

Bhupendra Nath Hazarika & Anr vs State Of Assam & Ors on 30 November, 2012

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Bench: Dipak Misra, K. S. Radhakrishnan

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS.8514-8515 OF 2012
(Arising out of S.L.P. (Civil) Nos. 19707-19708 of 2009)

Bhupendra Nath Hazarika and another ... Appellants

Versus

State of Assam and others ... Respondents

WITH

CIVIL APPEAL NO.8516 OF 2012
(Arising out of S.L.P. (Civil) No. 963 of 2010)

Bibekananda Das ... Appellant

Versus

State of Assam and others ... Respondents

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. In these appeals, the challenge is to the common judgment and order dated 9.9.2008 passed by the Division Bench of the High Court of Gauhati, Assam in WA Nos. 448 of 2004, 459 of 2004 and 465 of 2004 whereby stamp of approval has been given to the judgment and order dated 19.11.2004 passed by the learned single Judge in WP(C) Nos. 7482 of 2002, 7843 of 2002, 7564 of 2002, 8081 of 2002 and 298 of 2003 whereunder the learned single Judge had maintained the order dated 11.10.2002 passed by the Assam Administrative Tribunal, Guwahati (for short “the tribunal”) in

Appeal Case No. 79ATA of 1999, and dismissed WP(C) Nos. 4028 of 2003, 4129 of 2003 and 1031 of 2003 which were preferred directly for issuance of mandamus commanding the respondent authorities to consider the previous services rendered by the petitioners therein prior to their appointments in the Assam Police Service (Junior Grade) in the year 1993 and to determine their inter se seniority in the promotional cadre accordingly and further disposed of WP(C) 69 of 2003 preferred by an Additional Superintendent of Police, Guwahati for quashing of the appointment to the promotional post of the private respondents therein on the foundation that they had been promoted in violation of the provisions of the Assam Police Service Rules, 1966 (for brevity “the 1966 Rules”).

3. Shorn of unnecessary details, the facts which are requisite to be stated are that the Assam Public Service Commission (for short “the Commission”) issued an advertisement No. 9/92 dated 23.6.1992 inviting applications for preliminary examination for the Combined Competitive Examination, 1992-93 for selecting candidates for various posts and services including thirty vacancies in the Assam Police Service (Junior Grade) (for short “the APS”) as requisitioned by the Commissioner-cum- Secretary to the Government of Assam in the Department of Personnel on 5.9.1992. On 29.8.1992, the Commission published another advertisement No. 12/92 inviting applications for filling up of 20 posts in the APS under Rule 5(1)(c) of the 1966 Rules. There is no dispute that the initial 30 vacancies were put in the compartment of “regular batch” or “direct recruitment” and the other 20 vacancies, which were sought to be filled up by way of special drive, were kept in the category of “special batch” or “promotional recruits”. The main examination for the regular batch was held on 15.11.1992 for total marks of 1400. The examination for the special batch was held on 22.11.1992 for 650 marks. The Commission declared the result in respect of regular batch on 23.4.1993 and, vide letter dated 24.4.1993, recommended 30 candidates for appointment in order of merit. Despite the recommendation by the Commission, no appointment was made till 13.8.1993. At this juncture, the Commissioner-cum-Secretary to the Government of Assam in the Department of Home requested the Commission to furnish the select list of the special recruits at the earliest. On the basis of the aforesaid letter of request, the Commission sent its recommendations in respect of the candidates belonging to the special batch and on the basis of the said recommendation, vide notification No. HMA.478/86/Pt-I/17 dated 3.7.1993, the respondent Nos. 6 to 24 before the tribunal were appointed. The respondent No. 25 was appointed on 31.8.1994. Thereafter, the Competent Authority, vide notification No. HMA.110/93/43 dated 13.8.1993, appointed 28 persons from the regular batch. As the recruits of the special batch were appointed earlier, they were treated senior to the recruits belonging to the regular batch.

4. The facts, as further uncurtained, are that the determination of seniority came to the notice of the recruits of the regular batch at the time of their confirmation of service in the year 1999. Being dissatisfied with the action of the authorities, they immediately submitted a representation. When the representation was pending consideration, a provisional gradation list showing the inter se seniority as on 31.12.1992 was published on 12.3.1999. In the said provisional gradation list, the recruits of the special batch were shown as senior to the recruits of the regular batch. As warranted, the recruits belonging to the regular batch filed their objections to the fixation of seniority on 24.9.1999, but without publishing the final gradation list, the respondent No. 3, namely, the Secretary in the Department of Home, promoted 14 officers belonging to the special batch and 16

officers belonging to the regular batch to the Senior Scale of APS (Grade-II). In the promotional order, the officers belonging to the regular batch were shown below the officers belonging to the special batch. Because of the aforesaid situation, the direct recruits invoked the jurisdiction of the tribunal for the apposite determination of seniority claiming to be senior to the respondent Nos. 6 to 24.

5. The claim of the appellants before the tribunal was resisted by the respondent-State and the private respondents therein on many a ground including the one that the appeal was barred by limitation. It is worthy to note that in an affidavit, the Secretary to the Commission asseverated that the Government had not consulted the Commission before publishing the provisional gradation list; that when the selection process for the regular batch was already underway, there was no justification whatsoever to go for special recruitment; that the recourse taken to fill up the posts by way of special recruitment was in gross violation of the rules and procedure inasmuch as all vacancies could have been filled up by resorting to the usual and regular procedure of recruitment; that the Competent Authority of the State Government should have acted on the list sent by the Commission relating to the regular candidates in quite promptitude but delayed it for no apparent reason and called for the recommendation for the special batch and issued letters of appointment in their favour which exhibited unwarranted interest; and that the inter se seniority deserved to be refixed and the regular batch should be treated to be senior to the special batch.

6. The tribunal dealt with the issue of limitation and observed that the appeal did not concern itself with the validity or propriety of the appointments of the respondent Nos. 6 to 25 but fixation of inter se seniority and hence, the appeal was not barred under the provisions of the Assam Administrative Tribunals Act, 1977. It further opined that it was curious that despite the fact that the recommendation in respect of the regular batch had already been forwarded to the Government by the Commission, no steps were taken. The aforesaid act of the authority, observed the tribunal, on one hand, expositied lackadaisical attitude in dealing with the case of the regular batch and, on the other, unreasonable alacrity in the appointment of the special batch. The tribunal attributed motive to such an action and proceeded to opine that there was no administrative decision by the appropriate authority for making appointment to the service by resorting to the process of special recruitment in preference to general recruitment.

7. It is apt to note that the tribunal referred to various departmental communications including the letter dated 17.8.1991 which emanated from the Office of the DGP proposing to enlist 20 Deputy Superintendent of Police from other departments under Rule 5(1)(c) of the 1966 Rules. The tribunal referred to Rules 5, 7 and 8 of the 1966 Rules and came to hold that a close perusal of the provisions of the service Rules clearly show that recruitment by resorting to clause (c) of sub-rule (1) of Rule 5 should be made only in special cases and at all time such recruitment must be limited only to 5 per cent of the total number of posts in the cadre and such special recruitment must be limited only to one post in a particular year. It further stated that the 1966 Rules are quite silent as regards carry forward of such posts and, therefore, there could not have been accumulation of vacancies to be filled up by resorting to the provision contained in clause (c) of sub-rule (1) of Rule 5 and as such, the question of selecting and appointing as many as 20 persons in a year did not arise. The tribunal further held that as per Rule 8(1), the Governor is required to call for recommendations from the

recommending authorities for the purpose of recruitment to the service under clause (c) of sub-rule (1) of Rule 5 and the recommending authorities are also required to submit recommendations in respect of the persons having regard to the laid down criteria but in the instant case, the said procedure was given a total go by which is not permissible. The tribunal further noticed that Rule 8(2), which is mandatory, provides that all the recommendations are required to be submitted before the selection committee constituted under Rule 7(1) and the selection committee is required to interview the recommended candidates and prepare the select list and, therefore, the Commission, in no circumstance, could have been entrusted with the responsibility of interviewing, testing, selecting and recommending any candidate for special recruitment under clause (c) of sub-rule (1) of Rule 5. In this backdrop, the tribunal observed that, admittedly, all the processes undertaken by the Commission and the third respondent were in gross violation of the mandatory provisions of the Rules and hence, the selection was not valid.

8. After so stating, the tribunal proceeded to hold that as the respondent Nos. 6 to 25 had been appointed in violation of the rules, they could not be treated as regular recruits within the meaning of Rule 5(1)(a) of the 1966 Rules. It also stated that had the appeal been filed earlier in a different form, the selection and appointment of the special batch recruits could have possibly been set aside. Eventually, the tribunal placing reliance on *State of U.P. v. Rafiquddin and others*[1] and *Dalilah Sojah v. State of Kerala and others*[2], came to hold that due to unreasonable delay and inaction on the part of the Government in notifying the appointments, the regular batch candidates, who were earlier recommended by the Commission, could not be put in jeopardy and lose their seniority and accordingly directed for refixation of the seniority list. It further directed that the regular batch shall be allowed consequential benefits with effect from the date on which the senior most member of the special batch availed of any benefit even by creating supernumerary duty post in the cadre.

9. Being dissatisfied with the order passed by the tribunal, as has been stated earlier, certain writ petitions were preferred and some writ petitions were directly filed before the High Court seeking quashment of the appointment of the private respondents as Deputy Superintendent of Police. The prayer in the other batch of writ petitions was to treat the direct recruits as per the rules regard being had to their date of appointment and to extend the benefit of earlier services as stipulated under Rule 18 of the 1966 Rules.

10. The learned single Judge adverted to the facts in detail, the proposal before the Cabinet for appointment of 20 officers in the post of Deputy Superintendent of Police by taking resort to Rule 5(1)(c) of the 1966 Rules and basically posed three questions, namely, (i) whether the appeal preferred before the tribunal was barred by limitation; (ii) whether the members of the regular batch could be treated as senior when their appointments were violative of the recruitment process as envisaged under the relevant recruitment rules; and (iii) whether the tribunal was justified in directing rectification in the gradation list when there was no appeal seeking removal of the special batch recruits being in violation of the rules. Be it noted, as far as question No. (iii) is concerned, the learned single Judge framed five ancillary questions.

11. While dealing with the facet of limitation, the learned single Judge referred to the relevant provisions of the Act and expressed the view that the appellants before the tribunal having the

remedy which was available to them in terms of the directions contained in the circular dated 1.4.1999 were entitled to prefer the appeal in terms of the proviso to sub-section (2) of Section 4 of the AAT Act, 1977 and hence, the appeal was not barred by limitation.

12. Adverting to the facet of appointment, the learned single Judge scanned the anatomy of the 1966 Rules and came to hold that the number of persons who got selected as members of the special batch were not eligible for consideration for appointment in terms of Rule 5(1)(c) and further the procedure engrafted under the said sub-rule was not followed and, in fact, was mutilated and flouted in every conceivable manner leading, eventually, to the appointment of the members of the special batch. Dwelling upon the issue that the appointments were arbitrary, malafide and discriminatory vis-à-vis the appointment of the direct batch, the learned single Judge referred to the factual matrix pertaining to the recommendations sent for recruitment by special drive, the Cabinet Memorandum and the Cabinet decision and eventually held that notwithstanding the fact that the proposal for recruitment of twenty Dy. Superintendents of Police, as a special case, was submitted by the Home Department and the Government did not agree to the proposal, yet the decision to make the recruitment and the manner and modalities for holding of the interview and the test for the purpose of recruitment of the Special Batch was taken in the chamber of the Chairman of the Commission, on the basis of a discussion held between the then DGP, Assam, and the Chairman of the Commission and, therefore, the decision, so reached, could not be termed as a decision of the Government. He also observed that the members of the Special Batch were selected throwing over-board, in entirety, the relevant recruitment rules. Regard being had to chronology of events leading to the appointment of the members of the Special Batch, the learned single Judge opined that the entire exercise for selecting the Special Batch was wholly de hors the relevant recruitment rules. The urgency shown by the Government to obtain the result of the examination held in respect of the Special Batch was an indication that the Government was waiting, for no justified and valid reason, to, first, make appointment of the members of the Special Batch, though selected in complete disregard of the Rules, and, then, issue appointment in respect of the members of the Direct Batch, whose process of selection was never questioned. After so stating, the learned single Judge held that contrary to the provisions of Rule 5(1)(c), which prescribes upper age limit for selection to be 35 years and throwing to the wind the very purpose for which special recruitment was sought to be made, the age was relaxed to 45 years and persons, who were born in 1942, came to be selected in the year 1992, and thereby many of the officers recruited under the special drive were as old as 50 years, whereas proposal for the special drive was made on the pretext of recruiting young officers. He also opined that the whole process of selection of the special batch recruited was malafide and arbitrary.

13. After so stating, the learned single Judge dealt with issues whether the appointments were ab-initio void, whether the relevant rules of recruitment were relaxed in respect of the special batch at the time of making their recruitment and what was the permissible limit of relaxation and whether there can be deemed relaxation. Delving into the said aspects, the learned single Judge ruled that while appointing the special batch, the rules of recruitment were completely shelved, no order of relaxation was passed under Rule 23 relaxing the provisions contained in Rule 5(1)(c) of the 1966 Rules; and that there could not have been any deemed relaxation. The learned single Judge referred to various pronouncements of this Court with regard to relaxation and deemed relaxation

and expressed the view that the Special Batch was recruited, ostensibly, on the ground that the department was in need of young officers in the grade of Deputy Superintendent of Police, but the officers recruited were as old as 50 years, and, thus, the very purpose for which the proposal was mooted stood defeated. The writ court discussed the ratio laid down in *Bachan Singh v. Union of India*[3], *Narender Chadha v. Union of India*[4] and *J.C. Yadav v. State of Haryana*[5] and held that contrary to the facts of the case of *J.C. Yadav (supra)*, wherein the relaxation of the rules could be justified by the Government, the State-respondent had, in the obtaining factual matrix, miserably failed to show any justification to relax the rules and in any case could not have relaxed the rules to such an extent to make it nugatory. It was also observed that when the Cabinet Memorandum had failed to receive the approval of the Cabinet, the then DGP, Assam, in consultation with the Chairman of the Commission, could not have, through the back-door and with the help of an authority like the Commission, flouted the relevant rules and made the appointments.

14. The learned single Judge ruled that the appointment in the promotional cadre was de hors the rules and, therefore, the court cannot direct that the period of service rendered in the promotional post by virtue of illegal promotional appointment should be counted for the purpose of seniority. Relying on the pronouncement in *Raffiquddin (supra)*, the learned single Judge held that the case in hand is more akin to the facts of *Raffiquddin (supra)* and ruled that it is possible that without setting aside and quashing the appointment of an irregular appointee, the Court or tribunal may direct the appointing authority to treat a regular appointee in service, though appointed later in point of time than the irregular appointee, as senior to the irregular appointee.

15. It is worthy to note that the learned single Judge referred to Rule 18 of the 1966 Rules which clearly states that the seniority of the members of the service shall be determined on the basis of their respective dates of appointment to the service. He distinguished the applicability of Rule 18 and ultimately maintained the order passed by the tribunal and dismissed the writ petitions challenging the order of the tribunal. It is apt to note that in WP(C) 69 of 2003 wherein the petitioner had directly approached the High Court for quashment of the appointments of the special batch recruits, the learned single Judge observed that the appointments of the special batch deserved to be set aside and quashed, but he refrained from doing so considering the period of service which they had rendered.

16. Being dissatisfied with the aforesaid order, the special recruits preferred WA Nos. 448 of 2004 and 465 of 2004. WA 459 of 2004 was filed by the recruits under Rule 5(1)(a) of the 1966 Rules. The Division Bench noted the facts, adverted to the orders passed by the tribunal and the learned single Judge, dealt at length with the submissions canvassed by the learned counsel for the parties and came to hold that the tribunal had jurisdiction to deal with the appeals and thereafter, dealing with the stand that the appointments having not been challenged the delineation thereof by the tribunal and the learned single Judge was barred by the doctrine of *res judicata*, repelled them on the base that the memorandum of appeal before the tribunal had graphically challenged the appointments to be non est being in violation of the rules though that there was no prayer for cancellation of the appointments. The Division Bench analysed the scheme of the rules and stated that Rule 5(1)(c) envisages a selection in special cases from amongst the limited categories of persons referred to and the number of vacancies to be filled up by that procedure has also been restricted. The Division

Bench referred to Rule 8 and regarded it as unequivocal on the conditions of eligibility, commencement of the process contemplated and the culmination thereof, and observed that the assessment of eligibility by the Recommending Authority of the person is a sine qua non for consideration of his candidature to be recruited. The candidate, as per the mandate of Rule 8, has to be of outstanding merit and ability, possessing the academic qualification as prescribed by Rule 10, should not be above 35 years of age on the first day of the year in which the recommendations are called for and should have not less than two years of experience in duties comparable in status and responsibility to that of the Deputy Superintendent of Police or 8 years of experience in duties comparable in status and responsibility to that of the Inspector of Police.

17. After so stating, the Division Bench referred to various authorities and, eventually, came to hold that though the appointments of the special recruits had been made in deviation of the Rules, yet the same cannot by any means be branded as de hors any procedure whatsoever known to public employment. Their induction of the special recruits cannot be equated with ad hoc, casual or temporary recruitments or an entry through the backdoor and hence, their appointment cannot be regarded as de hors the rules. Dealing with the aspect of seniority it ruled that their appointments not being in observance of the statutory provision *stricto sensu*, the fixation of their batch wise seniority over the direct recruits of the same year is impermissible and the benefit as stipulated under the proviso to Rule 18(1) was not extendable.

18. The Division Bench further opined that at such a belated time their appointments could not be annulled. In the ultimate analysis, the Division Bench concurred with the view expressed by the learned single Judge on the issue of fixation of seniority.

19. It is worthy to note that in compliance of the judgment and order passed by the learned single Judge, a notification No. HMA.154/2004/Pt.1/176 was issued on 6.12.2004 wherein the direct recruits of the 1993 batch were placed above the special recruits of the same year in the APS Senior Grade-II. The Bench also perused file No. H.M.A. 10/99 of the Home Department from which it transpired that the names of the candidates to the promotional posts were recommended in order of preference following the same seniority in which their names appeared in the provisional gradation list dated 12.3.1999 as the Selection Committee did not find any reason justifying supersession of a senior by a junior. The Division Bench noticed that as the inter se seniority of promotees was a replication of that in the provisional gradation list which has been unsettled, the challenge to the notification dated 6.12.2004 was unsustainable. Being of this view, the Division Bench dismissed all the appeals.

20. We have heard Mr. Prashant Bhushan, learned counsel representing the special batch recruits, and Mr. V. Shekhar, learned senior counsel appearing for the direct recruits in all the appeals.

21. The fundamental questions that emanate for consideration before this Court are, namely, whether the appointments have been made in violation of the rules; whether the selection of the special batch recruits if accepted to be in violation of the rules, can be treated to be de hors the rules; and whether the concept of relaxation has been extended to them or is extendable to them and further whether they can avail the benefit under the second proviso to Rule 18 of the Rules and

whether the tribunal as well as the High Court is justified in refixing the seniority without quashing the appointment of the special batch recruits.

22. Regard being had to the aforesaid issues, we think it seemly to refer to certain authorities in the field. In *Roshan Lal and others v. International Airport Authority of India and others*[6], a two-Judge Bench, while entertaining a petition under Article 32 of the Constitution, held that when the appointments were made in 1975 and the writ petition was filed in 1978, it would not be justified in reopening the question of legality of the appointments of the respondents therein. The Bench also noticed that the prayer in the writ petition was also confined primarily to the seniority list and the consequences flowing from the seniority list.

23. We have referred to the said pronouncement only for the purpose that before the tribunal, the challenge was not for the quashment of the appointments on the foundation that they were made in violation of the rules and the propriety in the matter of appointment of the special recruits was not maintained and that apart, the appeal was filed after a span of nine years after the selection and appointment and hence, the principle stated therein is squarely applicable to the case at hand.

24. Be it noted, the tribunal as well as the High Court has placed reliance on *Rafiquddin and others* (supra) to refix the seniority and justify the direction for refixation of seniority by putting the direct recruits over and above the special recruits on the foundation that it was necessitous to strike the balance. In *Rafiquddin* case (supra), the U.P. Public Service Commission published a notification on September 3, 1970 inviting applications for recruitment to 85 posts of Munsifs. It recommended names of 46 candidates for appointment on October 25, 1971. The State Government requested the Commission to recommend some more candidates by suggesting that minimum of 40% marks may be reduced to 35%. Considering the said request, the Commission forwarded another list of 33 candidates on April 25, 1972. All the 79 candidates were appointed between May 1972 to June 12, 1973. Thereafter, on July 17, 1973, a notification was issued determining the inter se seniority of all the 79 candidates under Rule 19 of the U.P. Civil Service (Judicial Branch) Rules, 1951. In the meantime, the UP Public Service Commission held another competitive examination for appointment to the posts of 150 Munsifs and, eventually, they were appointed on different dates between 1975 to 1977. As the factual narration would show, a proposal was sent by the State Government to the Commission requesting it to reconsider the result of the examinations of 1967, 1968, 1969 and 1970 for appointment to the service of persons/candidates who might have obtained 40% of marks or more in the aggregate even if they had failed to secure the minimum marks in the viva voce test. The Commission declined to accede to the said request. A meeting was held by the High Level Committee and, eventually, a third list of 37 candidates was sent by the Commission for the aforementioned years in which list the name of *Rafiquddin* featured. As out of 37 candidates, 16 had already appeared in the 1972 examination and had been selected, the Government requested the Commission to select 16 more candidates from the 1972 examination. In pursuance of the Government's request, the Commission forwarded the list of 16 candidates for appointment. In this factual matrix, in March, 1977, the State Government published a seniority list of successful candidates of the competitive examination of 1970. The candidates belonging to the third list made a representation to the High Court for determining their seniority in accordance with Rule 22 of the Rules on the footing that they were recruited to service in pursuance of the 1970 examination and,

therefore, they were entitled to the seniority as candidates belonging to that examination irrespective of their appointment made in 1975. They claimed seniority above the recruits of the 1972 examination. As the representation was rejected, a writ petition was filed and the High Court allowed the same on the ground that as the third category candidates were appointed on the basis of the result of the 1970 examination, they were to be treated as senior in accordance with the stipulates engrafted under Rule 22 of the Rules. While dealing with such a situation, this Court scanned the anatomy of the Rules and its purport, the role of the Commission and held that the selection and appointment of 21 Munsifs at the later stage was invalid. However, it declined to strike down their appointments in view of the fact that they had already rendered 12 years of service.

25. After so holding, the Bench proceeded to deal with the issue as to what seniority should be assigned to the unplaced candidates who were appointed. In that context, the Bench came to hold that as they were appointed not in accordance with the rules, they could not be treated as selectees under the 1970 examination for the purpose of determining their seniority under Rule 22 of the Rules and, accordingly, the Bench directed that the said candidates have been placed below the candidates of recruits of the 1972 examination. In the 1972 examination, 16 candidates were appointed to the service on the basis of the result of the 1972 examination and their appointment did not suffer from any legal infirmity and they were entitled to seniority of the recruits of the 1972 examination on the basis of their position in the merit list but they were not entitled to be treated as senior on the basis of the 1970 examination.

26. We have referred to the facts in detail and what this Court had ultimately held only for the purpose that where recruitment of service is regulated by the statutory rules, the recruitment must be made in accordance with those rules and if any appointment is made in breach of the rules, the same would be illegal and the persons so appointed have to be put in a different class and they cannot claim seniority.

27. In *The Direct Recruit Class-II Engineering Officers' Association and others v. State of Maharashtra and others*[7], the Constitution Bench was dealing with the issue of seniority between direct recruits and the promotees under the Maharashtra Service of Engineers (Regulation of Seniority and Preparation and Revision of Seniority Lists for Specified Period) Rules, 1982. The Constitution Bench referred to the decision in *A.K. Subraman v. Union of India*[8] and ruled that if a rule fixing the ratio for recruitment from different sources is framed, it is meant to be respected and not violated at the whims of the authority. It ought to be strictly followed and not arbitrarily ignored. A deviation may be permissible to meet the exigencies. The Constitution Bench posed the question as to what would be the consideration if the quota rule is not followed at all continuously for a number of years and it becomes impossible to adhere to the same. The Constitution Bench opined that if the rule fixes the quota and it becomes impracticable to act upon, it is of no use insisting that the authorities must continue to give effect to it. But the Government, before departing from the rule, must make every effort to respect it and only when it ceases to be feasible to enforce it, then it has to be ignored. In such a situation, if appointments from one source are made in excess of the quota but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from other sources who are inducted in the service subsequently. A reference was made to the rules that permitted the Government to relax the

provisions fixing the ratio. In the said case, the Court observed that there was no justification to urge lack of bona fide on the part of the State. Eventually, the Bench summed up its conclusions and we proceed to reproduce some of them which are relevant for our purpose: -

“(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 a 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.

xxx xxx xxx (D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.”

28. In *Madan Gopal Garg v. State of Punjab and others*[9], the controversy related to inter se seniority of promotees and direct recruits in respect of the posts, namely, District Food and Supplies Controller and Deputy Director, Food and Supplies in the State of Punjab governed by the Punjab Food and Supplies Department (State Service Class II) Rules, 1966. After analyzing the facts and the appointments in excess of quota, the Court observed that the appointment of the controller was in excess of the quota and it continued to be so till the respondent No. 2 therein was appointed by direct recruitment. In that context, the Bench opined: -

“Once it is held that the appointment of the appellant was in excess of the quota fixed for promotees and officers appointed by transfer, the said appointment has to be treated as an invalid appointment and it can be treated as a regular appointment only when a vacancy is available against the promotion quota against which the said appointment can be regularized. In other words, any such appointment in excess of the quota has to be pushed down to a later year when it can be regularized as per the quota and such an appointment prior to regularization cannot confer any right as against a person who is directly appointed within the quota prescribed for direct recruits.”

29. In Maharashtra Vikrikar Karamchari Sangathan v. State of Maharashtra and another[10], a two-Judge Bench took note of the fact that when promotions are made in excess of the prescribed quota and the Government had not taken any conscious decision in accordance with law to treat the promotions of excess promotees on regular basis, it would be wrong to assert that such promotions were on regular basis. In that context, the Bench further proceeded to state thus: -

“Lastly, it was contended on behalf of the appellants that some of the appellants have put in more than 17 years of service when a few of the direct recruits were either schooling and/or not born in the cadre. If the appellants were to be pushed down, it would cause great hardship to them. We are unable to subscribe to this contention because if there is patent violation of the quota rule, the result must follow and the appellants who remained in the office for all these years cannot take the advantage of this situation. This submission is, therefore, devoid of any substance.”

30. In D. Ganesh Rao Patnaik and others v. State of Jharkhand and others[11], a three-Judge Bench was dealing with inter se seniority between the direct recruits and the promotees under the Bihar Superior Judicial Service Rules, 1946. The Bench also dealt with the concept of temporary posts and the computation of posts under Rule 6 therein, the definition of cadre and posed a question whether the temporary posts of Additional District and Sessions Judges are to be included in the cadre. After referring to various decisions, the Court opined that for determining the quota of direct recruits, both the temporary and permanent posts have to be counted and taken into consideration and their quota cannot be confined to permanent posts alone. In the said case, the promotees had exceeded their quota and entrenched into the quota of direct recruits and, in that context, the Court held that the promotion given to the promotees was not in accordance with law. The Court further proceeded to state that it did not lie in the mouth of the respondent therein to contend that the quota rule had broken down or that though their promotions were made beyond the quota fixed for promotees, yet the same should be treated not only perfectly valid but also in a manner so as to give them the benefit of seniority over the direct recruits. Eventually, the Bench ruled that the inevitable conclusion was that the contesting respondent could not claim seniority over the appellant.

31. We have referred to the aforesaid pronouncements to restate the legal principle that if the quota rule has been broken down, the appointee should not be pushed down below the appointees from other source; but, the Government before departing from the rule must make every effort to respect it and then only it may proceed to appoint from other source.

32. At this juncture, it is necessary to state that the decision in The Direct Recruit Class II Engineering Officers' Association (supra) was clarified by a three-Judge Bench in State of W.B. and others v. Aghore Nath Dey and others[12] as the later Bench perceived an apparent contradiction in conclusions (A) and (B). While clarifying, the Bench has stated thus: -

“19. The constitution bench in Maharashtra Engineers case (supra), while dealing with Narendra Chadha (supra) emphasised the unusual fact that the promotees in question had worked continuously for long periods of nearly fifteen to twenty years on the posts without being reverted, and then proceeded to state the principle thus:

(SCC p. 726, para 13) “We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.”

20. The constitution bench having dealt with Narender Chadha (supra) in this manner, to indicate the above principle, that decision cannot be construed to apply to cases where the initial appointment was not according to rules.

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22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed ‘according to rules’. The corollary set out in conclusion (A), then is, that ‘where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority’. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.” Thereafter, the Bench proceeded to state as follows: -

“Admittedly, this express requirement in Rule 11 was not followed or fulfilled subsequently, and, therefore, the initial ad hoc appointments cannot be treated to have been made according to the applicable rules. These ad hoc appointments were clearly not in accordance with the rules, and were made only as a stopgap arrangement for fixed period, as expressly stated in the appointment order itself.”
[Emphasis supplied]

33. Recently, in State of Haryana and others v. Vijay Singh and others[13], the question arose with regard to the fixation of seniority in the backdrop of ad hoc initial appointment made de hors the statutory rules but later on services were regularized by the State Government. The Court took note of the fact that the respondents therein were neither appointed by the competent authority on the recommendations made by the Board which was constituted by the Governor of Haryana nor were they placed on probation as required under the rules and, therefore, their ad hoc period could not be counted for the purpose of fixation of seniority. Thus, emphasis was laid that when appointment is made without following the procedure prescribed under the rules, the appointees are not entitled to have the seniority fixed on the basis of the total length of service. In essence, it has been ruled that when the appointment is made de hors the rules, the appointee cannot claim seniority even if his appointment is later on regularized.

34. Regard being had to the aforesaid enunciation of law pertaining to fixation of seniority when the initial appointment is made in breach of rules and further departure from provision pertaining to quota in their essential nature, it is apposite to refer to the relevant rules of the 1966 Rules. Rule 4 defines the 'Cadre'. Rule 4(1)(a) deals with the categories of posts in the junior grade and Rule 4(1)(b) deals with the senior grade posts. Rule 5 provides for the recruitment and procedure of selection, etc. Rule 5(1), being pertinent, is reproduced below: -

“5. Methods of recruitment to the service. (1) Recruitment to the service, after the commencement of these rules, shall be by the following methods, namely:

(a) by a competitive examination conducted by the Commission;

(b) by promotion of confirmed Inspectors of Police; and

(c) by selection, in special case, from amongst –

(i) persons other than Inspectors of Police serving in connection with the affairs of the Government; and

(ii) other persons having qualifications and experiences eminently suitable for service in the Police Department in the rank of Deputy Superintendent of Police :

Provided that fifty per cent of the total number of posts in the cadre shall be filled up by recruitment under Cls. (a) and (c) and the other fifty per cent exclusively under Cl. (b), and that the number of posts filled up under Cl. (c) above shall not at any time exceed five per cent of the total number of posts in the cadre and one post in any particular year.”

35. On scanning of Rule 5(1), it is evident that various methods have been stipulated for recruitment. In the case at hand, the direct recruits have been recruited by way of competitive examination conducted by the Commission. The special batch has been selected under Rule 5(1)(c). In that context, the proviso to Rule 5(1) of the 1966 Rules is significant. It clearly lays a postulate that the number of posts filled up under clause

(c) shall not, at any time, exceed five per cent of the total number of posts in the cadre and one post in any particular year. As has been stated hereinabove, there was a requisition for 20 posts to be filled up by special drive. On a query being made during hearing, it was fairly conceded before us that five per cent in the cadre could not have exceeded four posts. Thus, there has been selection in excess of the quota provided in the Rule and nothing had been shown to justify the departure since nothing really could have been demonstrated as the commission had already recommended the names of the candidates meant for direct recruits.

36. Rule 8 deals with recruitment by selection. It is reproduced hereunder: -

“8. Recruitment by selection. (1) The Governor may, from time to time, for the purpose of recruitment to the service under Cl.

(c) of sub-R. (1) of R. 5, call upon the recommending authorities to submit recommendations in respect of persons who-

a) are of outstanding merit and ability;

b) have to their credit not less than 2 years of experience in duties comparable in status and responsibility to that of Deputy Superintendent of Police or 8 years of experience in duties comparable in status and responsibility to that of Inspectors of Police;

c) possess the academic qualification prescribed under R.10;

d) are not above the age of 35 years on the 1st day of the year in which the recommendations are called for; and

e) are otherwise eligible, in the opinion of recommending authorities to be appointed to the service.

(2) On receipt of the recommendations, the Governor shall refer them and also simultaneously send the character rolls/ testimonials of character and service records/other relevant records of the persons recommended to the committee which will, after examination of the records forwarded to it and interviewing, such of the persons recommended as it considers necessary, draw up a list of persons in order of the preference who are considered suitable for appointment to the service. The procedure details in sub-Rr. (4) to (7) of R. 7, mutatis mutandis be followed in regard to the list of persons prepared under this sub-rule.

(3) For every recruitment a separate list shall be drawn up and the list once approved by the Commission shall lapse immediately on the year's quota of posts for persons under Cl.

(c) of sub-R. (1) of R. 5 having been filled up from the list.”

37. On a perusal of the aforesaid Rule, it is graphically clear that the recommending authority has to submit the recommendations to the Governor regard being had to certain aspects which have been prescribed under Rule 8(1). Rule 8(1)(d) prescribes the age limit on the first date of the year in which the recommendations are called for. Sub-rule (2) of Rule 8 stipulates that the procedure detailed in sub-rules (4) to (7) of Rule 7 mutatis mutandis be followed in regard to the list of persons prepared. In this context, it is necessary to reproduce sub-rules (4) to (7) of Rule 7 which are as follows: -

“(4) The list prepared by the Committee shall give the names in order of preference and the total number of such names shall not be more than double the number of vacancies that may arise in the promotion quota of the cadre and the ex-cadre temporary posts of the rank of Deputy Superintendent of Police during a period of approximately one year thereafter. In every case, where in drawing up the list the committee changes the order of seniority of any person in the rank of Inspector of Police or supersedes any one in that rank by omission of his name, the Committee shall record in writing the reason for such change or supersession.

(5) The Committee shall forward the list to the Governor and on receipt of the list the Governor shall forward the same to the Commission together with the character rolls and other relevant papers.

(6) The Commission shall consider the list prepared by the Committee along with other documents received from the Governor or on receipt of other documents as may be called for by the Commission unless it considers any change necessary, approve the list. If the Commission considers any change necessary, it shall inform the Governor of the changes proposed and after taking into account the comments, if any, by the Governor, may approve the list finally with such modification, if any, as may in its opinion be just and proper.

(7) The list, as finally approved by the Commission, shall be forwarded to the Governor along with all the papers received under sub-Rr. (5) and (6).”

38. It needs to be noted that under Rule 8(2), the Governor is required to send the character rolls/testimonials of the character and service records/other relevant records of the persons recommended to the Committee which would, after examination of the records forwarded to it and interviewing such of the persons recommended as it considers necessary, draw up a list of persons in order of the preference who are considered suitable for appointment to the service. “Committee” has been defined in Rule 2(c) and it reads as follows: -

“(c) “Committee” means a committee constituted in accordance with sub-R. (1) of R. 7.” The aforesaid definition makes sub-rule (1) of Rule 7 important. The said sub-rule reads as follows: -

“7. Recruitment by promotion. (1) There shall be a Selection Committee consisting of the following, namely :

(a) Chairman, Assam Public Service Commission, or, where the Chairman is unable to attend, a Member, Assam Public Service Commission nominated by him;

(b) Chief Secretary to the Government;

(c) Inspector-General of Police;

(d) A Senior Deputy Inspector General of Police to be nominated by Chief Secretary;

(e) Secretary to the Government of Assam in the Home Department or any other officer of the Home Department nominated in this behalf by the Chief Secretary. The Chairman, Assam Public Commission or the Member, Assam Public Service Commission, as the case may be, shall preside at the meeting of the Selection Committee at which he is present.” In the obtaining factual matrix, the Selection Committee had not recommended the case of the special batch recruits to the Commission. As the affidavit filed by the Secretary to the Commission before the tribunal clearly stated that the procedure was not followed and the same has been accepted by the tribunal and concurred with by the High Court, there is no reason to differ with the same. Therefore, we give the seal of imprimatur to the said conclusion. At the risk of repetition, we state that the selection has been made in excess of the quota and in the absence of a recommendation of the Selection Committee as prescribed under the rules.

Plainly speaking, a maladroit effort was made to appoint the special batch recruits first despite the recommendation of the direct recruits pending before the State Government. It is also disturbing that though the Cabinet had not approved the proposal for special drive to appoint from other source yet the Director General of Police impressed upon the Commission to recommend 20 names. It is also equally perplexing that the concept of the special drive was meant to have young officers but in the ultimate eventuate, officers were nearing fifty got the appointment. It is obvious that it was totally arbitrary and exhibits indecent enthusiasm to confer benefits on the special batch by making the rules comatosed.

39. At this stage, it is requisite to clarify one aspect. The learned single Judge has treated the selection of the special batch recruits totally de hors the rules and the Division Bench has opined that it is not de hors the rules on the foundation that they were not casual appointees and their recommendation had been made by the Commission and further they had not played any overt act in getting their selection done.

40. In *University of Kashmir and others v. Dr. Mohd. Yasin and others*[14], this Court expressed the view that an equitable ground does not clothe an appointment with a legal status. Similar view was also expressed in *Swapan Kumar Pal and others v. Samitabhar Chakraborty and others*[15].

41. In *State of Haryana v. Haryana Veterinary and AHTS Association and another*[16], a three-Judge Bench, after x-ray of the relevant rules, came to hold that when appointments are made in violation of the recruitment rules, the said appointments cannot be treated to be regular.

42. The aforesaid authorities clearly lay down the principle that when there is violation of the recruitment rules, the recruitment is unsustainable. Whether any active part is played by a selectee or not has nothing to do with the appointment made in contravention of the rules. In the case at hand, the special batch recruits have encroached into the quota of the direct recruits. The whole selection process is in violation of the rules and, therefore, we are inclined to concur with the

opinion expressed by the learned single Judge that the selection was made de hors the rules. The Division Bench was not justified in stating that the selection could not be said to be de hors the rules. However, we accept the conclusion of the tribunal as well as the High Court that as there had been long delay in challenging the selection of the special batch recruits and some of them have already retired, it would not be apposite to annul their appointments.

43. Presently, we shall refer to Rule 18 which deals with seniority. Mr. Prashant Bhushan, during the course of hearing, has laid immense emphasis on the said Rule to buttress the stance that if the service rendered in the previous posts by the special batch recruits are taken into consideration on the anvil of Rule 18, they should be treated as senior to the direct recruits. Regard being had to the said submission, it becomes necessitous to refer to the said Rule in entirety. It reads as follows: -

“18. Seniority. (1) The seniority of a member of the service shall be determined on the basis of his date of appointment to the service :

Provided that inter se seniority of the persons recruited under Rr. 5(1)(a), 5(1)(b) and 5(2) on the same date shall be according to the following order :

- (i) Persons recruited under R. 5(2);
- (ii) Persons recruited under R. 5(1)(b);
- (iii) Persons recruited under R. 5(1)(a);

Provided further that in the case of a person recruited under R.5(1)(c) the Governor may, in consideration of his previous service and/or experience, fix a deemed date of appointment for the purpose of seniority after taking into consideration half the period of continuous service in completed years subject to a maximum of 4 years rendered in previous service.

(2) Inter se seniority of persons appointed under any of the three clauses of R. 5(1), shall be in the order in which their names appear in the list from which the appointment is made.

(3) The date of appointment for the purposes of this rule shall be, if a date is specified in the notification of appointment, such date, or if no such date is specified, the date on which such notification is issued.

(4) Notwithstanding anything contained in sub-Rr. (1) to (3) the seniority of a person who does not join the service within three months of the date of appointment as defined in sub-R.(3), shall be determined on the basis of the actual date of his joining the service.

(5) If the confirmation of a member of the service is delayed on account of his failure to qualify for such confirmation, he shall lose his post in the order of seniority vis-à-vis such of his juniors as may be confirmed earlier than he. His original position shall, however, be restored on his confirmation subsequently but any benefits of promotion, etc., shall not accrue to him with retrospective effect on

such confirmation.

(6) Inter se seniority of persons promoted to the senior grade of the service shall be in the order in which their names appear in the list from which the promotion is made.”

44. The two facets which emerge from the scanning of the aforesaid Rule are that the seniority of a member of the service is to be determined on the basis of the date of appointment to the service and the seniority has to follow a particular order as has been stipulated therein. The other significant aspect is that power has been conferred on the Governor to consider the previous service of an incumbent and fix a deemed date of appointment for the purpose of seniority by adopting a specific method. As far as the first part is concerned, the tribunal as well as the High Court has not accepted the stipulation that in the present case the seniority should be determined on the basis of the date of appointment as the same has been made in flagrant violation of the rules and we have already concurred with the same. As far as the computation of the previous service is concerned, the learned single Judge as well as the Division Bench, after adequate ratiocination, has expressed the view that the appointments had been made in contravention of the rules, the question of conferment of the benefit under the second proviso to Rule 18(1) did not arise. In our considered view, the said conclusion is absolutely defensible for the simple reason when the infrastructure is founded on total illegal edifice, the endeavour to put forth a claim for counting the previous service to build a pyramid is bound to founder.

45. Another specious contention has been urged that power is vested with the Governor to dispense with or relax any rule and in the case at hand, it should be treated that the authority by its conduct has relaxed the rules. In this context, it is appropriate to refer to Rule 23 which reads as follows: -

“Power of the Governor to dispense with or relax any rule. Where the Governor is satisfied that the operation of any of these rules may cause undue hardship in any particular case, he may order to dispense with or relax the requirements of that rule to such an extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner :

Provided that the case of any person shall not be dealt with in any manner less favourable to him than that provided by any of these rules.”

46. As has been observed by the learned single Judge which has been accepted by the Division Bench, there was no decision to relax the rules in favour of the special batch recruits. That apart, whenever there has to be relaxation about the operation of any of the rules, regard has to be given to the test of causation of undue hardship in any particular case. That apart, the authority is required to record satisfaction while dispensing or relaxing the requirements of any rule to such an extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner. The language of the Rule really casts a number of conditions. It provides guidance. It cannot be exercised in an arbitrary manner so as to dispense with the procedure of selection in entirety in respect of a particular class, for it has to be strictly construed and there has to be apposite foundation for exercise of such power. It is to be borne in mind that if a particular rule

empowers the authority to throw all the rules overboard in all possibility, it may not withstand close scrutiny of Article 14 of the Constitution. Be that it may, no decision was taken to relax the rules and, the concept of deemed relaxation is not attracted and, therefore, the relief claimed by the special batch recruits has no legs to stand upon.

47. From the aforesaid analysis, there can be no scintilla of doubt that the selection of the special batch recruits was totally de hors the Rules; that there was a maladroit effort to go for a special drive when there was no need for the same by the State which is supposed to be a model employer; that neither the concept of relaxation nor the conception of benefit of Rule 18 would be attracted for grant on conferring any privilege to the special batch recruits; that their seniority has to be pushed down and, hence, the directions given by the tribunal and the High Court in that regard are absolutely flawless; and that regard being had to the delayed challenge and long rendering of service in the posts and further promotions having been effected, it would be inapposite to quash their appointments.

48. Before parting with the case, we are compelled to reiterate the oft- stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.

49. Almost a quarter century back, this Court in Balram Gupta vs Union of India & Anr. [1987 (Supp) SCC 228] had observed thus:

“As a model employer the Government must conduct itself with high probity and candour with its employees.”

50. In State of Haryana v. Piara Singh and Ors. [(1992)4SCC118], the Court had clearly stated:

“The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16”.

51. In Secretary, State Of Karnataka And vs. Umadevi And Others [(2006)4SCC1], the Constitution Bench, while discussing the role of state in recruitment procedure, stated that if rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.

52. In Mehar Chand Polytechnic & Anr. vs. Anu Lamba & Ors. [(2006) 7 SCC 161] the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.

53. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretized. We say no more.

54. Consequently, all the appeals are dismissed leaving the parties to bear their respective costs.

.....J. [K. S. Radhakrishnan]J. [Dipak Misra] New Delhi;

November 30, 2012.

- [1] AIR 1988 SC 162
- [2] (1998) 9 SCC 641

- [3] (1972) 3 SCC 489
- [4] (1986) 6 SCC 157
- [5] (1990) 2 SCC 189
- [6] 1980 (Supp) SCC 449

- [7] AIR 1990 SC 1607
- [8] AIR 1975 SC 483
- [9] 1995 Supp. (3) SCC 366
- [10] (2000) 2 SCC 552
- [11] (2005) 8 SCC 454
- [12] (1993) 3 SCC 371
- [13] (2012) 8 SCC 633
- [14] (1974) 3 SCC 546
- [15] (2001) 5 SCC 581
- [16] (2000) 8 SCC 4
