

SUPREME COURT OF INDIA

Uttaranchal Forest Rangers' Asson.(Direct Recruit)

Vs.

State of U.P.

C.A.No.4249 of 2006

(Dr. A.R.Lakshmanan and Tarun Chatterjee JJ.)

25.09.2006

JUDGMENT

DR. AR. LAKSHMANAN, J.

Delay condoned.

Leave granted.

These appeals were filed against the final judgment and order dated 12.4.2004 passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 366(S/B) of 2002 whereby the High Court allowed the writ petition filed by Shri C.B. Chhimwal, respondent No.5 herein in S.L.P.(c) No. 7375 of 2005 and against the final judgment and order dated 26.11.2001 in W.P.(C) No. 610(S/B) of 1996 whereby the High Court allowed the writ petition filed by Shri Suresh Chandra Sharma and Shri Vijay Kumar Mishra, respondent Nos. 5 & 6 herein in S.L.P.(c) No. 1860/2006. The appellants in these matters are direct recruits to the post of Forest Rangers in the State of U.P, now Uttaranchal. The respondents are the State of U.P, State of Uttaranchal and Ors.

The brief facts are as follows:

In the state of U.P, during the period 1969-1979, there was no direct appointment to the post of Forest Rangers. The Government kept promoting Deputy Forest Rangers on ad hoc basis to the post of Forest Rangers if any vacancy arose. On 30.11.1989, by a Government Resolution, 124 persons who were promoted on ad hoc basis to the post of Forest Rangers were regularized in 1972 -1979. However, as of 30.11.1989, there were not enough vacancies in the promotee quota to accommodate all the regularized Forest Rangers. Hence, some of the regularized 124 Forest Rangers were pushed down and accommodated in 1990 and 1991. By the year 1991, all the 124 regularised Forest Rangers were accommodated. In 1991, there was only one vacancy in the promotee quota.

Later in 1989-1990, the members of the appellants Association were appointed in the year 1990 as Forest Rangers on the basis of competitive exam held by the U.P. Public Service Commission in 1989. They were substantively appointed on the post of Forest Rangers by direct recruitment on various dates in 1990 e.g. the President of the Appellants Association was appointed on 01.03.1990.

Appellant No.3 was appointed on 01.11.1990. The appointments were within the direct recruitment quota.

On 30.01.1991, without realizing that there was no vacancy in the promotee quota of Forest Rangers the State of U.P. sent a requisition to the Public Service Commission to recommend 410 persons for promotion to the post of Deputy Forest Rangers. This mistake has been admitted by the State of U.P. in their counter affidavit before the High Court as also in this Court.

On 06.07.1991, the State PSC vide its letter dated 06.07.1991 sent the names of Forest Rangers as if there were vacancies from the period 1979 to 1989 in the promotee quota. The UPPSC allotted the officers on the basis of the selection year. Needless to mention there is no provision in the Service Rules for allocation on the basis of year of selection. In any event, there were no vacancies and, therefore, the basis of this recommendation was incorrect.

On the basis of this recommendation on 17.07.1991, 356 Deputy Forest Rangers were promoted to the post of Forest Rangers 'from the date of taking charge'. They were not given any back-dated promotion. The respondents have not challenged their promotion order which promoted them w.e.f. the day they took charge.

On 31.05.1996, when the State of U.P. was preparing the seniority list of Forest Rangers, it went strictly by the Seniority Rules. Since the appellants were substantively appointed within their quota in the year 1990, they were placed senior to the respondents. However, as of 17.07.1991, since there was only one vacancy in the promotee quota of Forest Rangers, the respondents herein were notionally pushed down for the purposes of the seniority alone and were adjusted till 1996. Needless to mention the respondents get all the benefits of a Forest Ranger though there was no vacancy when they were promoted, except seniority. Since, there was no direct recruitment after 1990; the respondents do not suffer at all. In July 1996, two of the Promotee Forest Rangers namely, Shri Suresh Chandra Sharma and Shri Vijay Kumar Mishra figuring at Sl. Nos. 286 and 277 in the promotion order of 17.07.1991 challenged the seniority list dated 31.05.1996 by way of a Writ Petition No.610 of 1996 in the High Court of Allahabad, claiming seniority.

The State of Uttaranchal came into being on 8th of November, 2000.

On 30.04.2001, the respondent Suresh Chandra Sharma opted for the State of Uttaranchal and started working in the State of Uttaranchal w.e.f. 30.04.2001. However, he did not implead the state of Uttaranchal or the present appellants as a party to the writ petition.

In 20.07.2001, the pending Writ petition was allowed by the High Court and the High Court directed that the seniority list on challenge be corrected by showing the promotees as senior to the direct recruits by an order dated 26.11.2001. On 12.06.2002, the new State of Uttaranchal notified in its own seniority list of Forest Rangers in which the appellants were shown as seniors to the promotees.

Another promotee Shri C.B. Chhimwal respondent no.5 filed a writ petition challenging the seniority list in the High Court of Allahabad. The High Court by an order dated 12.04.2004 allowed Chhimwal's claim following its previous order in the case of Suresh Chandra Sharma. The appellants were unaware of the said order of the Allahabad High Court at Lucknow. It was only when the said order was produced before the officers of the State of Uttaranchal, by respondent

no.5, the appellants came to know about the order which was passed by the High Court without making them a party.

Following the Chhimwal case, 44 others moved the Allahabad High Court challenging the said seniority list. The High Court of Allahabad disposed off all the writ petitions and allowed the claim of all the writ petitioners and ordered retrospective application of the order.

By an order dated 18.01.2005, the State of U.P. issued an amended promotion order by which 45 persons have been granted retrospective seniority, some from 01.01.1979 i.e. from a period of 12 years prior to their actual date of promotion, even though, admittedly, there was no vacancy in the promotee quota, the effect of this order would be in the state of Uttaranchal as well.

The appellants thereafter approached this Court on 20.02.2005 seeking a stay on the application of the order of the High Court of Allahabad. This Court ordered stay of the operation of the order of the High Court on 04.04.2005. The issue now before us is whether the seniority list published in 1996 is to be interfered with due to the order of the High Court of Allahabad dated 12.11.2001. We heard Mr. Jaideep Gupta, learned senior counsel appearing for the appellants and Mr. N.N. Goswami, learned senior counsel, Dr. R.G. Padia, learned senior counsel, Mr. A.S. Rawat, learned Additional Advocate General and Mr. Gaurav Agrawal, learned counsel for the respondents. Mr. Jaideep Gupta, learned senior counsel appearing for the appellants submitted that:

? That there were no vacancies in the promotee quota prior to 1991 and hence the High Court should not have directed the State to grant retrospective promotion and seniority.

? That the vacancies arose in the promotee quota of Forest Rangers for the first time in 1987-88. However, against the said vacancies, 124 Forest Rangers, who had been promoted to the post of Forest Rangers on an ad hoc basis between 1973-77 were regularized and adjusted on 30th November, 1989. Therefore, 124 vacancies arising between 1987 and 1990 in the promotee quota had been filled up on a regular basis by the order dated 30.11.1989. Therefore, it is only in the year 1991 that a clear vacancy arose in the promotee quota. As a result of this, even the persons who are promoted in 1991 could not be given seniority from 1991, but had to be pushed down and received their seniority on different dates between 1991 and 1996 as and when the vacancy arose. Further it was submitted that, if the High Court orders are given effect to, then 356 Deputy Forest Rangers would become entitled to promotion ahead of the direct recruits far in excess of the quota.

? That no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely appointed validly in the meantime, as decided by this court in the case of K.C. Joshi vs. Union of India, 1992 Suppl (1) SCC 227.

? That the Seniority Rules of 1991 were not taken into consideration by the High Court. Rule 8 of the Seniority Rules, states that,

"Section 8 Where appointments from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year, but shall get the seniority of the year in which their appointments are made." The above stated Rules have overriding effect and hence seniority has to be consistent with the Rules ? That the High Court has proceeded on the basis that vacancies arose in 1987-88 and therefore, the promotion should be given retrospective effect. It was submitted that

the date on which vacancies arises cannot, without more, be made a basis of giving retrospective promotion and seniority. Also the High Court did not give deserved amount of importance to the recommendations of the Public Service Commission and the Rules laid down under the Public Service Commission (Procedure) Rules, 1970.

? That even if the High Court was of the opinion that the seniority and promotion should be reworked, the same should have referred back to the Public Service Commission to ascertain who would be the relevant person(s) entitled to promotion. More crucially, in the second impugned order dated 12.04.2004, 45 persons were directed to be promoted without taking into consideration their relative position in the list prepared by the Public Service Commission. By not referring the matter to the PSC, incorrect persons were chosen by the High Court for the purpose of promotion.

? Concluding his submissions, the learned senior counsel submitted that the seniority list under challenge in the second writ petition was the seniority list of the Uttaranchal State Government of 2002. Such challenge could not have been made before the Lucknow Bench of the Allahabad High Court. He further submitted that none of the direct recruits, who would be directly affected by an order, were made parties to the writ petition. Therefore, the High Court did not have the benefit of competing arguments in the matter. Even though the Principal Secretary of the State of Uttaranchal was made a party, and that the said party was never served.

Learned senior counsel, Dr. Padiya, appearing for respondent Nos. 1 & 2 submitted as under:

? That in the State of U.P. promotion from the post of Dy. Forest Ranger to the post of Forest Ranger was held up between 1976-77 to 1987-88 on regular basis. 124 Dy. Forest Rangers were promoted to the post of Forest Ranger in the years 1973, 1974, 1975, 1976, 1977 & 1979 on ad hoc basis beyond the prescribed limit for promotion.

? That these ad hoc Forest Rangers were regularised in the year 30.11.1988 and a requisition was sent for regular promotion to the post of Forest Range Officer through Public Service Commission, U.P., Allahabad vide letter no.E-1851/1-2-4 dated 30.01.1991 for 410 vacancies. The Forest Department issued the promotion order vide F.O. No.E-23/2-2-4 dated 17.07.1991 for 356 posts and subsequently for 3 posts again.

? That all the promotion orders were made prospective to the date of joining. It was further submitted that promoted Range Officers were given their due seniority under quota fixed for promotion, as is evident from para- 2 of Order No.E-3211/10 72, dated 08.06.1995. It was further submitted that when the said seniority list dated 08.06.1995 was under preparation a mistake was discovered that there was no vacancy of Rangers in promotion quota and that there was no direct recruitment of Forest Rangers from 1969-70 to 1976-77 and these vacancies were utilized in favour of promotees thus adjusting the promotees against the vacancies of quota of Direct Recruit, in excess of the quota available for promotees under Rules. While preparing the final seniority list in question the promotees occupying vacancies in excess of their quota has been pushed down and the year wise vacancies of Direct Recruits have been carried forward and upon the availability of Direct Recruit they have been placed en bloc in the vacancies available in the quota for Direct Recruits. ? That U.P. Govt. Servant Seniority Rules 1991 was in force when the promotion order of above 359 Dy. Forest Ranger to the post of Forest Ranger was passed on 17.07.1991. The rule 8(3) proviso allows vacancies of back years to be counted in the promotion but specifically does not permit any promotion from back year. Consequently the order dated 17.07.1991 was from the prospective date

of joining.

? That an inadvertent error, oversight, made in the year 1991 came into the notice of department on 03.12.1994 and the same was referred to the State Govt. for directions. The State Govt. gave guidelines vide letter no. 715/14-3-95-700 (236)/94 dated 11.09.1995 to give promotees the benefit for seniority after following the respective quota for promotion strictly.

? That accordingly a final seniority list was published in 1995 and it was updated in 1996 by deleting the name of retired/promoted persons only. The original seniority list was published in 1995 and it was maintained in other respects as it is.

? That the appointing authority of the petitioner in the Writ petition is PCCF, U.P., Lucknow who was served with the judgment dated 26.11.2001 which found it fit to comply with the judgment as it was passed with the respect to petitioners of the writ petition. Only the judgment was complied with vide E-120/2-2-4(1) dated 30.01.2002 by the PCCF, U.P., Lucknow.

? That after the compliance of the judgment a set of new writ petitions and some pending writ petition were clubbed by the High Court, Lucknow under Case No.366 (SB) 2002 and was decided on 12.04.2004 on the same line.

? That a set of contempt petition was moved by the petitioners of the above bunch case specifically Contempt Petition No 1617 (C) of 2004 C.B. Chhimwal Vs. Smt. Surjit Kaur Sandhu & Ors. And Contempt Petition No. 1897 (C) of 2004 Chandra Shekhar Kargeti Vs. K.Prasad and the date of personal appearance of officials was fixed. Under these circumstances Principal chief Conservator of Forest, U.P. Lucknow passed F.O. No. E- 114/2-2-4 dated 18.01.2005 and judgment dated 12.04.2004 was complied with under pressure of Court order; giving notional promotions to the appellants. Thereafter, a report was produced before the High Court in Contempt Case No. 1617/C/2004 C.B. Chhimwal vs. Smt. Surjit Kaur Sandhu by an affidavit dated 19.01.2005. The High Court was not satisfied with the compliance and passed further direction on 28.02.2005 in the aforesaid contempt petition. The operative part of the order dated 28.02.2005 is reproduced below:-
"The apprehension genuinely appears to be sustainable as the consequential benefit may be kept confined to the seniority alone. It is also not understood as to why the phrase, 'notional promotion' has been used by Chief Conservator Officer in his order of January 18, 2005 in the circumstances of there being uncertainty on both the counts, the Principal Chief Conservator of Forests is directed to issue a corrigendum of the aforesaid order giving details of the benefit that would be extended to the petitioner in compliance of the judgment referred to above."

"Accordingly, he is directed to file his supplementary counter affidavit and a copy of the modified order within fifteen days, list on 21.04.2005 for orders. In case the uncertainty still remains, the court would consider the petitioners request for presence of the Principal Chief Conservator Officer before this Court."

? That Dy. Rangers who were promoted to the post of Range Officers vide F.O. No.E-23/2-2-4 dated 17.07.1991 cannot be promoted with retrospective effect from a date when they were not borne in the cadre. Although in compliance of the judgment and order passed by the High Court on 12.04.2004 the respondent no.6 along with other 44 Dy. Rangers has been notionally promoted with effect from 01.07.1987. A copy of the above promotion order was produced before the High Court in Contempt Case No. 1617/C/2004 C.B. Chhimwal vs. Smt. Surjit Kaur Sandhu and Another. But

the Court was not satisfied with the above compliance made by the department and on 28.02.2005 passed the above orders as mentioned above.

? That the High Court granted the benefit of seniority to respondent No.5 and other similarly situated persons through connected writ petition with effect from retrospective year 1979 to 1988 as the case may be, while their actual promotions have been done in the year 1991 to the post of Forest Rangers. It is further stated that service rules do not provide any time bound period for such promotion.

? That the Commission might have selected the respondent No.5 along with other similarly situated persons against the vacancy of a particular year but fixation of seniority has to be made in accordance with the statutory provision of U.P. Govt. Servant Seniority Rules 1991 framed under proviso to Art 309 of the Constitution which strictly prohibits giving back year seniority.

? That no direct recruitment between the year 1969-70 to 1976-77, the then existing vacancies of Forest Rangers were filled up by promotees of the department. As the vacancies belonging to the direct recruit was occupied by promotees between this period, the required number of post of promotees exceeded. Out of certain oversight the number of vacancies shown as year wise vacancies sent to the Public Service Commission against the vacancies of earlier years was wrongly indicated. At a later date at the time of preparation of seniority list this inadvertent mistake was noticed at the time of preparation of list on 08.06.1995 and immediately exercise was carried out to check the inadvertent mistake/oversight. The excess number of promotees against the Forest Rangers was later adjusted and carried forward as per provisions. As per the above facts it is crystal clear that there was no vacancy existing for the promotees after the year 1973-74 till 1986-87. In the year 1987-88, 9 vacancies were available after a long gap. Similarly, the vacancies available during the year 1988-89, 1989-90 and 1990-91 are 31, 54 & 84 respectively. It was out of these vacancies, the adjustment of 124 Forest Rangers regularized on 30.11.1989 were adjusted. The name of respondent no. 5 namely C.B. Chhimwal is much below and therefore he was not included in the above list. ? That in view of the facts and circumstances stated above and as per provisions of Law the respondent no.5 along with other similarly situated 353 persons are not entitled for back date seniority as well as consequential benefit as they have not actually worked on the post of Range Officer, therefore this Court may very kindly be pleased to quash the judgment and order dated 12.04.2004 passed by the High Court of Allahabad, Lucknow Bench, Lucknow in Writ Petition 366/SB/2002.

Learned AAG, (State of Uttaranchal) appeared for the state of Uttaranchal, and submitted as under:-

? Rule 8(1) of the Uttar Pradesh Government Servant Seniority Rules, 1991 provides conferment of seniority to an employee from a previous date provided that the date of such conferment along with substantive appointment is mentioned in the order of substantive appointment. Similar provision also exists in the Uttaranchal

Government Servant Seniority Rules, 2002. Hence it is clear that a person can be promoted with retrospective effect. It is also obvious that a person cannot be borne in a cadre till he is promoted to that cadre.

? A vacancy to any source of appointment can be ascertained only when that source of appointment has a well defined share of posts in ratio with other sources of appointment. In the present case, as per Rule 5(a) of Uttaranchal Subordinate Services Rules, 1951, it is quite clear that there is no

fixed/well defined quota for the promoted source of appointment. Hence, allocation of year-wise vacancies against promotion quota is not possible. Consequently, the question raised by the appellant that the seniority is reckoned from the date when appointment was done to the post in substantive capacity or from the date when the vacancy accrued for the post in the cadre is irrelevant.

? Though the State of Uttaranchal came into existence on 9.11.2000 but the final allotment/distribution of Forest Rangers' between Uttar Pradesh and Uttaranchal was done in February, 2004 with effect from 9.11.2004 by the Government of India under Section 73(1) of U.P. Reorganisation Act, 2000 till the stage of this final allotment, any dispute pertaining to their seniority was obviously the matter of jurisdiction of the State of Uttar Pradesh.

? Rule 8(3) of the Rules is not applicable in this case because the appointments were not made by both the direct and promoted sources of recruitment as a result of one selection. Moreover, definite quota is not prescribed for the two sources of appointment. ? As per Rule 8 of the Seniority Rules, there is a provision that if the appointment order specifies a particular back date with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and in other cases, it will mean the date of issuance of the order. This implies that there is a provision of vacancies of being carried over. Moreover, it is also in the interest of natural justice that employees are promoted from the date they become eligible and the vacancy exits. Otherwise, it would result in denying promotion to them for no fault of theirs and only because of not holding selection procedure on time for which they cannot be held responsible. As far as Rule 8(3) is concerned, it applies to one selection made both for promotion and direct recruitment, which is not the case under consideration.

Mr. N.N. Goswami, learned senior Counsel appearing for respondent no.5, Chhimwal, largely adopted the arguments of the state counsel. It was submitted that, this is a simple case of promotion of permanent Deputy Rangers against the vacancies as and when it occurred and the respondent was entitled for promotion. The High Court has correctly decided the issue in question in W.P No. 610 (S/B) of 1996, which the petitioners have accepted and did not prefer a petition for Special Leave to appeal then, and the same issue cannot be agitated after four years and after compliance has already been done. The present petition against impugned order was not decided on merit but was decided on the basis of parity. The learned counsel submitted further that, the present case squarely is covered by the judgment of this court in the case of P.N. Premachandran v. State of Kerala & Ors (2004) 1 SCC 245, where it was held that,

".we do not find any irregularity in the matter of grant to promote the respondents with effect from 1964 onwards. in view, of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their, part. It is also not disputed, that in ordinary course they were entitled to be promoted to the post of Assistant Director, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect. Such exercise of power on the part of the State is not unknown in service jurisprudence. Even assuming that such a power did not exist in Rule 31 of the Rules the same can be traced to Rule 39 of the Rules, as noted

hereinbefore."

He further relied on *A. Janardhana v. Union of India*, (1983) 3 SCC 601, where it was held as under:

"But avoiding any humanitarian approach to the problem, we shall strictly go by the relevant rules and precedents and the impact of the Rules on the members of the service and determine whether the impugned seniority lists is valid or not. But, having done that we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service jurisprudence from the precedents namely, that a person already rendering service as a promotee has to go down below a person who comes into service decades after the promotee enters the service and who may be a schoolian, if not in embryo, when the promotee on being promoted on account of the exigencies of service as required by the Government started rendering service. A time has come to recast, service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation."

We heard all the parties in detail and we have also perused through all the materials on record before us. We feel that, the appellants herein have a case and their arguments merit favourable consideration.

We feel that the impugned judgment dated 26.11.2001 of the High Court has correctly appreciated that vacancies arose in the year 1987-88, but have failed to appreciate that these vacancies were filled by regularizing 124 persons who were carrying on as Forest Rangers on an ad hoc basis. We also are of the view that, if the orders of the High Court are to be given effect to, then 356 Deputy Forest Rangers would become entitled to promotion in excess of the quota. It is well settled that promotion in excess of quota makes an employee an ad hoc employee and seniority cannot be given to such employees on the basis of ad hoc promotion. This was observed by this court in a series of cases. In the case of *Keshav Chandra Joshi & Ors v. Union of India & Ors*, 1992 Supp.1 SCC 272, this Court observed that, "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 Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. When promotion is out side 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 sub-sequent 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 it 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 Articles 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 Article 14 of the Constitution. This Court interpreted that equity is an integral part of Article 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."

In *Sanjay Kumar Sinha & Ors v. State of Bihar & Ors*, (2004) 10 SCC 734, this court observed that, "6. In our view the first point regarding alleged non-availability of posts of ACFs for appointment of promotees at the relevant time is sufficient to decide this appeal. On the question of availability of posts the case of the appellants is that posts were not available and in the absence of the posts no appointments could be made. Still the respondents had gone ahead with the appointments of the promotees. Such appointments are mere fortuitous and cannot confer the benefit of seniority from the date of appointment. The first document relied upon in support of this contention is a letter dated 23rd September, 1985 from the Chief Conservator, Forests and Environment Department, Government of Bihar, Patna. The letter directly deals with the question of promotion of Forest Range Officer (FRO) to the post of Assistant Conservator of Forests (ACF). The letter notes that under Rule 3 of the Bihar Forest Service Rules, at least 50% of the total existing vacancies have to be filled by promotion. It goes on to add: "Presently there are 125 officers in the cadre in the Bihar Forest Service, out of which 105 have been promoted from the post of Range Officer and rest are appointed by way of direct recruitment." According to this letter as per the cadre strength of the posts of ACF in Bihar State Forest Service, the promoted officers constituted 84%. The Chief Conservator of Forests expressed his view in the said letter that filling such large number of posts by way of promotions affects the quality of service. The Chief Conservator of Forests also notes that the State Service Commission had already issued advertisement for filling 40 posts of ACFs by direct recruitment. He has opined that in these circumstances it would not be proper to fill up the posts of ACF by promotion. This letter highlights the imbalance already existing in the service qua the posts of ACF so far as appointments of direct recruitment and promotees are concerned."

"12. It is clear from the admissions made on behalf of the respondents by way of affidavits filed in judicial proceedings that sanctioned number of posts were not available in the year 1987 when the respondents were promoted as ACFs, rather the promotions were made against non-existing posts. Can such promotions confer any right on the officers concerned particularly over and above the other duly appointed officers in the service like the appellants? In this connection we have to note that Rule 35 of the Bihar Forest Service Rules provides that seniority of officers appointed to the service is to be determined with reference to the date of their substantive appointment. In order to become a member of the service the person concerned has to satisfy at least two conditions - first, appointment must be in substantive capacity and (2) the appointment has to be to the post in the service according to the Rules and within the quota to a substantive vacancy."

Further in the case of *D.Ganesh Rao Patnaik & Ors v. State of Jharkhand & Ors*, (2005) 8 SCC 454, this court opined that,

". that the appointment of the contesting respondents was not only contrary to Rules but was fortuitous in nature and they can get no advantage of such fortuitous appointment until a substantive vacancy was available in their quota, which in fact became available much later some time in the year 1993-94, which is long after the appointment of the appellants. What is a fortuitous appointment has been explained in a Constitution Bench decision of this Court in *Rudra Kumar Sain*

v. Union of India (2000) 8 SCC 25. After observing that the Rules in question did not define the terms 'ad hoc', 'stopgap' and 'fortuitous', which are in frequent use in service jurisprudence, the Court referred to several dictionaries. The meaning given to the expression 'fortuitous' in Stroud's Judicial Dictionary is 'accident or fortuitous casualty'. This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation, such appointment obviously would not continue for a reasonably long period. In Black's Law Dictionary the expression 'fortuitous' means 'occurring by chance', 'a fortuitous event may be highly unfortunate'. It thus indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. In Oxford dictionary the meaning given to the word 'fortuitous' is - happening by accident or chance rather than design. In our opinion it will not be proper to hold that the promotion of the contesting respondents was fortuitous as contended by learned counsel for the appellants. It cannot be said that the contesting respondents were promoted by accident or by chance. Their promotion order was passed as there were vacancies to the posts of Additional District and Sessions Judges, though in the quota or direct recruits, but as no recruitment from the said channel had been made for a long time and sufficient number of candidates were not available, the vacancies were filled in by giving promotion to members of Bihar Civil Service (Judicial Branch). If promotion orders had not been passed and the posts had not been filled in, the judicial work in the districts would have suffered. However, it is clear that having regard to the various orders passed on the judicial side by the Patna High Court and the legal position being well settled that the temporary posts have also to be counted for determining the one-third quota of direct recruits, the promotion given to the contesting respondents was not in accordance with law. Instead of taking the harsh step of rescinding their order of promotion the Patna High Court, on the administrative side, took the decision to treat them promoted against subsequent quota of promotees. Therefore, the contesting respondents can under no circumstances claim seniority over the appellants and the view to the contrary taken by the Jharkhand High Court on 29th August, 2002 on administrative side and also in the judgment and order dated 1st April, 2003, which is the subject-matter of challenge in the present appeal, is wholly erroneous in law."

We also observe that, the High Court has granted seniority without even reference to Seniority Rules of 8, and in particular the proviso thereto, has not been taken into consideration. The said rules have overriding effect and hence seniority has to be consistent with the Rules. By virtue of Rule 8, Seniority can be given only from 'the date of substantive appointment'. In this case, the promotees were appointed on 17.07.1991 and therefore cannot be given seniority over the appellants who were substantively appointed prior in point of time i.e. in 1990. It is specifically indicated in proviso to Rule 8 that, "Where appointments from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year, but shall get seniority of the year in which their appointments are made." These rules were in force in 1991 when the Deputy Forest Rangers were promoted to the post of Forest Rangers on 17.07.1991. Also it is well settled that seniority has to be decided on the basis of Rules in force on the date of appointment. It was observed by this court in the case of State of Karnataka & Ors v. C. Lalitha, (2006) 2 SCC 747, that,

"Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well-settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I Post but the direction to create a supernumerary

post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

It was also observed in the case of *Union of India v. S.S.Uppal & Anr.*, (1996) 2 SCC 168 that, "12. We are of the view that the question of seniority of Uppal, the respondent No. 1, has to be determined by the rules in force on the date of his appointment to IAS. The fixation of seniority in the IAS follows appointment to the service. The Year of Allotment in the IAS will have to be determined according to the provisions of seniority rules which are in force at the time of his appointment. The date of occurrence of vacancy has really no relevance for the purpose of fixation of seniority in the IAS. The fixation of seniority is done only after an officer is appointed to IAS. The Central Government is competent to amend the seniority rules from time to time keeping in view the exigencies of administration."

Thus we feel that the High Court order granting promotees seniority from 1987-88 suffers from infirmity and is liable to be set aside.

We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely appointed validly in the meantime, as decided by this court in the case of *K.C. Joshi & others vs. Union of India*, 1992 Suppl (1) SCC 272 held that when promotion is outside the quota, 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, it 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 Articles 14 and 16(1) of the Constitution.

This Court has consistently held that no retrospective promotion can be granted nor any seniority can be given on retrospective basis from a date when an employee has not even borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime. In, *State of Bihar & Ors v. Akhouri Sachidananda Nath & Ors*, 1991 Suppl. (1) SCC 334, this court observed that,

"12. In the instant case, the promotee respondents 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when the respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over the respondents 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter-se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondents 6 to 23 can not be made senior to the respondents 1 to 5 by the

impugned Government orders as they entered into the said Service by promotion after the respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned Government orders made in annexures, 8, 9 and 10 is unexceptionable." This court in *Vinodanand Yadav & Ors v. State of Bihar & Ors*, 1994 Suppl. (2) SCC 44, held:

"On an issue regarding the inter se seniority among the direct recruits and promotees the Court applying the ratio of *State of Bihar v. Akhouri Sachindranath* held that the appellants who were direct recruits shall be considered senior over the promotees not borne on the cadre when the direct recruits were appointed in service. Hence the gradation list drawn under which promotees were given seniority over direct recruits could not be sustained and was thereby set aside".

The High Court, in the impugned judgment dated 26.11.2001 has proceeded on the basis that vacancies arose in 1987-88 and, therefore, should be given retrospective effect. The said submission, in our opinion, has no force and import. In our view, the date on which vacancies arose cannot without more be made a basis of giving retrospective promotion and seniority. In *Jagdish Ch. Patnaik & Ors v. State of Orissa & Ors*, 1998(4) SCC 456, this Court observed:

32. The next question for consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited? Mr. Banerjee's contention on this score is that since the appellant was recruited to the cadre of Assistant Engineer in respect of the vacancies that arose in the year 1978 though in fact the letter of appointment was issued only in March 1980, he should be treated to be a recruit of the year 1978 and as such would be senior to the promotees of the years 1979 and 1980 and would be junior to the promotees of the year 1978. According to the learned Counsel since the process of recruitment takes a fairly long period as the Public Service Commission invites application, interviews and finally selects them whereupon the Government takes the final decision, it would be illogical to ignore the year in which the vacancy arose and against which the recruitment has been made. There is no dispute that there will be some time lag between the year when the vacancy accrues and the year when the final recruitment is made for complying with the procedure prescribed but that would not give a handle to the Court to include something which is not there in the Rules of Seniority under Rule 26. Under Rule 26 the year in which vacancy arose and against which vacancy the recruitment has been made is not at all to be looked into for determination of the inter se seniority between direct recruits and the promotees. It merely states that during the calendar year direct recruits to the cadre of Assistant Engineer would be junior to the promotee recruits to the said cadre. It is not possible for the Court to import something which is not there in Rule 26 and thereby legislate a new Rule of Seniority. We are, therefore, not in a position to agree with the submission of Mr. Banerjee, the learned senior counsel appearing for the appellants on this score.

In the instant case, the High Court has relied upon the letter of the Public Service Commission dated 06.07.1991 to come to the conclusion that the PSC recommended the appointments to be given to the promotees from the date on which the vacancy arose. Even apart from the fact that it has now been conclusively established that the vacancy position indicated to the PSC was not correct, there is nothing in the said letter of the PSC which would lead to the conclusion that it had recommended that appointment should date back to the date of vacancies. All that the letter indicates is that the Commission had considered the fitness and suitability of the candidates year by year taking into consideration the vacancies that had allegedly arisen in the concerned year. This is only an exercise for the purpose of arriving at the name of the employees to be recommended which had nothing to

do with the date on which the appointment was to be given. The reliance placed by the High Court on the U.P. promotion by selection in consultation with the Public Service Commission (Procedure) Rules, 1970 and, in particular, Rules 13 and 21 also does not mandate that the appointment has to be made on the date on which the vacancy arose. It confirms that while selecting the persons the Government has to send requisition year-wise and the PSC to make its recommendation year-wise. Again this does not lead to a conclusion as to the date on which appointment should take effect.

An alternative argument was made by Mr. Gupta to the effect that even if the High Court was of the opinion that the seniority and promotion should be re-worked the same should have referred back to the PSC to ascertain who would be the relevant persons entitled to promotion. The High Court did not accept that PSC's recommendation in its entirety since in its view vacancies only arose in 1987-88 and not in 1979-80 as indicated by the PSC.

Likewise, in the second impugned order dated 12.04.2004, 45 persons were directed to be promoted without taking into consideration their relative position in the list prepared by the PSC. By not referring the matter to the PSC, incorrect persons were chosen by the High Court for the purpose of promotion. This submission was, however, made by learned senior counsel without prejudice to the submission that the entire basis for directing retrospective promotion and seniority was erroneous and there were no vacancies at all. The second impugned order dated 12.04.2004 is further vitiated for the following reasons:-

a) Forum: The seniority list under challenge in the second writ petition was the seniority list of the Uttaranchal State Government of 2002 and such challenge could not have been made before the Lucknow Bench of the Allahabad High Court.

b) Parties: None of the direct recruits who would be directly affected by order cannot were made parties to the writ petition. Therefore the High Court did not have the benefit of competing arguments in the matter. Even though, the Principal Secretary of the State of Uttaranchal was made a party, the said party was never served. The only respondent which was heard was the State of U.P. which had no stake in the matter at all since all of the writ petitioners before the Lucknow Bench of the Allahabad High Court were employees of the State of Uttaranchal on the relevant date. It is, therefore, evident that the relevant material was not placed before the Allahabad High Court for the purpose of deciding the writ petition. Accordingly, the permission had to be taken from this Court by the present appellants to prefer the SLPs. We, therefore, have no hesitation in setting aside the final judgment and order dated 12.04.2004 passed by the High Court of Judicature at Allahabad, Lucknow Bench in Writ Petition No. 366 SB of 2002 whereby the High Court allowed the writ petition filed by C.B. Chhimwal and allow the Civil Appeal No. of 2006 arising out of SLP (C) No. 7375 of 2005.

Likewise, we allow the Civil Appeal No. of 2006 arising out of SLP (C) No. 1860 of 2006 and set aside the impugned judgment and order dated 26.11.2001 passed in Writ Petition No. 610(S/B) of 1996 by the High Court of Allahabad at Lucknow Bench.

However, we are making it clear that this judgment of ours will not adversely affect the benefits of the order which have been enjoyed by any of the promotees who have retired from service. The division of seniority list, however, has serious and lasting consequences insofar as the appellants are concerned which of crucial importance as far as the promotional prospects of the appellants are concerned. We, therefore, direct the State of Uttaranchal through its Principal Secretary (Forest)

Dehradun, Uttaranchal to revise the seniority list of direct recruits in line with the observations and conclusions made in this judgment by us within 2 months from the date of receipt of this judgment.
No costs.