

# SUPREME COURT OF INDIA

Mr. U.D. Lama

Vs.

The State of Sikkim

(CJI, Suhas C. Sen and K.S. Paripoornan JJ.)

26.11.1996

## JUDGMENT

### SEN. J.

Leave granted.

This case has a long history. The dispute started when the Sikkim State Civil Service (hereinafter called the "Service") was constituted with effect from the 1st July, 1977 by rules framed under Article 309 of the Constitution of India, called Sikkim State Civil Service Rules, 1977 (hereinafter described as the "Rules"). It provided that the persons holding posts mentioned therein would be deemed to be members of the Service on the enforcement of the Rules. Rule 4 is important for the purpose of this case and provided for the method of recruitment to the Service:- "4. Method of recruitment to the service: (1) Recruitment to the service after the publication of these rules shall be by the following methods, namely:- (a) Competitive examination to be held by the Commission;

(b) Selection from among persons serving in connection with the affairs of the State of Sikkim.

(2) The proportion of vacancies to be filled in any year in accordance with clauses (a) and (b) above, shall be 50:50 respectively:

Provided that the number of persons, recruited under clause (b) above, shall not at any time exceed 50 per cent of the total strength of the service.

(3) Notwithstanding anything contained in sub-rule (1), if in the opinion of the government exigencies of the service so require, the government may, after consultation with the Commission, adopt such method of recruitment to the service other than those specified in the said sub-rule, as it may by notification in this behalf, prescribe."

Rule 5 provided for constitution of a Selection Committee consisting of Chairman, Sikkim Public Service Commission, and three other officers, to make recruitment under Rule 4(1)(b). Under Rule 6, the merit list prepared by the Selection Committee was to be forwarded to the Sikkim Public Service Commission for its final approval. Rule 8 laid down that the competitive examination for recruitment to the Service was to be conducted by the Sikkim Public Service Commission. Rules 9, 10 and 11 provided for eligibility and other qualifications for admission to the competitive

examination. Rule 12 stated that the decision of the Commission as to the eligibility or otherwise of a candidate for admission to the competitive examination shall be final.

Two methods of recruitment were laid down by the Rules - (1) competitive examination and (2) selection from persons serving in the State of Sikkim. In both the cases, Sikkim Public Service Commission had to make the recruitment to the Service. A competitive examination had to be held by the Commission for recruitment under Rule 4(1)(b). The Selection Committee had to be presided over by the Chairman of the Public Service Commission. Therefore, under the Rules, selection could be made only through Sikkim Public Service Commission and not otherwise. 63 officers were appointed to the Service including 34 of the rank of Under Secretaries and equivalent posts. No induction to the Service was made after the initial recruitment till 1981. When the Rules came into force on 1st July 1977, there was no Public Service Commission in the State. It was only on 20th November, 1981 a Chairman was appointed who assumed office on 11th January, 1982. The result being that from 1st July, 1977 till 11th January, 1982 Public Service Commission in the State had no been constituted and as such was not functioning. Under the circumstances, on 10th August, 1981, a Government decision was taken to induct officers who were already working in the Government into the Service by way of selection. A decision was taken to hold a written examination and viva voce test for selection to the Service. A notification was issued on 16th September, 1981 to the following effect:

#### "NOTIFICATION

In pursuance of sub-rule (3) of Rule 4 of the Sikkim State Civil Service Rules, 1977, the government being of opinion that the exigencies of the service so require, hereby adopts the method of written examination-cum-viva voce test as a method of recruitment to the service for that purpose constitutes a Selection Committee and prescribes the conditions of eligibility and regulation of seniority among the selected officers...

3. Officers eligible to appear at the written examination-cum-viva voce test.

(1) Every person who on the first day of August, 1981 is a gazetted officer under the Government of Sikkim not possessing the technical qualifications as specified in the notification of the Government of Sikkim in the Establishment Department No. 350/GEN/EST dated February 3, 1978 shall be eligible to appear at the written examination-cum-viva-voce test."

A large number of person applied, on the basis of the written examination as well as viva voce test, a merit list was prepared which was sent to the Sikkim Public Service Commission which had by that time been constituted. After obtaining its approval, 29 officers were appointed to the Service by notification dated 13th December, 1982. One of the unsuccessful candidates. Dorjee Bhutia Challenged the initial notification issued on 13th September, 1981 and the selection by a writ petition before the Sikkim High Court on the following grounds: "1. The exercise of power, in issuing the impugned notification under Rule 4(3) of the Rules was illegal as the requisite conditions namely the existence of exigencies of service and consultation with the Public Service Commission, were not satisfied.

2. The method of selection provided under the notification being contrary to the statutory rules was bad in law.

3. Rule 4(3) of the Rules was liable to be struck down on the ground of excessive delegation.

4. The Selection Committee was changed from time to time so much so that the Committee which took the written examination was different from the one which took the viva voce test."

The High Court upheld the contentions of the writ petitioner and the matter ultimately came to this Court on appeal. The case of the Sikkim Government before this Court was that the Service constituted under the Rules consisted of top ranking posts in the State Service. It was also to be used as a feeder cadre for appointment to the Indian Administrative Service. But since no Public Service Commission could be constituted for a long time, no appointments could be made to the Service. The decision to hold the said selection was taken under these circumstances. It was competent for the State Government in exercise of its executive power to issue the impugned notification. The action of the Government was also justified under Rule 4(3). Even under Rule 4(3), consultation with the Commission was necessary. But it was contended that this provision was directory and not mandatory in nature and in any event, the list that was prepared was finally approved by the Commission. This Court reversed the decision of the Sikkim High Court and held as under:-

"... When in a peculiar situation, as in the present case, the statutory provisions could not be operated there was no bar for the State Government to act in exercise of its executive power. The impugned notification to hold special selection was issued almost four years after the enforcement of the Rules. It was done to remove stagnation and to afford an opportunity to the eligible persons to enter the service. In our view the State Government was justified in issuing the impugned notification in exercise of its executive power..."

The fact that the State Government purported to act under Rule 4(3) of the Rules in issuing the impugned notification is of no consequence. When the source of power can be validly traced then the State action in the exercise of such power cannot be struck down on the ground that it was labelled under a different provision."

As has been stated earlier in the judgment, 29 officers in all were appointed to the Service with effect from the date of issue of the notification, i.e., 13th December, 1982. By another notification dated 17.4.1984, inter-se seniority of these 29 officers was fixed. Even while the writ petition filed by Dorjee Bhutia was pending in appeal in this Court, a representation was made by the Sikkim Government General Officers' Association on 27th March, 1989 to the State Government for induction of the officers belonging to their Association who were not inducted earlier into the Service. The grievances of the Association were :-

"2. Now we feel that there should not be two categories of officers who are working in the Government with parallel responsibilities. In view of this, it is submitted that all officers in the Administrative and Ministerial Wing (excluding those in technical and academic wings) who have not been inducted in the service should be inducted in the service duly protecting their seniority so that equality of states and opportunity for all could be maintained.

3. We also express our deep dissatisfaction regarding the promotion of officers of Civil Service Cadre within a short tenure of five years. Those officers who have been inducted in Civil Service were promoted to the Cadre of Deputy Secretary within 4 years. On the other hand, the non-civil Service officers who are holding Gazetted posts with equal responsibilities for last 10 years and even more have not been given promotion to the higher grade. If such inequality continues for some

time, the non-civil Service officers will lose their interest, self-confidence to work efficiently, which may badly hamper the administration of the State.

Furthermore, a handful of Civil Service Officers may not be able to run the administration of the State."

A five-member Committee under the Chairmanship of Justice (Brig.) D.M.Sen was set up to consider the representation. The terms of reference of the Committee were:-

"1. To examine whether all the then serving gazetted officers should have been inducted into the Sikkim State Civil Service at its initial constitution under Rule 3 of the Sikkim State Civil Service Rules, 1977.

2. To examine whether all those officers of the gazetted grade already serving in the government prior to 1977 and those appointed to gazetted grade from 1977 and date prior to the appointment in the lowest gazetted grade of the 20 officers inducted into the State Civil Service in 1986 had rightful claim for induction into the State Civil Service.

3. To suggest a method/principle for induction of serving gazetted officers into the Sikkim State Civil Service and a method for regulation of their own seniority with the officers already in the service.

4. To review the promotion of five members of the State Civil Service promoted to the senior grade of the State Civil Service."

Before the Committee gave its finding, it gave a personal hearing to the Association. Three members on behalf of the Association appeared before the Committee. One of the grievances of the appellants herein is that although they were going to be affected by the decision of the Committee, the Committee did not think it fit to give them a hearing. In our view, there is some justification in this grievance. The Committee having decided to give hearing to the Association, should have given a hearing to the appellants who were vitally interested.

It must, however, be noted that it is not the case of the writ petitioners that they had made any representation or request to the Committee for being heard. They have, however, taken a point that the notification regarding the constitution of Justice Sen Committee and the terms of reference of the Committee were not gazetted nor were the petitioners put to notice about this Committee. They were not invited to place their views on the question of seniority. It is difficult to uphold this contention. The Committee was functioning openly and publicly. The petitioners being responsible officers of various departments of the State could not have been unaware of the existence of the Committee and its functioning. Moreover, it has been stated in the counter filed on behalf of the State that the Second Committee was set up because of the resentment expressed by the writ petitioners against the report of the Sen Committee. The Second Committee adequately took into consideration the objections of the writ petitioners. Furthermore, the two Committees only made recommendations to the State Government. It was for the State Government to accept wholly or partially the recommendations or to reject them outright after considering all aspects of the matter.

The Committee was, inter alia, of the view that "- "17. The induction of these 29 officers, however, validly and properly it might have been done, does not conclude the cases so far as other officers

eligible at that time and who might have failed or not appeared at the examination are concerned. At the time these 29 officers were inducted, 78 in all were eligible under Rule 4(1)(b) and Rule (2)(b). So the cases of remaining 49 officers will have to be considered in the light of Rules 4(3) and 5(4). Of these 49 officers, we may note that 36 had appeared but failed.

18. The case of these 49 officers is that the examination system as introduced by the Government was not specified under rule 5(4) and, as such, this requirement of qualifying at an examination should not have stood in their way of being considered., The Committee sees lot of force in this submission and is constrained to hold that both on grounds of law and equity, introduction of a supplementary requirement or qualification might not have been duly warranted under rule 5(4). Also, "exigencies of service" as under rule 4(3) can hardly be invoked to justify the holding of an examination, as in case of real exigency that rather time consuming method of (sic) would not have been adopted.

19. In the above view of the matter, the Committee is of the opinion that all these 49 officers should now be inducted into Civil Service w.e.f. the date of induction of the 29 officers, if otherwise found suitable and if they satisfy the conditions prescribed in rule 5(2) and rule 5(3) and (4)."

The recommendations of the Committee were accepted by the Cabinet. A notification dated 29th December, 1990 was issued stating that the Government of Sikkim had decided to induct suitable officers except those specified therein into the Service. It also laid down a method for selection and determination of seniority. The Sikkim Public Service Commission, thereupon, invited applications from eligible officers. 166 officers were found eligible and were inducted into the service. The existing officers of the Service felt aggrieved by this action of the Government and thought that their seniority in Service had not been properly protected. Because of the resentment among the existing officers of the Service, another Committee was set up to go into the question of seniority. The Committee comprised of six officers headed by Shri K.C. Pradhan, Advisor to the Government of Sikkim. A point has been taken on behalf of the appellants that this Committee was not impartial, in that, one of the members of the Committee was an interested party in the controversy. The Advisor to the Government of Sikkim headed the Committee. His wife was one of the candidates for appointment to the Service and was appointed. The question of her seniority should not have been decided by the Committee of which her husband was a member. The Advisor has not been made a party to the Special Leave Petition and had not opportunity to deny this allegation. Moreover, this objection to deny this allegation. Moreover, this objection should have been made as soon as the Second Committee was constituted. It has to be borne in mind that the Second Committee was constituted because of the objections of the writ petitioners against the recommendations made by the first Committee headed by Justice D.M. Sen. It is on record that objections of the writ petitioners were taken into consideration by the Second Committee. It is not the case of the writ petitioners that they took this point before the Committee and the Committee overlooked this point. We are of the view that this point cannot be allowed to be urged at this belated stage. This Second Committee was of the view that:- "(1) Besides the Sikkim State Civil Service, 8 other State services had been constituted in the State. Except in the case of the Sikkim State Civil Service, all the other Services had inducted all gazetted officers of their departments as members of the Service. The disadvantage was only in respect of the Sikkim State Civil Service where a large number of officers had not been inducted into the Service. The Committee expressed the opinion that all officers should be encadred to the State Civil Service as in the case of other organised services and this should be done as per the principle outlined in the Justice Sen Committee Report.

(ii) There are no separate rules or regulations or pay scales or posts for the State Civil Service and all officers engaged in the general administration of the State are regulated by the same rules, pay scales etc., as of the State Civil Service. The question of being a member of the Service has only arisen when the Government has sought to make promotions from within the Service itself on certain occasions, while at the same time officers not belonging to the Service have also made use of this fact for their promotions. The adoption of different yardsticks at different points of time have resulted in the fact that while some people have benefitted, others have been affected adversely.

(iii) In the matter of service conditions relating to promotions, posting, pay scales etc., there has been no difference between the members of the Civil Service and the others and only advantages have been derived wherever it was opportune by both category of officers. Such an anomalous situation cannot be allowed to continue as this will create not only confusion in the management of the Service but also rivalry and unhealthy competition for favour among various categories of officers resulting in inefficiency and total chaos.

(iv) In the absence of the Notification of specific posts for the civil Service, most of the officers are languishing in the administrative jobs that do not offer any challenge with the result that officers are often badly underworked. If the Services are to be regulated properly then it is imperative that specific posts be notified against which only Civil Service officers be appointed.

(v) Under the present arrangement, recruitment to the General Administration is very competitive and even a brilliant applicant find limited opportunities while mere graduates in the technical subjects get jobs in the technical departments as also automatic induction to the State Technical Service.

The reports of the Two Committees were implemented and the seniority list of the employees was redrawn. The grievance of the appellants is that respondent Nos. 4 to 65 have been recruited in the Service with retrospective effect. It has been contended that a test was conducted in 1981 on the basis of the result of the competition among the officers who were employed by the Sikkim State, the appellants got into the Service on merit. Those who failed to get into the Service or those who did not appear in the test at all cannot be retrospectively promoted to disturb the seniority of the appellants in the Service. The recruitment in 1982 was made because 30 officers were required for the Service and accordingly after holding the tests, 30 officers were appointed. The respondents including respondent No. 18 failed to qualify in the selection test of 1982. It has further been contended that the appellants recruited in 1982 were placed below the officers appointed at the time of initial constitution of the Service in 1977. Likewise, officers appointed in 1986 were placed below the appellants and the officers appointed thereafter were placed below the officers appointed in 1986. This was the pattern of seniority that was followed till it was disturbed by the report of the Sen Committee. After getting into the Service, the appellants were given promotion on completion of qualifying service in each rank. At the time the promotion was given, the respondents belonged to a different service and could not in any way feel aggrieved by the promotion given in the Service to which the appellants belonged. Another point that has been urged was that after initial constitution of Service, the main source of appointment was Rule 4(1)(b) and Rule 5(2)(b) under which almost all the respondents were ineligible either not having completed six years' continuous service or not being holders of gazetted posts. That is the reason why a special selection in 1982 was held with different eligibility criteria of holding gazetted post only as on 1.8.1981. The sole purpose of this was to give a chance to all gazetted officers to qualify for the newly created Service. Those respondents who had failed in the selection tests continue to be governed by Sikkim Government

Service Rules, 1974 and Sikkim Establishment Rules. On the other hand, the appellants who had succeeded in the test became members of State Civil Service governed by the Sikkim State Civil Service Rules, 1977.

The contention of the appellants is that they had actually taken the test held in 1982 and qualified. They joined the Service in 1982. Their claim is that their seniority cannot be disturbed by induction of fresh recruits in the Service by the method of selection. On the other hand, it cannot be overlooked that the appellants were not appointed by following the regular procedure of appointment. Under Rule 4(1), recruitment could be made to the newly created State Civil Service by competitive examinations to be held by the Sikkim Public Service Commission. This competition is not confined to persons who are already in Government employment. The second method of recruitment is selection from persons "serving in connection with the affairs of the State of Sikkim". In the second category of recruitment, specifically no provision of holding written and viva voce test has been laid down. The respondents claim that had the procedure in rule 4(1)(b) been followed, they would have got into the Service without any examination. But their lawful exception was denied by the failure of the Government to set up a Commission or appoint a Chairman. What would have happened in normal course, did not happen because of the Government's failure. Only because of this, quite contrary to the Rules, a written and oral tests were held. This was upheld by this Court principally on the ground of what was described as "peculiar situation" which was created by the absence of a Commission and its Chairman. The selection and appointments made in 1982 were dictated by peculiar circumstances obtaining at that time. The appointments were not made strictly in accordance with the Rules but, as was held by this Court, in exercise of the executive power of the State. It is true that some of the respondents appeared in the test and did not qualify but there is substance in the contention of the respondents that they were entitled to be appointed even without these tests if Rule 4(1)(b) was followed. They were deprived of this chance. Even for Rule 4(1)(b), the instrumentality of Public Service Commission was necessary for making any appointment. Now that the Public Service Commission has been set up, the State Government has to undo the wrong that was initially done to these employees by subjecting them to tests which was not warranted by Rule 4(1)(b). Therefore, they should not be made to suffer in the matter of seniority or promotion in any way by failure of the State Government to implement the Rules laid down by it. In these circumstances by directing the new recruits to be treated to have been recruited on the day the appellants were recruited, the State Government has not done anything contrary or wrong but has really restored the injustice done to the respondents by the State Government's failure to recruit them into the Service in accordance with Rule 4(1)(b). In fact, the only door that was open to the appellants under the Rules to enter the Service was through Rule 4(1)(b). They might have also joined through open competition but neither of the two steps were taken or could be taken. In these circumstances, the appellants have really tried to steal a march upon the respondents by being successful in the tests which should not have been held in any event.

We are of the view that the contention of the respondents must be upheld. The point in dispute has been examined in depth by two Committees set up by the State Government. The earlier judgment of this Court upholding the recruitment of the appellants was because of the failure of the State Government to appoint the State Public Service Commission. As no appointments were being made for a number of years, the Government adopted the device of holding a written test which was not laid down by the Rules. This Court held that under the peculiar circumstances, it was justified. This, however, does not mean that the State Government would not be entitled to regularise the service on the basis of the rules framed. The appellants who were appointed under very special circumstances cannot claim any special right in the matter of promotion or seniority. It was not the fault of the

respondents that appointments according to rules could not be made in time. Taking an overall view of the matter, we are of the opinion that the High Court has come to a correct decision. The appeal is, therefore, dismissed with no order as to costs.