

C.K. Antony, P.T. Joseph, V.S. Thomas & ... vs B. Muraleedharan & Ors., C. ... on 1 September, 1998

Equivalent citations: AIR 1998 SUPREME COURT 3136, 1998 AIR SCW 3051, 1998 LAB. I. C. 3519, (1999) 2 SERVLJ 106, 1998 (6) ADSC 635, 1998 (5) SCALE 32, 1998 (6) SCC 630, (1998) 6 JT 11 (SC), 1998 (6) JT 11, (1998) 4 LAB LN 625, (1998) 2 KER LT 755, (1999) 1 LABLJ 572, (1998) 4 SCT 151, (1998) 3 SERVLR 2, (1998) 7 SUPREME 75, (1998) 5 SCALE 32, 1998 SCC (L&S) 1624

Bench: S. Saghir Ahmad, K. Venkataswami, S. Rajendra Babu

PETITIONER:

C.K. ANTONY, P.T. JOSEPH, V.S. THOMAS & ANR.

Vs.

RESPONDENT:

B. MURALEEDHARAN & ORS., C. BALACHANDRAN NAIR & ORS.

DATE OF JUDGMENT:

01/09/1998

BENCH:

S. SAGHIR AHMAD, K. VENKATASWAMI, S. RAJENDRA BABU

ACT:

HEADNOTE:

JUDGMENT:

WITH CIVIL APPEAL NOS. 11526-11529 OF 1995 WITH CIVIL APPEAL NO. 11531 OF 1995 J U D G M E N T Venkataswami, J.

In all these appeals, the vexed and unending question of seniority between the direct recruits and promotees arises for our consideration.

In these appeals, the question relates to a dispute that has arisen in the cadre of Assistant Conservator of forests, whose services are governed under the Kerala Forest Service.

It is common ground that recruitment to the cadre of Assistant Conservator of Forests (hereinafter called the "A.C.F.") is directly as well as by transfer. The proportion between the direct recruits and recruitment by transfer is also fixed as 3:2 in the Kerala Forest Service Special Rules. The seniority of a directly recruited A.C.F. has to be determined by the date of his appointment as probationary Assistant Conservator. It is the claim of the promotees - appellants that they were appointed by promotion as Assistant Conservator of forests long before 1.5.78., on which date the first respondent in civil Appal No. 11527/95 was appointed as a probationary Assistant Conservator. The Other two directly recruited Assistant Conservators were appointed as probationary Conservators subsequent to 1.5.78. Therefore, the dispute centres round the claim of the appellants whether they were appointed before 1.5.78 and whether such claim is sustainable under the relevant Kerala Forest Service Special Rules and also the Kerala State and subordinate Service Rules. We may at once point out that the first respondent in Civil Appeal No. 11527/95 was appointed in the cadre in accordance with the above-mentioned rules on 1.5.78, is not in dispute. Likewise, the fact that seniority of that respondent has to be reckoned on and from 1.5.78, is also not controverted. However, it is the case of the directly recruited Assistant Conservators in these appeals that the appointments of the appellants, if any, prior to 1.5.78 were all under rule 9(a)(i) of the General Rules and the same cannot be taken into account for the purpose of inter se seniority. According to them, the inter se seniority can be reckoned from the date of regular appointment as Assistant Conservators in accordance with the Rules, in particular, Rule 2 read with Rule 8 of the Special Rules.

Before considering the appeals further, it is necessary to set out the relevant Service Rules.

Kerala Forest Service Special Rules Rule 2. Appointment - (a) Appointment to the several categories of the service shall be made as follows:-

Category Method of recruitment (1) (2)

1. Chief Conservator By prompts on from Conservators
2. Conservators By promotion from Dy.

Conservators

3. Depute Conservator By promotion from Assistant Conservators
4. Asstt. Conservators By direct recruitment or recruitment by transfer from among Rangers in Kerala Forest Subordinate Service.

Explanation: - Direct recruitment and recruitment by transfer from among rangers shall be in the proportion 3:2 to the category of Assistant Conservators and the ratio shall be applicable only to the extent to which qualified and suitable candidates are available in each o the two categories. In the absence of the required number of direct recruits to be appointed against the vacancies apportioned to them, such vacancies shall also be filled up by recruitment by transfer and vice versa.

Provided that substantive vacancies alone in the category of Assistant Conservators shall be filled up in accordance with the seniority of approved probationers.

Rule 8. Seniority - the seniority of a directly recruited Assistant conservator shall be determined by the date of his appointment as probationary Assistant Conservator. where such date is the same in the case of two or more members, the seniority inter se shall be determined by their rank in the pass list issued by the Forest College, Dehra Dun.

Kerala Service Rules Rule 18 (a) - The Government shall suspend the lien of an officer on a permanent post which he holds substantively if he is appointed in a substantive capacity -

(1) To a permanent post outside the cadre on which he is borne, or (2) Provisionally to a post on which another officer would hold a lien had his lien not been suspended under this Rule.

Kerala State and Subordinate Service Rules, 1958 Rule 21 (a) " A person is said to be "appointed to a service" when the accordance with these Rules or in accordance with the Rules applicable at the time, as the case may be, he discharges for the first time the duties of a post borne on the Cadre of such service or commences the probation, instruction or training prescribed for members thereof.

Explanation: The Appointment of a person holding a post borne on the cadre of the one service to hold additional charge of a post borne on the cadre of another service or to discharge the current duties thereof does not amount to appointment to the latter service. Rule 2 (9) "Member of a service"

means a person who has been appointed to that service and who had not retired or resigned, been removed or dismissed, been substantively transferred or reduced to another service, or been discharge otherwise than of want of a vacancy he may be a probationer, an approved probationer or a full member of that service.

Rule 2 (13) A candidate is said to be "recruited by transfer" to a service -

(i) If his appointment to the service is in accordance with the orders issued or rules prescribed for recruitment by transfer to the service; and

(ii) If at the time of his first appointment thereto (a) he is either a full member or an approved probationer in any other service, the rules for which prescribe a period of probation for members thereof.

Rule 2 (15) " Service" means a group of persons classified by the state Government as a State or Subordinate Service, as the case may.

Note: - When the context so requires "service" means the period during which a person holds a post or a lien on a post or is a member of a service as above defined.

Rule 2 (18) 'Cadre' - The permanent cadre of each service, class category and grade shall be determined by the State Government. Rule 5. "Method of recruitment -

Where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer but is both by direct recruitment and by transfer -

(a) The proportion or order in which the special rules concerned may require vacancies to be filled by persons recruited direct and by those recruited by transfer shall be applicable only to substantive vacancies in the permanent cadre;

(b) A person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the special Rules referred to in Clause (a) and

(c) Recruitment to all other vacancies shall be made by Transfer".

(Note: - (1) All permanent vacancies and temporary vacancies except those of short duration shall be treated as substantive vacancies.

(2) Leave vacancies and vacancies of less than 6 months duration shall be treated as vacancies of short duration) (Amended with effect from 17.12- 1958 vide G.O. (P) S/PD dated 17-1- 1967).

Rule 9. " Temporary appointments -

(a) (i) where it is necessary in the public interest, owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the Special rules, the appointing authority may appoint a person otherwise than in accordance with the said Rules, temporarily.

(a)

(ii).....

(a) (iii) A person appointed under Clause (1) shall be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the said rules.

(a) (iv) A person appointed under Clause (i) or (ii) shall not be regarded as a probationer in such service class or category or be entitled by reason only of such appointment to any preferential claim to future Appointment to such service, class or category.

Rule 18 (a) "Date of commencement of probation of persons first appointed temporarily - "If a person having been appointed temporarily under Sub-Rule (a) or Sub-Rule (c) of Rule 9 to a post borne on the cadre of any service, class or category otherwise than in accordance with the Rules governing appointments thereto, is subsequently appointed to the service, class or category in accordance with the Rules, he shall commence his probation from the date of such subsequent Appointment or from such earlier date as the appointing authority may determine, without prejudice to seniority of others.

Rule 20. Probationer's suitability for full membership - (a) "At the end of the prescribed or extended period of probation as the case may be, the appointing authority shall consider the probationer's suitability for full membership of the service, class or category for which he was selected.

(b) If the appointing authority decides that a probationer is suitable for such membership, it shall as soon as possible issue an order declaring the probationer to have satisfactorily completed his probation. On the issue of such order, the probation shall be deemed to have satisfactorily completed his probation, on the date of the expiry of the prescribed or extended period of probation".

Rule 24. Appointment of full members-

(a) "Subject to the provisions of Rule 8 an approved probationer shall be appointed to be a full member in the class or category for which he was selected, at the earliest possible opportunity, in any substantive vacancy which may exist or arise in the permanent cadre of such class or category and if such vacancy existed from a date previous to the issue of the order of appointment, he may be so appointed with retrospective effect from the date or, as the case may be, from any subsequent date from which he was continuously on duty as a member of the service in such class or category or in the higher class or category. Provided that where more than one approved probationer is available for such Appointment as full member, the senior most approved probationer on the date of vacancy shall be appointed.

(b) where appointment to any service, class or category is according to rules normally both by direct recruitment and by transfer, vacancies against which persons have been recruited direct shall be regarded as a distinct group while all other vacancies shall be regarded as another distinct group, and appointment of full members in accordance with Sub Rule (a) shall be made separately in such of these groups".

"Rule 27. Seniority -

(a) Seniority of a person in a service, class category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade".

Explanation:- For the purpose of this Sub Rule, "appointment" shall not include appointment under Rule 9 or appointment by promotion under Rule 31.

(b)

(c) " Notwithstanding anything contained in Clauses (a) and (b) above, the seniority of a person appointed to a class, category or grade in a service on the advice of the Commission shall, unless he has been reduced to a lower rank as punishment, be determined by the date of first effective advice made for his Appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list".

Note- The date of effective advice in this Rule means the Date of the letter of the commission on the basis of which the candidates was appointed.

Rule 31. Temporary Promotion - (a)

(i) "Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a higher category in a service or class by promotion from a lower category and there would be undue delay in making such promotion in accordance with the Rules, the appointing authority may promote a person otherwise than in accordance with the Rules, temporarily.

(b)

.....

(c) A person promoted under Clause

(i) or clause (ii) of Sub Rule (a) shall be replaced as soon as possible by the member of the service who is entitled to the promotion under the rules, or by a candidate appointed in accordance with the rules, as the case may be.

(d) A person promoted under Sub Rule (a) or (b) shall not be regarded as a probationer in the higher category or be entitled by reason only of such promotion to any preferential claim to future promotion to such higher category.

(e) If such person is subsequently promoted to the higher category in accordance with the Rules, he shall commence his probation, if any, in such category from the date of such subsequent promotion or from such earlier date as the appointing authority may determine without prejudice to seniority."

On a careful perusal of the above extracted relevant rules, the following conclusions can be safely reached.

A direct recruit to the cadre of A.C.F. can count seniority only with effect from the date of his appointment as a probationary Assistant Conservator. A person, who has been appointed to a service or post temporarily or provisionally as a stop-gap arrangement, can never be considered as

one, who has been appointed to that post or service. If there is no substantive vacancy in the permanent cadre available, no direct recruitment can be resorted to. The direct recruits should get substantive vacancies in the permanent cadre, while recruits by transfer can be adjusted against a permanent vacancy or a temporary vacancy depending upon the vacancy position. A person, who gets a temporary appointment or promotion, as the case may be, shall not be regarded as a probationer in that category and on account of that temporary appointment or promotion, he cannot have any preferential claim to that post. Any commencement of probation for the purpose of counting seniority must precede by an appointment in accordance with the rules. In case a temporary appointee is allowed to start his probation from a date anterior to the date of his subsequent Appointment in accordance with the rules, that should be without prejudice to the seniority of others in the service, in this case, without prejudice to the seniority of direct recruits.

Bearing the above broad conclusions in mind, we may now look into the factual aspects in these cases. The Kerala Public Service Commission advised for training of the directly recruited A.C.Fs. Some time in May, 1976, 1977, and November, 1978. The petitioners in O.P. Nos. 5238/87, 1971/87 and 1388/87 before the High Court were direct recruits to the cadre of A.C.F. and were appointed as probationers after successfully completion of that training on 1.5.78, 1.5.79 and 1.11.80 respectively. The bone of contention of the appellants is that they were appointed long prior to the appointments of the above-said direct recruits and, therefore, they must be given seniority over and above the said direct recruits. It is true that the appellants were appointed earlier in point of time to the appointments of the direct recruits. But the point is that they were not appointed in accordance with the rules in the sense they were not appointed against the permanent vacancies intended for recruits by transfer. They were all appointed temporarily as a stop-gap arrangement. As a matter of fact, before the Division Bench of the High Court the State was called upon to produce the seniority list and also the cadre strength of A.O.F. The Division Bench has observed that the State did not come forward with consistent factual aspect regarding the seniority list and the cadre strength. The High Court in paragraphs 19 and 20 has observed as follows :-

19. In paragraph 13 of the counter affidavit dated 31.12.1994, the Chief Conservator of Forests (protection) stated that the sanctioned strength of Assistant Conservator of Forests as on 1.5.1978 is 29; 14 of which are permanent and 15 are temporary.

While we come to the additional affidavit dated 10.1.1995 sworn to by the same Chief Conservator of Forests (Protection), what we see is that he asserts that on 1.5.1978 there were 29 cadre posts of Assistant Conservators of forest in the Department. From this, it may lead to an inference that the cadre strength of Assistant Conservators of Forests as on 1.5.1978 was 29. Actually, this stand taken by him in the additional affidavit dated 10.1.1995 is not correct. As on 1.5.1978, the strength of the cadre, permanent posts of Assistant Conservators was only 14 and not 29 as is not stated.

20. From the above discussion, we come to the conclusion that the strength of Assistant Conservators of Forests, permanent cadre, has been 14 as on 1.5.1978. As on 1.5.1978, from Exhibit P10 order referred to earlier, it is evident that respondents 4 to 7 were only Rangers. They were not regularly promoted to the cadre of Assistant conservators of Forests. Their promotion to the cadre was purely under Rule 9 (a) (i) of the General Rules. The promotion can by no stretch of imagination

confer on them any right to the post, namely, the post of Assistant Conservators of Forests."

One other interest in aspect noticed by the High Court was that by proceedings dated 15.11.79 the appellants were given promotion as Senior Grade Rangers w.e.f. 1.7.78. if this be the position on 1.7.78, the claim of the appellants that they were appointed as A.C.Fs. prior to 1.5.78 falls to the ground. This proceedings dated 15.11.79 has been noticed by the High Court and it supports the case of the direct recruits that the appointments of the appellants prior to 15.11.79 were all temporary or stop-gap arrangements. They cannot, therefore, claim seniority over the direct recruits, who were regularly appointed in accordance with the rules. A sample order of appointment was produced to demonstrate that the appointment was produced to demonstrate that the appointments of the appellants were only temporary under Rule 9(a)(i). It is an admitted fact that among the appellants, P.T. Joseph is the senior most and his appointment letter as A.C.F. has been produced, which reads as follows:-

"GOVERNMENT OF KERALA"

Abstract FOREST DEPARTMENT -ESTABLISHMENT - ASSISTANT CONSERVATOR OF FORSTS
- PROMOTION - AND POSTINGS - ORDERS ISSUED.

AGRICULTURE (FOREST - EST.

DEPARTMENT) G.O. Rt. No. 282/75/AD. Dated, Trivandrum 31.1.75.

Read: - 1. Letter No. El dated 14.1.1975 from Chief Conservator of Forests, Trivandrum.

O R D E R The action of the Chief Conservator of Forests in having granted leave to Sri. K.S. Devassia, Divisional Forest Officer, Industrial Plantation Divn., Perimuzhy with effect from 3.9.1974 and in having directed Sri P.B. Renganathan, Divisional Forest Officer, Vazhachal, to hold full additional charge of the post of Divisional Forest Officer, Perumuzhy, during the period is ratified.

Sri P.T. Joseph, Senior most Range Officer in the department is provisionally promoted as Assistant Conservator of Forests, under rule 9 (a) (i) of the General Rules and Posts as Divisional Forest Officer, Perimuzhy , vice Sri. K.S. Devassia on leave.

(By order of the Governor) Sd/-

V. Lakshmi Narayana Iyer, Under Secretary."

After noticing the above aspect, the High Court observed thus:-

"Before proceeding further, it will be quite interesting to not exhibit P10 proceedings issued by the Chief Conservator of forests, Thiruvananthapuram, on 15.11.1979. By this proceedings, certain Forest Rangers were given promotion as Senior Grade Rangers with effect from 1.7.1978. That order States that it was in implementation of

the Direction given in G.O. (P) 860/78/Fin. dated 16.12.1978 Senior Grade in the scale of Rs. 650-1150 has been allowed in the ratio of 1:3 between Senior grade Rangers and Rangers. Babuji A. George, K.G. George and P.T. Joseph are serial Nos. 19, 20 and 22 in that order who got the benefit of Senior Grade. That order further given 1.7.1978 as the date from which promotion to the cadre of Senior Grade Range officer is given to these officers. These officers, who were rangers and who got promotion to the cadre of Senior Grade Range officers with effect from 1.7.1978, are now shown in the present list produced before this Court as having been appointed as Assistant Conservators of Forests in December, 1974 and January, 1975. Learned Government pleader has not brought before us any rule or decision of this Court which could confer on them such a benefit."

It is contended on behalf of the appellants that though the appointments of the appellants were temporary, the Government has regularised those appointments prior to the appointments of the direct recruits and, therefore, they are entitled to claim seniority over the direct recruits. We are unable to agree with this contention as any appointment/regularisation contrary to the rules, which would prejudice the rights of direct recruits, cannot be sustained. Factually, before the appointments of the direct recruits in the years 1978, 1979 and 1980 they were undergoing training as advised by the Kerala Public Service Commission. Therefore, it cannot be contended by the State that no direct recruits were available for appointment, which necessitated the recruitment by transfer. In this connection, we may usefully refer to two recent judgments of this Court arising under the Maharashtra Forests Service. There also the question of Seniority arose between the direct recruits and promotees in the cadre of A.C.Fs. In *State of Maharashtra & Anr. , etc. vs. Sanjay Thakre & Ors.* [1995 Supp (2) SCC 407], this Court observed as follows:-

"we, therefore, hold that the present was not a case about which it could be said that the quota rule had broken down. In this connection, it would be apposite to refer to *Keshav Chandra Joshi V. Union of India* and *A.N. Sehgal Vs. Raje Ram Sheron* which are judgments by three-judge and two-Judge Benches respectively. Both these cases dealt with the promotions given to the concerned persons in excess of the quota, because of which it was stated that their promotions were not according to rules. the promotions were, therefor, held to be fortuitous; it was also observed that the seniority could not be counted from the dates of fortuitous promotions. These cases voiced the feeling of the Court that the State having made the rules, should implement them in letter and spirit; any justification for dereliction in implementation should not be countenanced; it should really be snubbed."

An attempt was made to reconsider the ruling in *Sanjay Thakre's* case (supra) in *M.S.L. Patil, Asstt. Conservator of Forests, Solarpur (Maharashtra) & ors. vs. State of Maharashtra & ors.* [(1996) 11 SCC 361]. This Court while repelling such a plea, reiterated its earlier view in the following manner:-

" In view of these contentions, the question that arises is whether the judgment of this Court has been vitiated by any error of law warranting reconsideration at the behest of some of the persons who are not parties to the earlier proceedings? it is

undoubted that they were not parties to the earlier petition but this court has laid down the general principle of law and, therefore, whether or not they are parties to the earlier proceedings, the general principle of law stags applicable to every person irrespective of the fact whether he is a party to the earlier order or not. It is not in dispute that there is a ratio prescribed for the direct recruits and the promotees, namely, 1:1. In other words, for every 100 vacancies the promotees are entitled only to 50 vacancies. It is not in dispute that these promotees have been promoted in excess of the quota. Under those circumstances, it is settled law that the promotees who are appointed in excess of the quota cannot get the entire length of service. Therefore, they are required to be fitted into seniority according to the rules. As to what is the date on which the promotees or the direct recruits came to be appointed into the respective quota is a matter of record and the seniority is required to be determined according to the law laid down by this court. In several judgments of this Court it is now firmly settled that merely because of the fact that the State Government could not make direct recruitment due to its inaction, it cannot be said that the rule of quota has been broken down. Therefore, as and when the direct recruitment has been made, the direct recruits are entitled to placement of their seniority into the vacancies reserved for them as per the ratio and the seniority determined as per the rules within the respective quota. Similarly, when the promotees came to be promoted in accordance with the rules in excess of their quota, this Court stated in *Keshav Chandra Joshi V. Union of India* through a Bench of three Hon'ble judges, that the promotees in excess of the quota cannot be given seniority from the respective dates of their promotions. They have to be considered only from the respective dates on which their respective quota is available. The same decision was followed and reiterated in *A.N. Seghal V. Raje Ram Sheoran*. Under these circumstances we do not think that the judgment of this Court is vitiated by any error of law for reconsideration. Even Rule 4, second proviso has no application to the facts in this case. Rule 4 contemplates the seniority and second proviso postulates that when the recruitment could not be made, they have to certify the ground on which it could not be made and thereafter the seniority has to be determined. In view of the law now laid down, the certification of the non-making of direct recruitment according to rules, bears no relevance. The question of carry forward in this case as laid down in *Mandal* case, has no application for the reason that the recruitment in proportion is one of the methods of recruitment and is required to be made. The balance posts are required to be recruited by subsequent publication and the promotees have no right to get into the post reserved for the direct recruits. *mandal* case concerns carry forward posts reserved under Article 16(4) for Scheduled castes, Scheduled Tribes and other Backward Classes which has nothing to do in this case. though some of the grounds will be available to argue the case on merits, that is no ground to reopen the settled law laid by this court in earlier decision."

We have already noticed that the appellants were appointed on the relevant dates in excess of their quota. Therefore, any appointments in excess to the quota prescribed for the promotees cannot prejudice the rights of the direct recruits. The common judgment under appeal is quite in accord

with the law settled by this Court and the same does not call for any interference.

In the result, the appeals fail and are dismissed accordingly with no order as to costs.