

D. D. Suri

Vs

Union of India and Another

Civil Appeal No. 1419 of 1971

(V.R. Krishna Iyer, A.P. Sen JJ)

17.07.1979

JUDGMENT

SEN, J. -

1. This appeal, by special leave, is directed against the judgment and order of the High Court of Orissa, dated November 24, 1970, dismissing the appellant's writ petition for fixation of his year of allotment in the Indian Administrative Service as 1942 instead of 1944 and for giving necessary benefits to him in the fixation of his pay.

2. The facts of this case are complicated and involved. It is nevertheless necessary to unravel these complicated facts, in order to appreciate clearly what are the questions which must be dealt with in this appeal. The appellant having been selected by the Special Recruitment Board as an Emergency Recruit from the 'Open Market', was appointed to the Indian Administrative Service on August 7, 1950 and allocated to the Orissa cadre. He was born on January 7, 1915, and joined the Editorial Staff of the Civil and Military Gazette, Lahore, towards the end of 1938. He continued to serve the Civil and Military Gazette, up to January 7, 1943 when he joined the Army. During the Second World War, he was granted an Emergency Commission in the Army w.e.f. March 7, 1943 with the rank of Lieutenant w.e.f. June 3, 1948, but with seniority in that rank w.e.f. September 9, 1944.

3. The Government of India, Ministry of Home Affairs, New Delhi, by letter dated July 19, 1951 forwarded a statement showing the years of allotment assigned to various officers borne on the Indian Civil Administrative cadre of Orissa. The year of allotment assigned to the petitioner was 1943 1/2 for purposes of seniority, on the basis of his particulars as available at that time. On receiving his representation, the Ministry of Defence was requested to furnish information regarding the particulars of his pay and allowances drawn by him during the period December 31, 1944 to December 31, 1948. As the information furnished by the Ministry of Defence did not tally with those furnished by the petitioner in his application for recruitment to the Indian Administrative Service to the Special Recruitment Board, he was asked to explain the discrepancy between the particulars furnished by him and those furnished by the Ministry of Defence. He was also asked to explain why his seniority should not be calculated on the basis of the information furnished by the Ministry of Defence according to which his year of allotment should have been 1945. On receiving his reply, the Government of India, Ministry of Home Affairs, by its letter dated June 11, 1952, decided after due consideration that his 'protection pay' should be treated as part of his pay, the allowances like the Calcutta Compensatory and Lodging allowances etc., were not to be counted as part of his pay. It was further decided that the deficiency of six days in counting the number of completed years of actual experience could not be condoned. The Government of India, Ministry of Home Affairs, accordingly, fixed the year of allotment of the petitioner to the Indian Administrative

Service as 1944.

4. The appellant has had a chequered career. It appears that the petitioners faced heavy weather in the State of Orissa, from where in 1952 he was sent out on deputation to the Government of India, i.e., after he had served the State Government of Orissa for a period of little less than two years. Thereafter he remained continuously on deputation with the Government of India for 12 1/2 years till he reverted to his parent State on April 23, 1965 despite the objection of the then Chief Minister. He served as Deputy Secretary to the Government of India in the Ministry of Transport from 1955 to 1961. On April 1, 1961, he proceeded on long leave. On his return from leave, the petitioner was appointed as the Salt Commissioner and Managing Director, Hindustan Salt Ltd., with headquarters at Jaipur. He held both the posts until December 23, 1963, and only as Salt Commissioner till April 7, 1964, whereafter he was reverted to the State of Orissa. On his reversion to the State, he was first appointed as Managing Director, State Warehousing Corporation, a post usually held by an Additional District Magistrate, but later on allowed to officiate in the super-time scale as Revenue Divisional Commissioner, Sambalpur, w.e.f. October 24, 1965, by reverting an officer junior to him. While the petitioner was serving as commissioner of Land Reforms, Orissa, a prosecution was launched against him on November 24, 1967 under Section 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947, on a charge of having assets to the tune of Rs. 3,29,476.90 disproportionate to his income. There was a search of his house at Cuttack on and after November 27, 1967, and he was placed under suspension by the Government of Orissa on November 28, 1967, under Rule 7(3) of the All India Services (Discipline and Appeal) Rules, 1955. Eventually, the prosecution ended in an acquittal. The petitioner was compulsorily retired by the Government on June 9, 1971. On September 1, 1977, the State Government after the order of acquittal, issued an order directing that the period from November 29, 1967, i.e. the date of suspension, till June 9, 1971, i.e., the date of his retirement shall be treated as period spent on duty. It also made consequential directions in the matter of pay and allowances, treating him in the super-time grade from November 29, 1967, to April 24, 1968, and, thereafter in the selection grade, from April 25, 1968 till June 9, 1971.

5. The questions sought to be raised by the appellant who appeared in person, are no doubt of a wide and general importance. The question still remains whether one of them, i.e., regarding the year of allotment need or could be decided at all. Three questions arise for determination on his submissions : First, whether the Court has the jurisdiction or the power to make a direction requiring the Government of India, to re-fix the year of allotment of the petitioner as 1942 instead of 1944 as determined, respecting his seniority in the Indian Administrative Service, from which he has retired; secondly, whether the Fundamental Rules applied to the petitioner, and if so, whether he was entitled under F.R. 49 for the period from September 11, 1961, to December 23, 1963 during which he simultaneously held both the posts of the Salt Commissioner and the Managing Director, Hindustan Salt Ltd. with headquarters at Jaipur in the State of Rajasthan, to the full salary of one post and additional salary up to a maximum of 50% of the second post, which salary has been denied to him, and thirdly, whether the Next Below Rule implied in F.R. 30 was applicable to the petitioner while he was serving in connection with the affairs of the Union inasmuch as his junior in the Orissa Cadre, Sri V. V. Anantkrishnan was appointed in the super-time scale on July 24, 1962 and he was thus entitled to the benefit of the same and had to be placed in the super-time scale w.e.f. July 24, 1962 to June 9, 1971, i.e., the date of his retirement.

6. But the whole structure of this argument has no real foundation.

7. The Union of India and the State of Orissa filed counter-affidavits and denied the petitioner's

right to relief on any of the grounds.

8. In its elaborate judgment, the High Court carefully considered all the aspects and took the view that the considered decision of the Government of India, Ministry of Home Affairs, on the representation of the petitioner reached after due consideration, cannot be interfered with. They had decided not to condone the deficiency of six days in counting the number of completed years of actual experience, not take into account compensatory allowance like Calcutta Compensatory allowance and the Lodging allowance, in calculating his pay, for determining the year of allotment. Further, the High Court observed that the failure of the petitioner to explain the discrepancy between the particulars as furnished by him and those furnished by the Ministry of Defence, his failure to produce any records to show what the information of the Ministry of Defence was or even the reply that he had ultimately sent to the Government of India in trying to explain the discrepancy, coupled with the fact that he had neither produced the impugned order of the Government of India fixing 1944 as the year of allotment, nor had he furnished the details of his pay and allowances from time to time in respect of the period in question, were fatal to the petitioner's case. It also observed that in the absence of any good reason being shown to justify intervention by the court in the exercise of its writ jurisdiction, the contention regarding the year of allotment cannot be accepted.

9. The High Court also held in the alternative, that the Government of India had arrived at the correct year of allotment in respect of the petitioner. In determining the number of completed years in the 'N' formula, the Government was not duty bound under Rule 3 to relax the same, and its refusal to condone the deficiency of six days, it could not be said that the Government had not dealt with the case in a just and equitable manner. In its view, the benefit claimed by the petitioner, to say the least, would be in direct contravention of the requirement that no fraction of a year was to be taken into account. On a proper reading of the 'N' formula, it was not possible to read into the same the imposition of a duty on the Government to relax the requirements in appropriate cases, nor would the Government be justified in making a departure from the plain meaning of the instructions in a particular case, merely on the ground of hardship. According to the High Court, the word 'pay' in the context of the relevant Rules and Instructions, included only such allowances as were intended to form an addition to pay and not compensatory allowances like Calcutta City Allowance and Lodging Allowance, etc., i.e., allowances which were essentially compensatory in character and were intended to be reimbursed to the Government servant for the expenditure incurred by him in the course of his duty and, therefore, they could not be taken to form part of 'pay' as referred to in the instruction. It lastly, held that it was not disputed before it with regard to the applicability of the 'Next Below Rule', that promotion to a post in super-time scale involves an element of selection and not mere seniority, and that there was nothing to show that the Government of India ever failed to apply their mind to the case of the petitioner in respect of his claim to the benefit of the 'Next Below Rule' nor was it argued before it that the Government of India acted mala fide or in an arbitrary manner. From the language of the clarificatory letter of the Secretary of State for India in Council, dated April 2, 1947, it was clear that no officer can claim as of right promotion to a post carried in super-time scale under the 'Next Below Rule'. It merely embodies the guiding principles governing promotion to such post which involves an element of selection and not mere seniority.

10. There can be no doubt, in our opinion, agreeing with the decision of the High Court, that the petitioner was not entitled to any relief. The High Court has, to our mind, reached a just and correct decision.

11. At the very outset, we tried to impress on the petitioner that his main relief, i.e., with respect to fixation of the year of allotment, according to the 'N' formula, had become infructuous, as he had

already retired from service and only the subsidiary relief, i.e. for giving necessary benefits to him in the fixation of his pay remains which is nothing but a monetary claim, for the enforcement of which the remedy lay elsewhere. But the petitioner who appeared in person persisted in arguing all the points raised particularly the one regarding fixation of the year of allotment, saying that he was doing it for the 'benefit of others'. We have, therefore, no alternative but to deal with the appeal on merits.

12. We fail to comprehend what relief the petitioner can be granted in this appeal. In his application for grant of special leave to this Court under Article 136 of the Constitution, the petitioner has categorically stated that 'he was no longer interested in the relief for determination of the year of allotment', according to the 'N' formula since he was on the verge of retirement, and that the arguments advanced on his behalf in the High Court were, therefore, only confined to 'his entitlement to additional pay under F.R. 49', irrespective of the fact whether he was given the benefit under the 'Next Below Rule' or not. In this connection, he avers :

2. In the said writ petition, your petitioner had prayed for the following reliefs from the respondents :

(a) Proper fixation of his year of allotment in the Indian Administrative Service;

(b) Grant to the petitioner of the necessary benefits under Fundamental Rule 49 and 'Next Below Rule' in the fixation of his pay at a rate higher than the super-time scale pay of the IAS from 11-9-1961, the date on which he took over concurrently the two appointments of Salt Limited, and at super-time scale pay from 23-12-1963 when he held the appointment of Salt Commissioner only.

4. That the petitioner was much less interested in the adjudication of the claim stated in sub-para (a) in view of his impending retirement from service

the petitioner's main interest was in his claim stated in detail in sub-clause (b) of para 2, particularly, its portion relating to his entitlement of extra remuneration under Fundamental Rule 49 for holding two independent posts concurrently, which involved arrears of pay amounting to over Rs. 30,000.

In that situation, the petitioner cannot be heard to say that the Government of India had not arrived at a correct decision in assigning 1944 as the year of allotment to him. Even if he were entitled to do so, the contention merits no consideration.

13. The learned Solicitor-General has, at our request, placed before us all the relevant records of the Ministry of Home Affairs, Ministry of Finance and the Ministry of Law and Justice which bear upon the question at issue. On a perusal of these records, it is quite clear the Government of India evolved uniform policy as a matter of principles to deal with such questions. In the light of the set principles, all the demands of the petitioner were considered at each stage, and found that they could not be accepted, keeping in view the desirability of uniformity of policy in such matters.

14. In support of the contention regarding the year of allotment, the petitioner's submission is twofold, namely, (i) the Government of India were in error in not condoning the deficiency of six days in reckoning the completed years of his services after attaining the age of 25 years. He has wrongly been given credit for only 8 years instead of 9 years as there was a short fall of six days to complete 9 years, which short fall should have been waived by the Government, and (ii) he being a

regular Army Officer, the definition of 'pay' in F.R. 9(21)(b) was attracted, so that in determining the year of allotment, 'pay' would also include allowances like Lodging Allowances. We are afraid, none of the contentions can prevail.

15. It is common ground that as regards Emergency Recruits from the 'Open Market', the year of allotment was to be determined according to the 'Open Market Emergency Recruitment Scheme', embodied in the instructions of the Government of India for the preparation of a common gradation list for the officers of the Indian Civil Service Cadre in each State issued on July 7, 1950. The relevant instructions adverted to, so far as material, (hereinafter referred to as 'N' formula) reads as follows :

IV. Emergency Recruits from the 'Open Market' :- These officers should be given an year of allotment on the basis of the following rules below :

(1) The number of completed years of actual experience of the officers after attaining the age of 25 and up to the 31st December, 1948 as certified by the Special Recruitment Board will be the period of previous experience to be taken into account.

This period will be divided into two parts, N1 and N2 as below :

(a) N1 means the period of continuous employment on a pay or income of not less than Rs. 800 per month inclusive.

(b) N2 means the entire period of previous experience to be taken into account, exclusive of N1.

(2) The year of allotment in each case will be 1949 - Y, where Y = N1 plus 1/2 of N2.

These instructions form a part of counter-affidavit filed on behalf of the Union of India and are printed in the All India Services Manual, Second Edition, at p. 774, with the heading "Executive Instructions/Orders issued by the Government of India under the Indian Administrative Service (Regulation of Seniority) Rules, 1954."

The year of allotment : 'N' formula :

16. Rule 3 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954, so far as relevant, reads :

3. Assignment of year of allotment. - (1) Every officer shall be assigned a year allotment in accordance with the provisions hereinafter contained in this rule.

(2) The year of allotment of an officer in service at the commencement of these rules shall be the same as has been assigned to him or may be assigned to him by the Central Government in accordance with the orders and instructions in force immediately before the commencement of these rules.

17. Even according to the petitioner, he is not entitled, under the 'N' formula as it stands, to a credit of more than 8 years. If that be so, the High Court quite properly declined to exercise its

extraordinary jurisdiction under Article 226 of the Constitution inasmuch as no writ or direction could be issued, in a matter which was essentially in the discretion of the Government, to re-fix his seniority by giving credit for 9 years instead of 8 years as provided for, as admittedly the relevant instructions require 'completed years of actual experience.'

18. Normally, the decision of the Government of India assigning a year of allotment to a particular officer under Rule 3 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954, or in accordance with orders and instructions issued by the Central Government in that behalf the commencement of these Rules, is final and cannot be interfered by the Courts under Article 226 of the Constitution unless such decision was capricious or arbitrary or in breach of the said Rules. The same principle should apply to the assignment of a year of allotment under the 'N' formula.

19. The contention that the Government of India should have condoned the short fall of six days by relaxation of the relevant Rule under the powers vested in it by the All India Services (Conditions of Service - Residuary Matters) Rules, 1960, can hardly be accepted. These Rules were not in force when the Government of India, Ministry of Home Affairs, by their letter dated July 19, 1951, issued a statement showing their years of allotment assigned to officers borne on the Indian Civil Administrative Service Cadre of Orissa, wherein the year of allotment assigned to the petitioner was 1943 1/2, or even at the time when the Ministry of Home Affairs by its letter dated June 11, 1952 rejected his representation in that behalf, while revising his year of allotment to 1944. The relevant records of the Government of India, Ministry of Home Affairs, disclose that the Government of India adopted a uniform policy in this regard and short falls of even less than 6 days have not been condoned so that there could be uniformity of taking note of 'completed years of service', irrespective of the short fall of number of days, in calculating the year of allotment in every case under the 'N' formula.

20. The question of relaxation was considered at the highest level as admitted by the petitioner himself. The records of the Government of India, Ministry of Home Affairs, disclose that by letter dated June 11, 1952, the Government of India, after due consideration, rejected the representation of the petitioner, by issuing an order to the following effect :

I am directed to say that the Government of India have carefully considered the points raised by Sri Suri in his representation. The decision thereon are as follows :

(i) Considering the circumstances in which the pay scale in the Army was generally reduced and a 'protection pay' was given, the Government of India consider that it would only be fair that the 'protection pay' granted to Sri Suri during his service in Army should be treated as part of his basic pay for purposes of determining his seniority.

(ii) The Calcutta Compensatory Allowance and the Lodging Allowance drawn by Sri Suri during the period October 1944, to August 1947, cannot be treated as part of pay for computing N1 or N2.

(iii) Sri Suri has represented that the completed years of service after attaining the age of 25 up to the 31st December, 1948, calculated in accordance with the formula falls short of one additional year in his case because of a shortage of six days. He has requested that this deficiency should be condoned. The Government of India have rejected similar requests for condonation of even shorter periods and regret,

therefore, that they are unable to accede to the request.

2. On the basis of the decision referred to in para 1 (i) above, Sri Suri's revised year of allotment works out to be 1944. His position in the Orissa Indian Civil Administrative Gradation List (forwarded with the Ministry of Home Affairs Letter No. 2/3/52-AIS, dated the 26th April, 1952) will therefore be immediately below Sri S. T. Merani (S. No. 12) and above Sri S. S. Murthi (S. No. 33). The serial numbers of Shri Murthi and officers below him in the list may be changed accordingly.

21. The matter did not rest at that. Thereafter, the All India Services (Conditions, of Service - Residuary Matters) Rules, 1960 were framed, and by Rule 3 the Central Government were conferred power to relax the rules and regulations regulating the conditions of service appointed to an All India Service, in any particular case, on the ground 'undue hardship', as they may consider it necessary for dealing with the case in a just and equitable manner. A doubt was raised whether the power of relaxing rules was intended to be applicable to 'Recruitment Rules' also. The Government of India have held that the 'Recruitment Rules' cannot be relaxed under Rule 3. Nevertheless, the petitioner kept on making representations and the question was reconsidered on occasions more than one as reflected in the order of Sri Govind Ballabh Pant, Minister for Home Affairs, dated June 1, 1958, which reads :

Sri Suri's case has been considered more than once. I do not find, however, any adequate reasons for revising the orders already passed. It would be difficult to condone the deficiency even if it be of only 7 days in the case of only one officer. The rule which gave an advantage to married officers cannot apply to him as he was not married at the time.

22. Even assuming there was a power to condone the deficiency, the matter rested entirely in the discretion of the Government of India. When a decision in a policy matter like this is left to the absolute discretion of the Executive, we do not see how the courts can interfere and issue a direction to the Government of India to reconsider the matter afresh, after a lapse of more than 25 years. It would not only disturb the combined gradation list of the officers belonging to the Indian Administrative Service, but also affect the seniority of many officers who have not been impleaded in these proceedings. May be, many of them may have died or retired and even as regards the others, they may have been confirmed in the super-time grade. The High Court, therefore, rightly, in our opinion, held that there could be no interference in such matters.

23. 'N' Formula and F.R. 9(21)(b). - F.R. 9(21)(b) reads :

(b) In the case of a military officer, in receipt of the rates of pay introduced on July 1, 1924, pay includes the amount which he receives monthly, under the following designations :

(i) pay of appointment, lodging allowance and marriage allowance and

(ii) pay of rank, command pay, additional pay, Indian Army allowance, lodging allowance and marriage allowance.

F.R. 2 provides that the Fundamental Rules shall apply, subject to the provisions of F.R. 3, to all Government servants whose pay is debitable to civil estimates and to any other class of Government servants to which the President may by general or special order declare then to be applicable. It is,

however, provided by F.R. 3, that unless it be otherwise distinctly provided by or under the Rules, nothing in these Rules shall apply to Government Servants whose conditions of service are governed by Army or Marine Regulations. It is, therefore, obvious that the definition of 'pay' in the case of a military officer, introduced by F.R. 9(21)(b) is for 'protection pay' when such officer is recruited in civil service under the employment of the Union of India, i.e., for fixation of his pay in such service. For this limited purpose, the term 'pay' not only includes the 'rank pay' but also command pay, additional pay etc., and, 'allowance' like lodging allowance and marriage allowance are treated as part of 'pay'. If a military officer had been receiving any of these allowances, they will fall under the head 'Pay' under F.R. 9(21)(a). F.R. 9(21)(b) had, therefore, no relevance in the matter of fixing the seniority of Emergency Recruits from the 'Open Market' to the Indian Administrative Service, like the petitioner, even where they were drawn from the Army, but was applicable only in regard to fixation of their initial pay.

24. It is, however, argued that the petitioner was a regular Army Officer at the time when he was appointed as an Emergency Recruit from the 'Open Market' and, therefore, his pay for purposes of calculating the year of allotment was regulated by F.R. 9(21)(b), in the absence of any provision to the contrary.

25. The argument appears to be somewhat attractive but on deeper considerations must be rejected. The underlying principles on which the 'N' formula was evolved by the Government of India are set out in the letter of the Ministry of Home Affairs, dated July 18, 1949, the substance of which reads :

4. No decision has yet been reached about the seniority to be accorded to candidates from the 'Open Market' appointed to the IAS on the recommendation of the Special Recruitment Board. There were two alternative methods by which seniority of such officers should be determined, viz., (a) on the principle of the 'basic pay' or (b) related to the experience which the candidates concerned had gained in their respective employment, profession or business. The 'basic pay' of the Emergency Recruits drawn from the 'Open Market' had been fixed mainly on the basis of age. As regards (a), it was felt that if seniority is to follow strictly the basic pay, the initial 'basic pay' would be subject to a maximum of Rs. 660 for the junior scale and Rs. 1,000 in the senior scale which represents the pay admissible in the tenth year of service at the age of 36. The alternative method of approach, i.e., to relate seniority of the new recruits to the length of his actual experience in the previous employment, business or profession, would be fair to the recruits themselves inter se as it would maintain a distinction on the basis of their 'actual experience'. It was, therefore, proposed that credit should be given to the Emergency Recruits for the purpose of determining their seniority in the IAS at the rate of six months in every year of experience which such recruits may have after the age of 25.

The 'pay' for purposes of determining the year of allotment under 'N' formula recruits like the petitioner, was, therefore, the 'basic pay' which must necessarily exclude allowances. This concept of 'basic pay' for fixation of initial pay is reflected in the Indian Administrative Service (Pay) Rules, 1954 which takes into account only the 'initial pay.'

26. It has been stated on behalf of the Union of India that the Special Recruitment Board, for this recruitment, interviewed candidates who were already employed under the Government or in commercial firms or business houses and in public or local bodies as well as members of the legal profession and others and out of 153 candidates selected, 115 were Government servants, 15 were

from commercial firms and business houses, 8 from public and local bodies 4 from legal profession and 11 from other sources. The rule which requires credit to be given for the period of continuous employment on pay or income not less than Rs. 800 p.m. would, therefore, apply uniformly to persons who were previously lawyers or employed in business houses or in Government service. Uniformity in such a case can only be attained by excluding allowances in every case, because the allowances which persons drawn from these different sources would be getting, would be varied in character. The Government of India, therefore, acted fully in consonance with Articles 14 and 16 of the Constitution in excluding allowances in computing the pay. The amount of Rs. 800 p.m. was taken as a basis as it was the first stage in the senior time scale of pay of officers in the Indian Administrative Service. In this scale, the amount of Rs. 800, is the 'basic pay' without including allowances.

27. Under these circumstances, the decision taken from the beginning was that allowances would not be included in computing the pay and as long as this decision is applied uniformly, without exception, the appellant can have no grievance in this regard to seniority specifically as allowances would have to be added uniformly to all other persons in the seniority list. Thus, the definition of 'pay' in F.R. 9(21)(b) is applicable only for the fixation of 'pay' of a Government servant who had been recruited from the Armed Forces. In such a case, the total salary including such allowances as falling within the definition is taken note of. The petitioner admittedly was given an initial pay of Rs. 1,000, i.e. much higher than officers appointed to the Indian Administrative Service on the result of the competitive examinations. Here we are not concerned with the fixation of pay of the petitioner but with regard to the Rules relating to the fixation of his seniority which would take note of the period prior to his recruitment to the Indian Administrative Service and for that purpose the 'basic pay' alone was relevant. The concept of pay under F.R. 9(21)(b) cannot, therefore, be introduced for purpose of regulating the year of allotment under 'N' formula, as it relates to fixation of seniority and not of pay. The matter falls to be regulated by the interpretation placed by the Government of India, Ministry of Home Affairs in their letter date July 18, 1949.

28. If the definition of 'pay' in F.R. 9(21)(b) was to be taken note of, then Calcutta Compensatory Allowance and marriage allowance would also be included. Obviously, a rule which makes seniority dependent upon marriage allowance and, therefore, on whether the officer was married or not will be violative of Article 14 of the Constitution. The petitioner gave up before the High Court his claim to the inclusion of marriage allowance though covered by the definition of pay, and in this Court his claim for the inclusion of Calcutta Compensatory Allowance. In dealing with the question, the High Court has observed that the word 'pay' in the context of the relevant Rules and Instructions included only such allowances as were intended to form an addition to pay and not compensatory allowance like Calcutta City Allowance and Lodging Allowance, etc., i.e., allowances which were compensatory in character and were intended to be reimbursed to the Government servant for the expenditure incurred by him in the course of his duty and, therefore, they could not be taken to form part of 'pay' as referred to in the 'N' formula. We cannot see that the petitioner is on a better footing as regards lodging allowance, which is usually given to Army Officers in lieu of rent-free quarters. They become at once disentitled to such allowance the moment they are allotted quarters. Lodging allowance is, therefore, essentially, compensatory in nature. The inclusion of pay as defined in F.R. 9(21)(b) in the 'N' formula to include the lodging allowance, is not permissible as the petitioner would have to claim the application of the definition of 'Pay' in its full rigour or not at all. Any other construction will lead to manifest injustice as it would result in discrimination between persons similarly situated, i.e., between an Army Officer in receipt of lodging allowance in lieu of rent-free quarters and one in occupation of such rent-free quarters, in the matter of seniority in the Indian Administrative Service. The inevitable conclusion, therefore, is that the definition of 'pay' in F.R.

9(21)(b) was not applicable for purposes of fixation of seniority of the petitioner.

Fundamental Rules and their applicability :

29. It is not necessary for our purposes to deal with the larger question as to whether the Fundamental Rules regulate the conditions of service of members of the Indian Administrative Service. As at present advised, we are inclined to think that their conditions of service are regulated by the provisions of All India Services Act, 1951 and the various Rules and Regulations framed thereunder, such as Indian Administrative Service (Recruitment) Rules 1954, Indian Administrative Service (Cadre) Rules, 1954, Indian Administrative Service (Pay) Rules, 1954, Indian Administrative Service (Regulation of Seniority) Rules, 1954, Indian Administrative Service (Appointment by Promotion) Regulation, 1955, All India Services (Discipline & Appeal) Rules, 1955 and 1969. All India Services (Conditions of Service - Residuary Matters) Rules, 1960, etc. When there is specific provision made in regard to them on a particular subject regulating their conditions of service in the said Act and the Rules, the question of applicability of the Fundamental Rules does not arise.

30. Even assuming that the Fundamental Rules were applicable on August 7, 1950, i.e., at the time when the petitioner was appointed to the Indian Administrative Service, these Fundamental Rules ceased to be applicable on the coming into force of the aforesaid rules and regulations framed under the Act, unless the President by an order under F.R. 2 declared them to be so applicable.

Combination of posts and right to Additional Pay under F.R. 48 :

31. The short question for consideration is whether the petitioner was entitled under F.R. 49 for the period from September 11, 1961 to December 23, 1963 during which he simultaneously held both the posts of the Salt Commissioner and the Managing Director, Hindustan Salt Ltd., with headquarters at Jaipur, to the full salary of one post and additional salary of a maximum of 50% of the second post. The answer must clearly be in the negative. The provisions of F.R. 49 were not applicable to him after the Indian Administrative Service (Pay) Rules, 1954 were brought into force; and even if they were, F.R. 49, in terms, provides that when a civil servant holds two posts, he is disentitled to draw the salary of both the posts. All that such a civil servant becomes entitled to is the salary of the higher post, but no additional salary can be allowed for performing the duties of the lower post. Thus, the pay of one of the posts can be allowed. Furthermore, the rules relating to pay applicable in 1962 were the Indian Administrative Service (Pay) Rules, 1954 which make no provision for additional pay.

31A. Rule 13 of the said Rules reads as follows :

13. Repeal and saving. - Any rules corresponding to these rules and in force immediately before the commencement of these rules are hereby repealed :

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

It would thus follow that the provisions of Fundamental Rules in regard to pay, even if applicable, ceased to apply from the date on which the Indian Administrative Service (Pay) Rules, 1954 came into force. The petitioner, therefore, would normally not be entitled to invoke F.R. 49 in regard to the salary paid to him when he was simultaneously holding the two posts in question.

32. Even assuming that the provisions in the Fundamental Rules would continue to apply to a member of the Indian Administrative Service in regard to which no specific provisions is made by framing a rule under the All India Services Act, 1951 and, therefore, the petitioner was still governed by F.R. 49, he had no claim to any additional salary. The records of the Government of India, Ministry of Home Affairs disclose that the ground on which the claim of the petitioner was rejected was that at the time the post of Managing Director, Hindustan Salt Ltd. was brought into existence, there was a down-grading of the post of Salt Commissioner having regard to the diminution in the nature of duties and responsibilities attached to the said post. Normally, this should have resulted in a reduction in the scale of pay of the post Salt Commissioner, but the Government of India, on due application of mind, refrained from doing so, purely on consideration of his additional charge, and continued the post in the same scale of pay as a result of which the petitioner, in fact, obtained monetary benefit. For this reason, the Finance Ministry did not agree to any extra remuneration over and above the scale of Rs. 1800 - 2000 to the Salt Commissioner-cum-Managing Director.

33. The grievance of the petitioner that his successor-in-office to the post of Salt Commissioner, Jaipur was given a pay of Rs. 2,250 was also considered, but his representation was rejected on the ground that the said incumbent had already been drawing Rs. 2250 when he was asked to hold the post of Salt Commissioner, Jaipur. The relevant record disclose again a full and detailed applicable of mind to the issues involved.

34. Thus there was no question of the petitioner being entitled to be given an additional pay under F.R. 49, i.e. full salary of one post and additional salary up to maximum to 50% of the other post, for the period from September 11, 1961 to December 23, 1963, during which he simultaneously held both the posts.

'Next Below Rule'

35. The intention underlying the second proviso to F.R. 30(1) which is commonly known as the 'Next Below Rule' is the principle that when an officer in a post (whether within the cadre of his service or not) is for any reason prevented from officiating in his turn in a post on higher scale or grade borne on the cadre of the service to which he belongs, he may be authorised by special order of the appropriate authority pro forma officiating promotions into such scale of pay and thereupon be granted the pay of that scale or grade, if they be more advantageous to him on each occasion on which the officer immediately junior to him in the cadre of his service draws officiating pay in that scale or grade. The principle behind the so-called rule is evidently that an officer out of his regular line should not suffer by forfeiting acting promotion which he would otherwise have received had he remained in his regular line : State of Mysore v. M. H. Bellary ((1964) 7 SCR 471 : AIR 1965 SC 868 : (1965) 1 SCJ 311).

36. The real implications of the 'Next Below Rule' as defined in the Secretary of State for India's ruling clarified by the Government of India, Ministry of Finance by letter No. 2(25)-Est. III/46, dated April 2, 1974 : All India Services Manual, 2nd Ed. pp. 765-66, insofar as they bear upon the claim or right to the benefits thereunder in respect of the petitioner, are extracted below :

The so-called 'rule' is not a rule of any independent application. It sets out only the guiding principles for application in any case in which the Governor-General in Council, or the Governor exercising his individual judgment in virtue of the powers conferred on him by the Secretary of State's Rule of the 14th April, 1942 (published

with Home Department Notification No. 195/40 Ests., dated the 9th June 1942), proposes to regulate officiating pay by special orders under the second proviso to Fundamental Rule 30(1). The condition precedent to the application of the 'Next Below Rule' must, therefore, be fulfilled in each individual case before action may be taken under this proviso.

It would thus appear that the 'Next Below Rule' is not a rule of any independent application. It sets out only the guiding principles for application in any case in which the President or the Governor proposes to regulate an officiating pay by special order under the second proviso to F.R. 30(1). The condition precedent to the application of the 'Next Below Rule' must, therefore, be fulfilled in each individual case before any action can be taken under this proviso.

37. It was not disputed before the High Court with regard to the 'Next Below Rule' that promotion to a post in a super-time scale involves an element of selection and not mere seniority. The Government of India, Ministry of Home Affairs, intimated the petitioner in June 1965 that his representation for fixation of pay in the super-time scale on the basis of the 'Next Below Rule' had been rejected. It was, therefore, accepted before the High Court that there was due application of mind by the Government of India to the case of the petitioner in respect of his claim to the benefit of the 'Next Below Rule' and that there was nothing to show that the Government has acted mala fide or in an arbitrary manner in rejecting his claim.

38. The Additional Solicitor-General placed before us voluminous records showing that, as a rule of universal application, the benefit of the 'Next Below Rule' has never been extended when there is promotion to a post in super-time scale. This is a problem which has faced the Government of India on numerous occasion and eventually the Government reached a uniform decision that the 'Next Below Rule' should not be applied to a super-time scale post, carrying Rupees 2500-125/2-2750 for considerations of policy which are these : (1) the length of service which officers in States have to put in before they get promotion to super-time scale is not uniform; (ii) Most of the States have got Divisional Commissioners, while some States do not have this post; (iii) The posts of Secretaries in some States carry pay in super-time scale while in other these posts carry pay in the senior scale; and (iv) An officer might be good enough to be a Divisional Commissioner, but might not be good enough to be Joint Secretary to the Government of India.

39. The benefit of the 'Next Below Rule' is available in the selection grade but this benefit has not so far been allowed to the members of the Indian Administrative Service in the super-time scale. The considerations on which this policy of the Central Government is based are contained in the note of Sri. L. P. Singh which is reproduced below :

The length of service which officers in different States have to put in before they get promotion is not uniform. In some States, officers become Commissioners in the 15th or 16th year of service; in some, even officers who have put in 20 years' service in the Indian Civil Service are still drawing pay in the senior time scale. Again while most States have got Divisional Commissioners, some have not. Further, Secretaries to Government in West Bengal, Maharashtra and Gujarat are allowed special rates of remuneration. Again, while an officer may be good enough to be Divisional Commissioner, he may not necessarily be good enough to be a Joint Secretary to the Government of India.

40. It appears that the State Government of Tamil Nadu made a reference on the subject, and the

matter was studied in depth by the various ministries. The Ministry of Home Affairs was not unfavourably inclined. It expressed that since new guidelines have been evolved and the State Governments have been requested to constitute a Screening Committee for considering the cases of the members of the Indian Administrative Service for appointments to posts carrying pay in super-time scale, the benefit of super-time scale should be extended to officers on deputation with the Government of India under the 'Next Below Rule.' It, however, agreed that there cannot be complete uniformity at any particular time, since the length of service which officers in different States have to put in before they get promotion is not uniform but expressed that this criterion loses much of its force with the passage of time and that the view that an officer might be good enough to be a Divisional Commissioner and might not be good enough to be the Joint Secretary to the Government of India, hits at the very root of the system of administration which we have adopted in this country. It further expressed that the fact that most of the States have got Divisional Commissioners while some States do not have these posts, has no relevance. It, therefore, proposed that officers belonging to the Indian Administrative Service should be given pro forma promotion to the super-time scale by the State Government under the 'Next Below Rule' so that the service rendered by such officer from the date of such promotion, will count for the purpose of fixation of initial pay, on reversion to the parent cadre, and also for the purpose of increments, and the benefit should be allowed on 'one for one basis'. It was also suggested in the alternative, that if the benefit of the 'Next Below Rule' could not be extended to such officer and if he is detained by the Government in a lower post at the Centre against his wishes and in public interest, he should be given the 'higher pay' on personal basis, i.e., as a measure personal to him within the framework of the policy quoted above. When the matter was referred to the Ministry of Finance, it did not agree to either proposal, and the Ministry of Law rightly pointed out :

It is not appropriate to raise the scale of ex-cadre post to that of super-time scale merely because the incumbent has become due for promotion to the super-time scale. The pay attached to a post is with regard to the nature of the duties and responsibilities and not with reference to the entitlements of the incumbents.

As regards the scope of the protection of pay envisaged by the Proviso to sub-rule (2) of Rule 6 of the Indian Administrative Service (Cadre) Rules, the Law Ministry advised that :

The concept of the basic pay which the officer would have drawn but for his deputation is limited to the basic pay of the post to which he would have been promoted in the natural course of things but not to a post like a super-time scale to which appointment is not only on the basis of seniority but also merit and suitability.

41. Thus the present position is that the benefit of the 'Next Below Rule' is available at the first stage of selection, i.e. at the time of appointment in the selection grade but not at the second stage, namely, at the time of promotion to the super-time scale.

42. It is, therefore, abundantly clear that the petitioner cannot claim as a right the super-time scale merely on the basis of his seniority among the members of the Indian Administrative Service belonging to the Orissa Cadre. The process of appointment to the super-time scale is by selection. When the element of selection comes in, this promotion must be subject only to the claims of exceptional merit and suitability, and is not a matter of right : *Union of India v. M. L. Capoor* ((1973) 2 SCC 836 : 1974 SCC (L&S) 5). Promotion to the super-time scale is, therefore, not a matter of course. The officer must stand the test of suitability and his integrity must be beyond doubt. For this purpose, there is a Senior Selection Committee which prepares a select list of

suitable officers which must be approved by the Union Public Service Commission. The Senior Commission has to prepare a panel of names for each grade and submit there same for approval to the Union Public Service Commission as well as to the Government of India, Ministry of Home Affairs. The select list has to be reviewed and revised every year, and the Senior Selection Committee meets annually. The essence of holding Selection Committee meeting annually is that each annual proceeding is independent of the other. That is why as soon as the proceedings of the new Selection Committee are approved by the Union Public Service Commission, the proceedings of the earlier Selection Committee become inoperative. No manner of continuity can, therefore, be imputed to the proceedings of the various selection Committees. It is not the petitioner's case that his name was ever brought into the select list by the Senior Selection Committee and approved by the Government of India, Ministry of Home Affairs, for appointment in the selection grade. If the petitioner was "consciously" passed over by the Senior Selection Committee or the Government of India, Ministry of Home Affairs then there is no question of the applicability of the 'Next Below Rule'.

43. Much stress was, however, laid on the letter of Sri R. N. Mohanti. Joint Secretary to the Government of Orissa, Political and Services Department, dated May 7, 1963, addressed to the petitioner in reply to his letter dated March 15, 1963, for the submission that had he remained in his parent cadre, he would have been promoted and drawn pay in the super-time scale. It was urged that the petitioner should have been given pro forma promotion and the higher scale of pay in the super-time grade under the 'Next Below Rule' because his junior in his parent cadre and been promoted to such scale of pay or granted 'higher pay' on personal basis to compensate for the financial loss suffered by him due to his retention in a lower post at the Centre. We are afraid, the contention must be rejected. The aforementioned letter only stated that his case would have been 'considered' in the normal course for the appointment to the selection grade as well as to a super-time scale post, had he continued under the State Government. It did not at all mention nor could it be construed to mean that he was entitled for appointment to a post in super-time scale on account of his seniority on the basis of the 'Next Below Rule'. In any event, the letter, we are afraid, cannot take the place of the recommendation of the Senior Selection Committee.

44. In the result, the appeal fails and is dismissed. There shall be no order as to costs.

</html