

Keshav Chandra Joshi and Others

Vs

Union of India and Others

Writ Petns. Nos. 626 of 1986 and 660 of 1987

(CJI Ranganath Misra, M.M. Punchhi, K. Ramaswamy JJ)

06.11.1990

JUDGMENT

K. RAMASWAMY, J.:-

1. The vexed question of inter se seniority between promotees and direct recruits has once again been brought to the fore at the behest of the petitioners in these writ petitions filed under Art. 32 and respondents Nos. 4 to 99 in the first writ petition, for short 'promotees' and the respondents Nos. 100 to 139 in the first writ petition, for short 'direct recruits' as Asstt. Conservators of Forest. The Governor of U. P. exercising the power under the proviso to Art. 309 of the Constitution issued the U.P. Forest Service Rules, 1952, for short 'the rules' which became effective from January 2, 1952. The promotees are confirmed Forest Range Officers in U.P. Forest Subordinate Service which is a feeder source for recruitment by promotion under R. 5(b) of the rules as Asstt. Conservator of Forest. Rule 4 constitutes and fixes the cadre strength of Chief Conservator of Forest; Conservator of Forest; Deputy Conservator of Forest and Asstt. Conservator of Forest. By fiction of law in Note to Rule 3(h) all the members of the provincial Forest Service became members of the initially constituted service. It would appear that after amalgamation no recruitment under Rule 5(a) of the posts of Asstt. Conservator of Forest was immediately made. In May, 1966, the selection to the posts of Asstt. Conservator of Forest was made but was ultimately vacated by this Court in A. K. Kraipak v. Union of India, (1970) 1 SCR 457 : (AIR 1970 SC 150), and the connected matters. The process of recruitment was again started in the year 1972 but was stayed by the High Court of Allahabad in W. P. No. 119 of 1972. The list of the recruits of 1966 could not thus be finalised till 1975. With effect from May 1, 1975, the ratio of 25% recruitment of promotees in Rule 6 was increased to 33-1/3rd per cent. The Governor also issued "promotion by selection in consultation with the Public Service Commission Procedure Rules, 1970". In the meanwhile the number of posts of Asstt. Conservator, Forest was determined. As there was no direct recruitment under Rule 5(a) till 1974 and even thereafter, promotees were appointed, admittedly on ad hoc basis, between March 13, 1974 and November 21, 1981, subject to direct recruitment and were posted as Assistant Conservator, Forest. Thus they are continuing temporarily on ad hoc basis though for varying periods of 5 to 12 years. In the meanwhile, the direct recruits under R. 5(a), had undergone two years training in the Indian Forest College, Dehradun and obtained diploma therefrom. In 1976, they were appointed on probation to substantive vacancies. When their claim was ripe for consideration as Deputy Conservators of Forest in the Indian Forest Service, the petitioners claiming seniority over them filed the writ petitions seeking inter alia for the issue of (a) a writ of mandamus to declare Rule 3(h) and Rule 24 of the Rules relating to reckoning of seniority from the date of the substantive appointment as illegal and violative of Arts. 14 and 16 of the Constitution of India; (b) to declare Rule 4 of the Indian Forest Service (Recruitment) Rules, 1966 and Regulation 5 of Indian Forest Service (Appointment by Promotion) Regulation, 1966 as violative of Arts. 14 and 16 etc.,

the details of which art, not material since the petitioners have given up their challenge before us. The only plea put forth is that the promotees should be declared ten have been regularly appointed from the respective dates of their-initial promotion as Assistant Conservators with all consequential benefits. The contention of M/ s. Mukhoty and Garg, their learned senior counsel is that though the promotees were appointed on ad hoc basis due to non-availability of direct recruits to the vacant posts of Asstt. Conservator of Forest, they are continuing for well over 5 to 12 years discharging the same duties, drawing the same scale of pay without any reversion. The posts held by the petitioners are not fortuitous, nor stop gap. The entire continuous length of service from the dates of their initial promotion should he counted towards their seniority. They strongly relied on Narendra Chadha v. Union of India, (1986) 1 SCR 211 : (AIR 1986 SC 638), Baleshwardas v. State of U. P., (1981) 1 SCR 449: (AIR 1981 SC 41) N. K. Chauhan v. State of Gujarat, (1977) 1 SCR 1037: (AIR 1977 SC 251) and proposition 'B' in paragraph 47 (of SCC) : (Para 44 of AIR), in Direct Recruits Class II Engineering Officers' Association v. State of Maharashtra, (1990) 2 SCC 715, para 47, Prop. 'B': (AIR 1990 SC 1607, Para 44) for short 'Direct Recruits' case in their support.

2. Shri P. P. Rao, learned counsel for the direct recruits contended that the appointment of the promotees admittedly being ad hoc they had not have any right to the posts. Their appointments, not being on the basis of merit as per rules, did not confer any right to the posts. Their seniority has to be counted only from the dates of substantive appointment. The service rendered from the dates of initial promotion till date of the substantive appointment should be treated as fortuitous. The delay to make direct recruitment had been occasioned only on account of the pendency of the proceedings right from Kraipak's case (AIR 1970 SC 150) in Allahabad High Court till the present group of writ petitions. Since promotees were appointed in excess of the prescribed quota in Rule 6, they should be pushed down to the vacancies that had arisen in each year above the direct recruits as per the ratio as the promotees are not entitled to claim seniority from the initial dates of their respective promotions. In support thereof he relied on proposition 'A' of paragraph 47 (of SCC) : (Para 44 of AIR) of the Direct Recruits' case (1990 (2) SCC 715 : AIR 1990 SC 1607) and the ratio in Masood Akhtar Khan v. State of Madhya Pradesh (1990) 3 JT 295. He also contended that the power of relaxation in Rule 27 is only in respect of conditions of service and not relating to recruitment or promotion. He placed reliance on A. J. Patel v. State of Gujarat, AIR 1965 Gujarat 23 (FB).

3. Since the rules are legislative in character, they must harmoniously be interpreted as a connected whole giving life and force to each word, phrase and rule and no part thereof should be rendered nugatory or a surplus age. Resort to iron out the creases could be had only when the construction of the relevant rule, phrase or word would lead to unintended absurd results. To accord just solution to this, we have set out only the relevant rules. Rule 3(h) of the Rules defines "Members of the Service" to mean "a person appointed in a substantive capacity under provisions of these rules" or of rules or orders in force previous to the introduction of these rules, "to a post in the cadre of the service". The rules shall not apply to the members of the Indian Forest Service. Rule 3(e) defines direct recruitment, which means recruitment in the manner prescribed in clause (a) of Rule 5 of these Rules. Rule 5 in Part III indicates sources and methods of recruitment as Asstt. Conservator of Forest service shall be made -

(a) by direct recruitment of candidates who having been selected in the manner prescribed in Appendix 'A' for admission to the Superior Forest Service Course of the Indian Forest College, DehraDun, have obtained a Diploma after having completed successfully a training of two years at the said college;

(b) by promotion in the manner prescribed in Appendix 'B' to these rules of all

permanent Forest Rangers of the Subordinate Forest Service who -

(i) hold a certificate of the Forest Rangers' College, DehraDun; and

(ii) have put in eight years' services as Forest Ranger including continuous officiating and temporary service.

4. Rule 6 provided that not more than 25 per cent of the total number of posts in the service shall be filled up by promotion and the ratio was enhanced per 1/4 to 1/3 w.e.f. January 1, 1975. On amendment, the Rule read thus:

"Number of appointments to be made. The Governor shall decide the number of vacancies to be filled from each of the two courses specified in rule 5 provided that not more than 33 1/3 per cent of the total number of posts in the Service shall be filled from the source mentioned in clause (b) of rule 5. In deciding the number of vacancies to be filled from each of the two sources each year, regard shall be paid to the relative number of promoted and directly recruited officers in the cadre of the Service. The above percentage will be observed if suitable officers are available for promotion to that extent."

5. Part V provides the procedure for appointment, probation and confirmation.

6. Rule 12 prescribes the procedure for appointment. A person finally selected for appointment to the Service in the manner prescribed in the foregoing rules shall be appointed by the Governor thereto (unless he subsequently becomes disqualified for appointment) on the occurrence of a substantive vacancy. The order in which such appointments made shall be:-

(a) in the case of candidates appointed by recruitment, as indicated in the fourth proviso to Rule 24; and

(b) in the case of candidates recruited by promotion, according to their seniority in the Subordinate Forest Service.

7. Sub-Rules (2) and (3) are not necessary, hence omitted.

8. Rule 14 prescribes the period of probation, discharge, etc. All appointments to the service in a substantive vacancy shall be made on probation. The period of probation shall be two years and will count from the date of taking over charge of appointment, provided that the Governor may extend the period of probation. Any such extension shall specify the date up to which the extension is granted. Sub-rules (2) and (3) are not necessary.

9. Rule 15 prescribed passing of departmental examination prescribed in that regard as a condition for confirmation.

10. Rule 16 empowers confirmation thus:- (a) A person on probation shall not be confirmed in his appointment unless:-

(i) he has completed the prescribed period of probation;

(ii) he has passed all the test prescribed in Rule 15 or has been exempted from

passing. such tests; and

(iii) the Governor is satisfied that he is fit for confirmation in other respects.

11. Clause (b) of Rule 16 is not necessary for the purpose of its case, hence omitted.

12. Rule 19 prescribes pay of the direct recruits during probation. Note to Rule 19 postulates the date of service of the direct recruits thus:

The date of service of an officer under clause (a) to Rule 5 shall begin from the day following the day on which he obtained his diploma in Forestry of the Indian Forest College, Dehra Dun, if such officer his appointment within ten days from the date of issue of the Diploma.

Rule 24 adumbrates to fix seniority thus: -

The seniority of officers on their appointment to the Service "shall be determined according to the date of the order of their substantive appointment to the Service".

Provided that if the order of appointment of two or more candidates bears the same date, their seniority inter se shall be determined according to the order in which their appointment has been notified;

13. Provisos 2 and 3 are not relevant hence omitted.

Proviso 4 - Provided further that the relative seniority of members of the Service who are appointed by direct recruitment shall be in accordance, with the order of merit in which they are placed on passing out of the Indian Forest College at Dehra Dun, or any other institution at which arrangements are made for training.

Proviso 5 - provided further that candidates by direct recruitment and who are recruited by promotion in the same year, the latter shall be placed above the former in the seniority list.

14. Appendices 'A' and 'B' are integral parts of Rule 5. Appendix 'A' relates to the direct recruits and Appendix 'B' relates to the promotees. Appendix 'A' enumerates the procedure to notify the vacancies for direct recruitment to the post of Assistant Conservator, Forest by the Public Service Commission, Uttar Pradesh and the manner of Selection.

15. Para 16 postulates that on obtaining Diploma in Forestry at the end of two years' Course at the Dehra Dun Forest Training College, the candidate will be appointed as Assistant Conservator of Forest. Appendix 'B' prescribes the procedure "for recruitment by promotion in terms of R. 5(b)". Paragraph 1 says thus

"For the purpose of recruitment under clause (b) of Rule 5, a selection strictly on merit shall be made from amongst Forest Rangers eligible under the rules for promotion."

Then the procedure was prescribed for selecting the candidates by promotion, the details of which are not material. Para 4 postulates that the "names shall be arranged in the order of merit and not in

accordance with seniority". Paragraph 5 enjoins that the Chief Conservator of Forests shall also draw up a supplementary list containing names of officials whom he considers suitable for "officiating" or "temporary appointments" during the course of the year keeping in view the possible approximate vacancies and the candidates recommended by him to be suitable shall be approximately equal to the vacancies expected to occur during the course of the year.

16. Paragraph 7 prescribes the procedure for considering the claims of the Forest Rangers. The list of eligible candidates drawn by the Chief Conservator of Forest would be forwarded to the Public Service Commission. The Secretary to the Government in Forest Department in consultation with the Commission shall fix a date and call those candidates for interview by a Selection Committee consisting of a representative of the Public Service Commission, who presides over it, the Secretary to the Govt. in the Forest Department and the Chief Conservator of Forests or any other superior officer of the Department whom the Government nominates. The Public Service Commission shall draw a list of candidates in order of merit and forward it to the State Government. The Governor shall appoint the Forest Range Officers as per the list as Asstt. Conservators of Forest on probation. On passing the prescribed tests within two years or extended period, if any, of probation or on exemption, the Governor shall consider the suitability for confirmation and to pass an order confirming the promotee in a substantive capacity to a substantive vacancy.

17. A close reading of the fascicule of rules clearly posits that recruitment as Asstt. Conservator of Forest shall be from two sources, namely, by direct recruitment and by promotion of permanent Forest Rangers of the Subordinate Forest Service. Qualifications have been provided for recruitment. The direct recruit, on selection by the Public Service Commission are required to undergo training for two years in the College as a part of the selection and on obtaining Diploma, the Governor is to appoint them to the , substantive post of Asstt, Conservator of Forest on probation. The service of the direct recruits is to be counted from the date of discharging the duties of the post and on successful completion of the probation within two years or extended period and passing the tests and on confirmation thereof by the Governor, he becomes a member of the service in substantive capacity. Similarly the promotees shall be recruited in accordance with Rule 5(b) and the procedure prescribed in Appendix 'B'. The Chief Conservator of Forest would draw up the list of permanent Forest Range Officers eligible for promotion strictly on the basis of merit. The Committee headed by the member of the Public Service Commission would interview them and prepare the list of the selected candidates on the basis of merit and ability, which would be forwarded to the Government. On receipt thereof the Governor would appoint the Forest Range Officers as Asstt. Conservator of Forest on probation in terms of the ratio prescribed in Rule 6. The selection shall be based on merit and ability. The seniority of Forest Rangers inter se is to be considered only where the merit and ability as Forest Rangers are approximately equal. Thus even the junior most meritorious Forest Range Officer would steal a march over his seniors and would earn his seniority as Asstt. Conservator of Forest. The promotee shall also be on probation for a period of two years and shall also have to pass the prescribed tests unless exempted. On successful completion and the Governor after satisfying that the appointee is also otherwise fit to be confirmed makes an order. Then only the promotee becomes a regular member of the service in a substantive capacity.

18. The heart of the controversy lies on the question as to when a person is appointed to a post in the service in a substantive capacity within the meaning of rule 3(h) read with Rr. 5 and 24 of the Rules. Under R. 5 read with R. 3(h) a member of the service means a person, be it direct recruit under R. 5(a) or promotee under R. 5(b), appointed in a substantive capacity to the service as per the provisions of the rules. In order to become a member of the service he/they must satisfy two

conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service according to rules and within the quota to a substantive vacancy. There exists marked distinction between appointment in a substantive capacity and appointment to the substantive post. Therefore, the membership to the service must be preceded by an order of appointment to the post validly made by the Governor. Then only he/they became member/members of the service. Any other construction would be violation of the rules.

19. The narrative of facts and attendant circumstances would indicate that the Government at no point of time abandoned direct recruitment under Rule 5(a), nor omitted to fix inter se seniority. No blame in this regard should lie at the doors of the Govt. as due to recourse to judicial process this situation crept up. It is not the case of the promotees that Government held out any promise that the promotees would be regularised from the respective dates of promotion. On the other hand the Government's positive act of adjusting the promotees in excess of the quota under Rule 6 in the vacancies that arose in the succeeding years belie such a situation.

20. From the above background two questions would emerge : (i) as to when promotee become members of the cadre of Asstt. Conservators in a substantive capacity in accordance with the rules and (ii) whether the entire length of service from the date of .initial appointments should be counted towards their seniority. The prerequisite of the right to inclusion in a common list of seniority is that all those who claim that right must broadly bear the same characteristics. Fortuitous circumstances of their holding the grade post carrying the same designation or scale of pay or discharging the same duty would not justify the conclusion that they belong to the same cadre, due to exigencies of service temporary promotions against substantive vacancies were made. It is undoubted that preceding their promotion, an ad hoc committee had considered the cases of the promotees. Admittedly seniority subject to rejection of unfit was the criteria, followed in the selection. The selection was, therefore, in defiance of and de hors Rule 5(b) read with Appendix 'B'.

21. In a democracy governed by Rule of law, it is necessary for the appropriate governance of the country that the

political executive should have the support of an efficient bureaucracy. Our Constitution enjoins upon the executive and charges the legislature to lay down the policy of administration in the light of the directive principles. The executive should implement them to establish the contemplated egalitarian social order envisaged in the preamble of the Constitution.

22. It is seen that the appointments of the promotees were made in batches year-wise. The rule postulates that appointment shall be strictly as per merit after interview arranged in order by the Public Service Commission. In the same year when the appointments are made to the substantive vacancies from both the sources, the promotees shall rank senior to the direct recruits in accordance with the quota prescribed under Rule 6. The rules provide the power to appoint Forest Rangers from Subordinate Service, due to administrative exigencies to officiate or to act temporarily as Asstt. Conservators of Forest. The rule itself, thus, recognises the distinction between substantive appointment and temporary/ officiating appointment. The procedure to prepare the list to man the officiating or temporary vacancies is on the basis of seniority subject to rejection of the unfit. The question of considering relative merit and ability of the promotees inter se, then would not arise. Thereby, it is clear that the list prepared by the Chief Conservator of Forest for appointment of the Forest Rangers to officiate in the posts of Assistant Conservator of Forest on ad hoc or temporary basis is only fortuitous due to non-availability of the direct recruits as stop gap arrangement. Employees appointed purely on ad hoc or officiating basis due to administrative exigencies, even

though continued for a long spell, do not become the members of the service unless the Governor appoints them in accordance with the rules and so they are not entitled to count the entire length of their continuous officiating or fortuitous service towards their seniority.

23. It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Art. 14 read with Art. 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Arts. 14 and 16(1). Therefore, the rules must be carefully applied in such a manner as not to violate the rules or equality assured under Art. 14 of the Constitution. This Court interpreted that equity is an integral part of Art. 14. So every attempt would be made to minimise, as far as possible, inequity. Disparity is inherent in the system of working out integration of the employees drawn from different sources, who have legitimate aspiration to reach higher echelons of service. A feeling of hardship to one, or heart burning to either would be avoided. At the same time equality is accorded to all the employees.

24. In Direct Recruits' case (1990 (2) SCC 715 : AIR 1990 SC 1607) the Constitution Bench of this Court in which one of us (K.Ramaswamy, J.) was a member, in propositions 'A' & 'B' in paragraph 47 at page 745 (of SCC): (Para 44, at p. 1627 of AIR) stated.-

"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be -counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted".

M/ s. Mukhoty and Garg repeatedly asked us to apply the ratio in the cases of Narendra Chadha (AIR 1986 SC 638), Baleshwar Das (AIR 1981 SC 41) and Chauhan (AIR 1977 SC 251)

contending that the promotees were appointed to the same post, are discharging the same duties, drawing the same salary, therefore, they should be deemed to be given promotion from their initial dates of appointment. We express our inability to travel beyond the ratio in Direct Recruits' case. While reiterating insistence upon adherence to the rule that seniority between direct recruits and the promotees has to be from the respective dates of appointment, this Court noticed that in certain cases, Government by deliberate disregard of the rules promotions were made and allowed the promotees to continue for well over 15 to 20 years without reversion and thereafter seniority is sought to be fixed from the date of ad hoc appointment. In order to obviate unjust and inequitable results, this Court was constrained to evolve rule of deemed relaxation of the relevant rules" and directed to regularise the services giving the entire length of temporary service from the date of initial appointment for seniority. To lay down binding precedent the cases were referred to a Constitution Bench. In the Director Recruits case, this Court has laid down clear propositions of general application in items A to K. Therefore, to keep the law clear and certain and to avoid any slant. we are of the considered view that it is not expedient to hark back into the past precedents and we prefer to adhere to the ratio laid down in the Direct Recruits case.

25. As stated, the counsel for the promotees placed strong reliance on proposition 'B' while the counsel for the Direct Recruits relied on proposition 'A'. The controversy is as to which of the propositions would apply to the facts of this case. The proposition 'A' lays down that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The latter part thereof amplifies postulating that where the initial appointment is only ad hoc and not according to rules and is made as a stop-gap arrangement, the period of officiation in such post cannot be taken into account for reckoning seniority. The quintessence of the propositions is that the appointment to a post must be according to rules and not, by way of ad hoc or stop-gap arrangement made due to administrative exigencies. If the initial appointment thus made was de hors the rules, the entire length of such service cannot be counted for seniority. In other words the appointee would become a member of the service in the substantive capacity from the date of his appointment only if the appointment was made according to rules and seniority would be counted only! from that date. Propositions 'A' and 'B' cover different aspects of one situation. One must discern the difference critically. Proposition 'B' must, therefore, be read along with para 13 of the judgment wherein the ratio decidendi of Narendra Chadha was held to have considerable force. The latter postulated that if the initial appointment to a substantive post or vacancy was made deliberately, in disregard of the rule and allowed the incumbent to continue on the post for well over 15 to 20 years without reversion and still the date of regularisation of the service in accordance with the rules, the period of officiating service has to be counted towards seniority. This Court in Narendra Chadha's case was cognizant of the fact that the rules empower the Government to relax the rule of appointment. Without reading, paragraph 13 and Proposition 'B' and Narendra Chadha's ratio together the true import of the proposition would not be appreciated. We would deal with the exercise of power of relaxing the rule later. After giving anxious consideration, we are of the view that the latter half of Proposition 'A' would apply to the facts of the case and the rule laid down in that half is to be followed. If the concerned rules provide the procedure to fix inter se seniority between direct recruits and promotees, the seniority has to be determined in that manner.

26. Realising that applicability of Proposition 'B' to the facts would run into rough weather the counsel for the promotees attempted to anchor it by reiterating that as on date the Public Service Commission found the promotees eligible for confirmation as per rules. Therefore, the entire length of service would be counted for their seniority. We express our inability to accede to the contention. It is seen that appointment of the promotees as Assistant Conservators of Forest was not in

accordance with rule 5(b) read with appendix 'B' of the rules. Admittedly the promotions were on ad hoc basis pending direct recruitment and are in excess of the quota prescribed under R.6. By no stretch of imagination it could be said that the promotions were made to a substantive post in accordance with the rules. Therefore, the promotees do not hold the post in substantive capacity.

27. Undoubtedly when there was dearth of direct recruits the promotees discharged the duties ranging between 5 to 12 years prior to filing of the writ petitions. The promotees generally may get one or two chances of promotion to cadre posts in higher echelons of the Indian Forest Service. Reckoning continuous officiation of ad hoc promotion would enable the less privileged to excel their latent capabilities in the cadre post.

28. In an appropriate case if the court finds that wanton or deliberate deviation from the rules was made by the implementing authority the court should call upon them to explain the reasons therefor and in the absence of proper explanation forthcoming castigate the authority and pass strictures condemning the actions which would discipline the authorities to adhere to the rules. Undue latitude and acquiescence thereto would not only defeat the due enforcement of the rules but also create disorder and frustration among the members of the services. We have also kept at the back of our minds that the interpretation we are to give to the rules would have far reaching effect, not only for similar services in other states, but also to Indian Forest Service for which the State Services are the feeder source.

29. In *Massod Akhtar Khan's case v. State of Madhya Pradesh*, (1990) 3 JT 295 (SC), a Division Bench considered, after *Direct Recruits case* (AIR 1990 SC 1607), the question whether the subsequent selection would entitle an employee to the benefits of the entire temporary service for seniority. Sawant, J. speaking for the court held (with which we respectfully agree) that when the rules of advertisements and the orders of appointments indicate that the appointment is only for a limited period, subject to recruitment by Public Service Commission, the appointments are only emergency arrangement pending regular selection by the Public Service Commission. Therefore, the entire length of service cannot be counted for seniority.

30. It is next contended that the promotees must be deemed to have been appointed in relaxation of the rules of recruitment under Rule 27 of the Rules by the Governor and placed strong reliance on the ratio in *Narendra Chadha's case* (AIR 1986 SC 638). Rule 27 reads thus :---

"Where the Governor is satisfied that the operation of any rule regarding the conditions of service of the members of the service causes undue hardship in any particular case, he may, in consultation with the Commission, notwithstanding anything contained in the rules applicable to the case, by order dispense with or relax the requirements of that rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner".

31. It is true that in *Narendra Chadha's case* (1986 (1) SCR 211 : AIR 1986 SC 638) this Court noticed that appointments by promotion were not made in accordance with the rules and R. 16 of Indian Economic/ Indian Statistics Service Rules, 1961 as was in force empowers the Govt. to relax "any provision of the rules" to such an extent as (emphasis supplied) may be necessary to ensure satisfactory working or removing inequitable results held that as the Government deliberately deviated from the rules and allowed the promotees to be in continuous service without reversion for well over 15 to 20 years, the Government must be deemed to have relaxed the rules. While holding so at page 238 (of SCR) : (at p. 648, Para 23 of AIR) it was stated that:-

"we wish to make it clear that there is no question of any rotation system being applied under the Rules, as they exist now. All appointments shall be made hereafter in accordance with the Rules and the seniority of all officers to be appointed hereafter shall be governed by rule 9-C of the Rules".

32. In those peculiar circumstances this Court though recognised that appointment according to rules is a condition precedent, adopted the rule of deemed relaxation and deemed promotion to the service in accordance with the rules. R. 27 of the Rules gives power to the Governor that if he is satisfied that the operation of any rule regarding conditions of service of the members caused undue hardship in a particular case; he may consult the Public Service Commission; notwithstanding anything contained in the Rules and dispense with or relax the requirement of the conditions of service and extend the necessary benefit as is expedient so as to relieve hardship and to cause just and equitable results. The word "may" consult the Commission has been used in the context of discharge of statutory duty. The Governor is obligated to consult the Public Service Commission. Therefore, the word "may" must be construed as to mean "shall" and it is mandatory on the part of the Governor to consult the Public Service Commission before exempting or relaxing the operation of rule regarding conditions of the service of a member to relieve him from undue hardship and to cause just and equitable results. There is a distinction between "rules of recruitment" and "conditions of service". To become a member of the service in a substantive capacity, appointment by the Governor shall be preceded by selection of a direct recruit by the Public Service Commission; undergoing training in Forestry for two years in the College and passing Diploma are conditions precedent. If the contention of the promotees that rules of recruitment are conditions of service is accepted, it would be open to the Governor to say that "I like the face of 'A' and I am satisfied that he is fit to be appointed; I dispense with the rules of recruitment and probation and appoint 'A' straightway to the service in a substantive capacity as Asstt. Conservator of Forest. Take another instance. Passing the prescribed tests during probation is a condition of service. Similarly efficiency bar stands as an impediment for the promotee's confirmation. On consideration of the record and on objective satisfaction, in an appropriate case, the Governor may relax those or other similar conditions. So passing the tests prescribed is a condition of service. Therefore, the rule which effects the right to confirmation or similar provision is a condition of service. The rules relating to recruitment to the service either under R. 5(a) or 5(b) or the manner of recruitment to service as per Appendix 'A' or 'B' are basic rules of recruitment to service. Satisfaction of the Governor that the operation of the rules regarding the conditions of service would cause undue hardship in a particular case or cases and the need to relieve hardship and to cause just and equitable results is a precondition. Even otherwise the court cannot substitute its satisfaction to the satisfaction of the Governor in exercise of the power of deemed relaxation. In Narendra Chadha's case the power to relax was wide enough to cover 'any rule' and there was no precondition of objective satisfaction by the Governor. We hold that R. 5(a) and (b) and Appendices 'A' and 'B' are basic rules of recruitment and would not be subject to R. 27.

33. Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on ad hoc basis as a stop-gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are de hors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority. The Governor shall have to make recruitment by promotion to substantive vacancies in the posts of Asstt. Conservator of Forest, if not already made, in accordance with R. 5(b) read with Appendix 'B' and R. 6. Their seniority shall be counted only from the respective dates of appointment to the substantive posts in their quota under R. 6 as per the

rules. The direct recruits having been appointed in accordance with R. 5(a) read with Appendix 'A', their seniority shall be counted from the date of their discharging the duties of the post of Asstt. Conservator of Forest and the seniority of the direct recruits also shall accordingly be fixed. The inter se seniority of the direct recruits and promotees shall be determined in accordance with Rr. 5, 6 and the R. 24 in the light of the law declared in the judgment. All the employees are entitled to all consequential benefits. On account of the pendency of judicial proceedings, if any of, the employees become barred by age for consideration for promotion to cadre posts, the appropriate Governments would do well to suitably relax the rules and do justice to the eligible conditions.

34. The writ petitions are accordingly allowed but in the circumstances parties are directed to bear their own costs.

Petitions allowed.

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