihar Forest Service before the Petitioners were appointed, the rights of the Petitioners were not adversely affected by the appointment of the concerned Respondents.

(c) There were substantive vacancies in the cadre against which the concerned Respondents were promoted and this was in accordance with the direction of the Governor of Bihar with regard to the proportion to be maintained between direct recruits and promotes.

(e) The Departmental Promotion Committees followed the same procedure as is followed for the grant of promotion in a regular manner and the same was approved by the Bihar Public Service Commission. It cannot, therefore, be said that the Respondents were appointed de hors the rules.

(f) In accordance with the Bihar Forest Service Rules, for the purpose of seniority, the date of substantive appointment to the Service was relevant. Since the Petitioners were appointed later than the concerned Respondents, they cannot claim seniority over the Respondents. In any event, they cannot claim

seniority by reckoning any date prior to the date of appointment, since they were not members of the service before their appointment.

25. As earlier noticed, in the writ petition filed by the Petitioners the only relief sought for by the Petitioners was for quashing of the final gradation list showing Respondent Nos. 4 to 46 senior to them, and for a direction to the Respondents to grant to the Petitioners their due place in gradation list in accordance with law. The earlier promotions granted to the aforesaid Respondents was challenged on the ground that the Petitioners ought to have been appointed first as all the necessary formalities had been completed, and only the ministerial act of issuing an order of appointment remained to be performed. With the malafide intention, the State of Bihar delayed the appointment of the Petitioners and in the meantime, it hurriedly took steps for promotion of the aforesaid Respondents to the posts of Assistant Conservator of Forests.

26. It is not disputed as a matter of fact that the Respondents were appointed by promotion to the post of Assistant Conservator of Forests under notifications dated 6.10.87 and 23.11.87, while the Petitioners were appointed as Assistant Conservator of Forests by order dated 14.12.1987. The aforesaid Respondents were, therefore, appointed to the Service earlier than the Petitioners. Under Rule 35 of the Rules, seniority of officers appointed to the service has to be determined by reference to the date of their substantive appointment to the Service. In the instant case we are not concerned with the three provisos to the rule because I have no doubt that though the Petitioners and the Respondents were appointed in the same calendar year, their appointment by direct recruitment or promotion was not made at the same time as part of the same transaction. Therefore, the question of the promotes ranking senior to the direct recruits under the proviso does not arise. However, since the promotes were promoted earlier to the Service, on that ground alone they are entitled to seniority over the Petitioners. Apart from Rule 35, justifiably the Petitioners could not be given seniority with effect from any earlier date, earlier than the date on which the Respondents were promoted to the Service. The Petitioners entered the Service through the method of direct recruitment. They, therefore, became the members of the Service on the date on which they were appointed to the Service. A direct recruit cannot claim any benefit relating to any period prior to his entry to service in the matter of seniority, promotion etc. They were for the first time born in the service on 14.12.1987, and this date cannot be changed so as to make them senior to the promoted Respondents. The prayer of the Petitioners that the seniority list be quashed and they should be given their due position in the seniority list must be rejected.

27. The next question is whether the action of the State in promoting the Respondents earlier was malafide. We are inclined to agree with the view that the delay of a few months in issuing the formal order of appointment was normal procedural delay and such delays are not uncommon so far as the Government of Bihar is concerned. There is no averment in the writ petition that any particular

officer or authority was unduly interested in the matter, nor is there any averment that any of the Respondents had approached any authority or officer of the State of Bihar with a view to influence their decision in the matter of issuance of appointment letters to the Petitioners. A plea of malafide must allege specifically, as to the offending action and the offending parties. A vague allegation that the State of Bihar acted malafide with a view to help the case of Forest Rangers, cannot be examined in the absence of specific allegations as to the manner in which and the persons who, influenced the mind of the Government. Specific averments should have been made as to the person through whom the State, of Bihar was influenced. In the absence of" such particulars I find no substance in the allegation of malafide against the State of Bihar. I am inclined to accept the plea of the Respondents that the delay that occasioned was not deliberate and was on account of procedural formalities and the slow movement of the files in the Government Department.

28. The Respondents, on the other hand, have also offered an explanation justifying their earlier appointment in the facts and circumstances of the case. It has been pointed out that after the year 1983 none of the Forest Rangers belonging to the unreserved category has been grantee promotion to the Service. Though vacancies arose in the years 1984, 85 and 86, none of them were promoted, even though as early in the year 1984 the State had written to the Chief Conservator of Forest requesting him to send the necessary service records of 66 Forest Rangers for consideration by the Bihar Public Service Commission, since 61 vacancies were anticipated out of which 33 were to be filled up by promotion of the candidates of general quota. Moreover, another Departmental Promotion Committee on 22.12.1986 had found the Respondents to be fit for promotion and decided to grant them promotion from the date the vacancies arose. Despite this no steps were taken to get the recommendation of the Bihar Public Service Commission for appointment to the Service by promotion from the cadre of Range Officer of Forests. When the Government realized this fact and found that the promotes would suffer great injustice if their appointments were further delayed, the Government took steps to hold meetings of the Departmental Promotion Committee and to obtain the recommendation of the Bihar Public Service Commission.

29. Having regard to the facts and circumstances discussed above, I have no hesitation in coming to the conclusion that the Respondents, who had been promoted earlier to the Service, must rank senior to the Petitioners who were appointed later in view of the clear provision of Section 35 of the Rules. The action of the State of Bihar in appointing the Petitioners by issuance of order dated 14.12.1987 is not vitiated by malafide. For the purpose of reckoning their seniority, in Service, the only relevant date for the Petitioners is the date of their appointment to the Service, namely, 14.12.1987. For the purpose of determining their seniority no earlier date can be reckoned as the Petitioners were not members of the. Service on such earlier date, they being direct recruits. In fact, it is doubtful if the Petitioners can even challenge the appointments of

Respondents, since those appointments were made prior to the date of entry into service of the Petitioners. However, on this ground alone I am not inclined to reject the writ petition.

30. The question then arises as to whether the Petitioners should be permitted to challenge the very appointment of the Respondents to the Service against the initial post of Assistant Conservator of Forests. Several decisions of the Supreme Court were cited before us and for the proposition that a writ court may refuse to grant relief in cases where the Petitioner is found guilty of delay and laches. It is not necessary to refer to binding precedents for a proposition well-settled in law. The Respondents were appointed to the Service on 6.10.1987 and 23.11.1987. The Petitioners were appointed to the Service on 14.12.1987. If the Petitioners were really aggrieved by the appointments of the Respondents to the Service on the ground that their appointments were illegal being in breach of statutory rules, they could have challenged their appointments soon after their appointment. They did not do so. After the tentative gradation list was issued on 7.3.1989 and final gradation list was issued on 24.7.1989 the Petitioners filed the instant writ petition on 14.9.1989. In the writ petition the Petitioners did not challenge the appointment of the Respondents to the Service on the ground that they had been appointed in breach of the statutory rules or that they could not be so appointed since no vacancies existed in the Service for promotes. The only ground urged in the writ petition was that the action of the State in appointing the Respondents earlier than the Petitioners was vitiated by malafide, since that gave an undue benefit in the matter of seniority to the Respondents. There is no whisper in the writ petition about the violation of any Service Rule or about non-existence of vacancies in promoters' quota. In fact, no ground was urged in the writ petition challenging the legality and validity of the appointments of the Respondents. The grievance of the Petitioners was that they should be ranked senior to the Respondents.

31. Respondent Nos. 23 and 26 to 28 filed their counter-affidavit on 14.5.1990. The State and its officers filed their counter-affidavit on 5.11.1993. The reply to the counter-affidavit of the private Respondents was filed by the Petitioners on 15.2.1995 while their reply to the counter-affidavit on behalf of the State was filed a little earlier on 20.9.1994. In these rejoinders no doubt the Petitioners urged several grounds to contend that the appointment of the Respondents to the Service was illegal for the reason that there were no vacancies for promotes against which they could be appointed, and In any event the Selection Board was not constituted, as contemplated by Rule 36(a) of the Rules. It will thus be seen that for the first time the Petitioners challenged the legality and validity of the appointment of the Respondents more than seven years after their appointment. Counsel for the Respondents, therefore, strongly urged that the Petitioners should not be permitted to question the legality of their appointment made more than seven years ago. It was further contended that in a writ petition, where the relief sought for related to the seniority inter se of the direct recruits and the promotes this Court should not go into the question of the validity of the

appointment of promotes. It was submitted that though these facts were brought in by filing rejoinder affidavits, the writ petition and the relief prayed for was never amended by the Petitioners, and the question of legality of the appointment of the Respondents was wholly unrelated to the question of seniority which was the only issue involved in the writ petition. In *Roshan Lal and Ors. v. International Airport Authority of India* AIR 1981 SC 597 the Petitioners had, challenged the appointment of the Respondents who had been appointed as Airport Officer (Operations) prior to the Petitioners. Before the reorganisation and rationalisation of the existing set up at the Airports and headquarters the Petitioners as well as the Respondents were working as Terminal Managers which post was abolished. Before the Supreme Court it was sought to be urged that at the time when the aforesaid Respondents were appointed as Airport Officer (Operations), there was no sanction for such posts and, therefore, their appointment was illegal. Negative the contention the Court observed:

One of the principal submissions made by Smt. Shyamla Pappu, learned Counsel for the Petitioners was that the appointment of the Respondents as Airport Officers (Ops.) was made at a time when there was no sanction for such posts and therefore their appointment was illegal. Other reasons were also advanced in support of the claim that the Respondents were irregularly appointed as Airport Officers. We are afraid that it is rather late in the day for the Petitioners to question the appointment of the Respondents as Airport Officers (Ops.). The Respondents were appointed as Airport Officers in 1975 and the present Writ Petitions were filed in 1978. We do not think we will be justified in reopening the question of the legality of the appointment of Respondents as Airport Officers several years after their appointment. We also notice that the prayer in the Writ Petitions also is confined primarily to the seniority list and the consequences flowing from the seniority list.

The Respondents have strongly relied upon this decision of the Supreme Court and in my view, rightly.

32. After the disposal of the SLP by the Supreme Court a petition was filed before this Court for amendment of the writ petition which was allowed. The Petitioners have thereby challenged the promotions granted to Respondent Nos. 4 to 46 on the ground that the promotions were granted in violation of statutory rules on the basis of the recommendations made by the Departmental Promotion Committees which were not duly constituted in accordance with law, and also on the ground that the enhancement of the cadre strength from 172 to 277 pursuant to the resolution dated 12.8.1987 was mala fide and without jurisdiction. I have already held that the terms in which the SLP was disposed of by the Supreme Court did not justify the submission that the scope of the writ petition was enlarged. In any event, the Respondents can object to the Court going to the question relating to the legality of their appointment on the ground that the challenge to their appointment is belated and this Court should not in exercise of writ jurisdiction grant relief to a party who is guilty of delay and

laches. The amendment petition challenging the promotions granted to the Respondents was filed on 28th November 1996 while the Respondents were appointed to the Service on 6.10.1987 and 23.11.1987. I find myself in agreement with counsel for the Respondents that the validity of the promotions granted to the Respondents cannot be challenged after a lapse of about nine years.

33. However, with a view to satisfy our judicial conscience and to guard against any serious miscarriage of justice, I propose to consider the two main objections raised by the Petitioners impugning the validity of the appointment of the private Respondents to the Service. The two main objections urged before us are firstly, that sufficient number of posts did not exist in the cadre against which the private Respondents could be promoted, and secondly, that the Departmental Promotion Committees which considered their cases for promotion were not duly constituted in accordance with law. Counsel for the Petitioners submitted that under Annexure R/A dated 21.8.1984 no doubt the State Government had written to the Chief Conservator of Forest informing him about the existence of 33 vacancies to be filled up by candidates belonging to the general category, the remaining 28 being posts meant for candidates belonging to reserved category. Thus, a total number of 61 vacancies was indicated in the aforesaid letter and a request was made to send the service records of 66 candidates of general category so that necessary steps may be taken for filling up the vacancies by promotion in consultation with the Bihar Public Service Commission. On receipt of this letter the Chief Conservator of Forest by his communication dated 27th October, 1984 wrote to the Government seeking clarification as to the basis on which 61 vacancies in the cadre of Assistant Conservator of Forest had been worked out, because according to him there were only two vacancies. Again, on 23rd September 1985 the Chief Conservator of forest wrote to the Government a letter Annexure 13/B and another letter on 20th November, 1986(Annexure 13/C) seeking clarification from the Government as to how the cadre strength had been calculated. In Annexure 13/C the Chief Conservator of Forest has given his own calculation and at the same time had made his own suggestions. The letters (Annexure 13 series) no doubt indicate that there was some confusion in the mind of the authorities as to the number of posts in the cadre of Assistant Conservator of Forests. Apart from previously sanctioned posts, new posts had been created and some of the cadre officers were deputed against ex-cadre posts. Similarly, several posts had been created under different projects. It also appears that the Government had not taken a final decision in the matter, and that is why several requests were made by the Chief Conservator of Forest seeking the Government's clear cut decision. It was in the light of these that the Government of Bihar issued Annexure-14, the resolution issued under the orders of the Governor of Bihar dated 12th August 1987 published in the gazette on 14th October, 1987. The said resolution refers to the fact that the matter regarding the determination of strength of the cadre of Assistant Conservator of Forest had been under consideration of the Government for a long period and on

account of the non-determination of the strength of the cadre, the officers were finding considerable difficulty in the matter of direct recruitment, promotion, grant of selection grade, super time scale etc. In these circumstances, the Government had taken a decision to determine the strength of the cadre. From Annexure-14 it would appear that the strength of the cadre was determined as 277, the details whereof are mentioned in the aforesaid Annexure. Annexure-14 is the same as Annexure R/D filed on behalf of the Respondents. It would thus appear that the strength of the cadre was determined finally on 12th August 1987, and if the strength so determined is taken into account, sufficient number of posts existed in the cadre against which the private Respondents could be appointed. This furnishes a complete answer to the submission urged on behalf of the Petitioners.

34. The Petitioners have, however, challenged the validity of Annexure-14 and contended that the rules of executive business were not followed inasmuch the concurrence of the Finance Department had not been obtained, and the approval of the Cabinet was also, lacking. Counsel for the Respondents contended that the strength of a cadre could be determined by an executive order, and the Resolution(Annexure-14) was issued under the orders of Governor of Bihar. There was, therefore, no illegality in the issuance of Annexure-14. It was further submitted that if one were to be guided by the objection raised by the Chief Conservator of Forest, even in accommodating the direct recruits, additional posts in the cadre had to be created and this is obvious from the letter of Chief Conservator of Forest (Annexure 13/B). In any event it was submitted that the cadre strength could be increased by issuance of an executive order. Counsel for the Petitioners in reply submitted that no doubt the cadre strength could be increased by issuance of executive instructions, but once rules have been framed, they must be adhered to.

35. It deserves notice that by issuance of Annexure-14 a new cadre was not being created, only the strength of the cadre was being determined by the Governor of Bihar. The strength of the cadre has not been determined under the Bihar Forest Service Rules, 1953 and, therefore, it cannot be said that Annexure-14 is in breach of the rules framed under the proviso to Article 309 of the Constitution of India. Under these circumstances, it was always open to the Governor to determine the strength of the cadre from time to time, and that is all that was done under Annexure-14.

36. Another submission was urged on behalf of the Petitioners that under Rule 4 of the Rules the Governor is required to decide from time to time the number of vacancies to be filled by direct recruitment and/or by promotion respectively. It is not disputed that the Governor of Bihar had decided that not less than 50 percent of the posts in the cadre of Assistant Conservator of Forests shall be filled up by promotion. There is no quota provided under the rules, and all that the rules provide is that the appointment to the Service is to be made both by promotion and by direct recruitment. Moreover, the rule which applies to the

promotes, applies with equal force to the direct recruits, because the Governor is required not only to determine the number of vacancies to be filled up by promotion, but is also required to decide from time to time the number of vacancies to be filled up by direct recruitment. In my view, the rule does not prescribe any time limit within which the Governor is required to take a decision in the matter. It is not necessary that each year the Governor should issue such an order deciding how many vacancies are to be filled up by direct recruitment and how many by promotion. If it is the case of the Petitioners that the Governor failed to decide the number of vacancies to be filled up by promotion, the Governor also failed to decide under that rule the number of posts to be filled up by direct recruitment. Under these circumstances, having regard to the earlier decision taken by the Governor which was in force, not less than 50 percent posts in the cadre of Assistant Conservator of Forests had to be filled up by promotion. Under Rule 4 it is open to the Governor to change his decision at any time, and thereby change the proportion in which the vacancies may be filled up by direct recruitment and by promotion. However, the appointments made will not be vitiated if the proportion in which they are made is consistent with the decision of the Governor in force.

I, therefore, find no merit in the first objection urged on behalf of the Petitioners.

37. It was then submitted that the Departmental Promotion Committee had been earlier constituted on 22.12.1986 vide Annexure-R/B only to consider the grant of promotion to the Respondents on ad-hoc basis. The recommendation made by the Departmental Promotion Committees in the cases of the Respondents was, however, for regular promotion and, therefore, illegal. It is no doubt true that when an earlier Departmental Promotion Committee met on 22.10.1986, they were considering the grant of ad-hoc promotion to the concerned Range Officers of Forest, but there is nothing to show that the Departmental Promotion Committees which met on 20th June, 1987 and 17th October, 1987, were constituted only to recommend cases for ad-hoc promotion. Counsel for the Respondents submitted that the Departmental Promotion Committees constituted for recommending the names of the eligible Respondents for promotion to the Service were presided over by a member of the Bihar Public Service Commission. There is nothing on record to show that the Committee was constituted only to recommend promotions on ad-hoc basis as was the case when the earlier Departmental Promotion Committee met on 20.10.1986. In fact, since they were presided over by a member of the Bihar Public Service Commission in accordance with the executive instructions issued in this regard, there is no justification in the submission that such a duly constituted Departmental Promotion Committee was required to make recommendations for appointment on adhoc basis only. Indeed the recommendations of the two committees were later considered by the Bihar Public Service Commission and approved by it. The submission urged on behalf of the Respondents has therefore considerable force. In the absence of there being anything to suggest that the Departmental Promotion Committees which met in the year 1987 were constituted only for the purpose of making

recommendations for ad-hoc promotions, the submission urged on be half of the Petitioners must be rejected. Since the Departmental Promotion Committees were duly constituted and were presided over by a member of the Bihar Public Service Commission, and its recommendations were approved by the Bihar Public Service Commission, it must be held that the promotions were being granted on regular basis after following the regular procedure and not on ad-hoc basis.

38. The second objection of the Petitioners that the Departmental Promotion Committees were not constituted In accordance with law is also devoid of force. Under the Bihar Forest Service Rules, 1953 there was a provision for appointment to the Service by direct recruitment and by promotion. Under Rule 36(a) Forest Rangers fulfilling the requisite eligibility conditions were eligible for promotion to the Service in the cadre of Assistant Conservator of Forests. The said post was a non-gazetted post. By is suance of notification dated 21st February, 1973 the Governor of Bihar was pleased to change the designation of the post from Forest Rangers to Range Officer of Forests. The posts were made gazetted posts. Other consequential provisions were also made in the said notification (Annexure R/C). This has not been disputed or challenged by the Respondents. It would thus appear that after 21st February, 1973 there was no post of Forest Ranger, a non-gazetted post. The statutory Rules contemplated the constitution of a Selection Committee to consider the cases of promotion of Forest Rangers to the post of Assistant Conservator of Forests since the post of Forest Ranger was made a gazetted post and was designated as Range Officer of Forests, the said statutory Selection Committee could not have considered the cases of promotion of gazetted officers known as Range Officer of Forests. In fact, till the time the rules were amended, there was nothing in the rules regarding constitution of a Selection Committee for promotion of Range Officer of Forests. By issuance of Annexure-12 dated 27th November, 1976 executive instructions were issued by the Department of Personnel with regard to the constitution of Departmental Promotion Committee, which had to be constituted by the concerned Departmental is under executive orders. Such a Committee was to be presided over by a member of the Bihar Public Service Commission Pursuant to Annexure-12 by issuance of notification (Annexure A) dated 6/7th September, 1977, the Department of Forest constituted a Departmental Promotion Committee consisting of Chairman, who was to be the Chairman or member of Bihar Public Service Commission, the Secretary, Department of Forest, Chief Conservator of Forest, Director, Department of Welfare and one Sri K. Bajpayee, an officer representing the Scheduled Caste and Scheduled Tribe. The said notification was published in the Bihar Gazette (Extraordinary) on 12th September, 1977. Later by issuance of Annexure 4/E the resolution dated 21st July, 1983 published in the gazette on 11th July 1984 the Committee was reconstituted and in place of Sri Bajpayee one Sri M. Patra, IAS was appointed as the officer representing the Scheduled Castes and Scheduled Tribes. In its reply (affidavit filed on 1st February 1996 the State of Bihar has stated in paragraph No. 6 thereof that in accordance with the aforesaid resolution the Departmental

Promotion Committee was constituted consisting of Chairman or member of the Bihar Public Service Commission as Chairman and the Secretary, Forest Department, Chief Conservator of Forest, Director, Welfare Department and Sri Bajpayee as its members. It was the Committee so constituted which considered the cases of the Respondents for promotion to the Service.

39. It would thus appear that the Departmental Promotion Committee under the rules was constituted to consider the promotion of Forest Rangers to the Service. Since the post of Forest Ranger ceased to exist and instead a gazetted post designated as Range Officer of Forests was created, there was nothing in the rules regarding consideration of the cases of such Range Officer of Forests for promotion to the Service. This happened as early as in February 1973. The Departmental Promotion Committees were constituted thereafter in accordance with the Resolution (Annexure-12) dated 27.11.1976. Since there was no rule governing the grant of promotion to Range Officer of Forests, necessary executive instructions were issued regarding constitution of Departmental Promotion Committees. There was, therefore, no illegality in the constitution of the Departmental Promotion Committees in accordance with the resolution of the Government dated 27.11.1976. It was faintly urged before us that the proceedings of the Departmental Promotion Committees would show that only three members had signed the proceedings. Counsel for the State in reply submitted that since the Committee was duly constituted in accordance with the executive order, the mere fact that two members were absent, did not vitiate the recommendation of the Committee. No rule or executive instruction has been brought to our notice prescribing any quorum for the meeting of the Committee. In these circumstances, when the majority of members were present, the absence of two members of a Committee would not vitiate the recommendation made by the Committee. Moreover, the Departmental Promotion Committee of the Department of Forest was constituted as early as in July 1977 pursuant to the Government Resolution dated 27.11.76 and was subsequently reconstituted on 21.7.1983 since one of the members representing the Scheduled Caste, Scheduled Tribes was not available. The Committee was presided over by a member of the Bihar Public Service Commission and the Secretary of the Department of Forest and Chief Conservator, of Forest were the two other members who took part in the proceedings of the Committee. Under these circumstances, it is difficult to hold that the Departmental Promotion Committees were not duly constituted.

40. It is no doubt true that the rules were formally amended as late as on 26th December, 1989. Necessary amendments were made in the rules by substituting "Range Officer of Forests" in place of "Forest Ranger" wherever necessary including Rule 36. This, however, will not make any difference to the case of the Respondents, because till the rules were so amended, they did not apply to the cases of promotion of Range Officer of Forests, a gazetted post, since the unamended rule applied to the case of Forest Ranger, a non-gazetted post. In the absence of rules, the executive orders prevailed.

41. I am, therefore, satisfied that no serious miscarriage of justice has taken place in this case.

42. In the result, I find no merit in this writ petition, and the same is, accordingly, dismissed. There will be no order as to costs.

N.K. Sinha, J.

43. I agree.