

KESHAV CHANDRA JOSHI AND ORS. ETC.

v.

UNION OF INDIA AND ORS.

NOVEMBER 6, 1990

[RANGANATH MISRA, CJ, M.M. PUNCHHI AND
K. RAMASWAMY, JJ.]

U.P. Forest Service Rules, 1952: Rules 3(h), 5(a)(b)—Appendix 'A' & 'B'—6, 24 and 27.

Service Law—Seniority—Assistant Conservators of Forest—Direct recruits and promotees—Fixation of seniority—Appointment of promotees on ad hoc basis as a stop gap arrangement and dehors the rules—Promotees holding posts continuously for a long period—Continuous length of ad hoc service from the date of initial appointment—Whether should be counted towards seniority.

Rules relating to 'Conditions of service'—Power of Governor to relax—Consultation by Governor with public Service Commission is mandatory—Word 'may' in Rule 27 has been used in the context of discharge of duty—It must be read as 'shall'.

'Rules of recruitment' and 'Conditions of service'—Distinction between—Rule 5(a)(b) and Appendix 'A' & 'B' are basic rules of recruitment and not subject to Rule 27.

Promotees appointed on ad hoc basis and dehors the Rules—Allowing the promotees to officiate for a long period—Whether appointment should be deemed to have been made in relaxation of the Rules.

Under U.P. Forest Service Rules, 1952 recruitment to the posts of Assistant conservators of Forest was made from two sources, namely, by direct recruitment, under Rule 5(a) read with Appendix 'A', and by promotion of permanent Forest Rangers, under Rule 5(b) read with Appendix 'B'. Rule 6 of the rules provided that not more than 25% of the total number of posts shall be filled by promotion.

The petitioners (promotees) were appointed to the posts of Forest Rangers. Due to pendency of legal proceedings there was no direct recruitment to the posts of Assistant Conservators of Forest under Rule

- A 5(a) till 1974 and even thereafter. The petitioners-promotees were appointed on the posts of Assistant Conservators of Forest on *ad hoc* basis, between March 13, 1974 and November 21, 1981 subject to direct recruitment and they were continuing temporarily on *ad hoc* basis for varying period of 5 to 12 years. With effect from 1st May, 1975 the ratio of 25% recruitment of promotees under Rule 6 was increased to 33
- B 1/3%. In the meanwhile the direct recruits under Rule 5(a) were appointed on probation to substantive vacancies. When their claim was ripe for consideration as Deputy Conservators of forest, the petitioners claiming seniority over them filed Writ Petitions in this Court contending (i) that though the promotees were appointed on *ad hoc* basis due to non-availability of direct recruits yet they were continuing for well over 5 to 12 years discharging the same duties, drawing the same scale of pay without any reversion; their posts were not
- C fortuitous, nor stop gap. Consequently their entire continuous length of service from the dates of their initial promotion should be counted towards their seniority; (ii) since the promotees were allowed to officiate for a long period they must be deemed to have been appointed in relaxation of the rules of recruitment under Rule 27 of the rules by
- D the Governor.

- On behalf of the direct recruits it was contended (i) since the appointment of the promotees was on *ad hoc* basis and not on the basis of merit as per rules they have no right to the posts. Consequently the service rendered by them from the dates of initial promotion till date of substantive appointment being fortuitous cannot be counted towards seniority; (ii) since the promotees were appointed in excess of the prescribed quota in Rule 6, they should be pushed down to the vacancies that had arisen in each year above the direct recruits as per the ratio as the promotees were not entitled to claim seniority from the initial dates of their respective promotions; (iii) that the power of relaxation in Rule
- E 27 was only in respect of conditions of service and not relating to recruitment or promotion.
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Disposing the petitions, this Court,

- G HELD: 1. Under rule 5 read with Rule 3(h) of the U.P. Forest Service Rules, 1952 a member of the service means a person, be it direct recruit under rule 5(a) or promotee under Rule 5(b), appointed in a substantive capacity to the service as per the provisions of the rules. In order to become a member of the service he must satisfy two conditions, namely, the appointment must be in substantive capacity and the
- H appointment has to be to the post in the service according to rules and

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

2. Employees appointed purely on *ad hoc* or officiating basis due to administrative exigencies, even though continued for a long spell, do not become the members of the service unless the Governor appoints them in accordance with the rules and so they are not entitled to count the entire length of their continuous officiating or fortuitous service towards their seniority. Reckoning continuous officiating of *ad hoc* promotion would enable the less privileged to excel their latent capabilities in the cadre post.

Narendra Chadha v. Union of India, [1986] 1 S.C.R. 211; *Baleshwardas v. State of U.P.*, [1981] 1 S.C.R. 449; *N.K. Chauhan v. State of Gujarat*, [1977] 1 S.C.R. 1037 and *Direct Recruits Class II Engg. Officers' Association v. State of Maharashtra*, [1990] 2 S.C.C. 715; *A.J. Patel & Ors. v. State of Gujarat & Ors.*, A.I.R. 1965 Guj. 23 (FB): referred to.

Masoor Akhtar Khan & Ors. v. State of M.P. & Ors., J.T. 1990 3 S.C. 295; followed.

A.K. Kraipak & Ors. etc. v. Union of India & Ors., [1970] 1 S.C.R. 457; cited.

2.1 In the instant case due to exigencies of service temporary promotions against substantive vacancies were made. It is undoubted that preceding their promotion, an *ad hoc* Committee had considered the cases of the promotees. Admittedly seniority subject to rejection of unfit was the criteria, followed in the selection. The selection was, therefore, in defiance of and dehors Rule 5(b) read with Appendix 'B'. The promotions were on *ad hoc* basis pending direct recruitment and were in excess of the quota prescribed under rule 6. By no stretch of imagination it could be said that the promotions were made to a substantive post in accordance with the rules. Therefore, the promotees do not hold the post in substantive capacity. Accordingly their continuous length of *ad hoc* service from the date of initial appointment cannot be counted towards seniority.

A 3. The pre-requisite of the right to inclusion in a common list of seniority is that all those who claim that right must broadly bear the same characteristics. Fortuitous circumstances of their holding the grade post carrying the same designation or scale of pay or discharging the same duty would not justify the conclusion that they being to the same cadre.

B 4. 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 subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota any 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).

F 5. Since the rules are legislative in character, they must harmoniously be interpreted as a connected whole giving life and force to each word, phrase and rule and no part thereof should be rendered nugatory or a surplusage. Resort to iron out the creases could be had only when the construction of the relevant rule, phrase or word would lead to unintended absurd results.

G 5.1 In an appropriate case if the court finds that wanton or deliberate deviation from the rules was made by the implementing authority the court should call upon them to explain the reasons therefor and in the absence of proper explanation forthcoming castigate the authority and pass structures condemning the actions which would discipline

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the authorities to adhere to the rules. Undue latitude and acquiescence thereto would not only defeat the due enforcement of the rules but also create disorder and frustration among the members of the service.

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5.2 Rule 27 of the U.P. Forest Service Rules, 1952 gives power to the Governor that if he is satisfied that the operation of any rule regarding conditions of service of the members caused undue hardship in a particular case; he may consult the Public Service Commission; notwithstanding anything contained in the Rules and dispense with or relax the requirement the conditions of service and extend the necessary benefit as is expedient so as to relieve hardship and to cause just and equitable results. The word "may" consult the Commission has been used in the context of discharge of statutory duty. The Governor is obligated to consult the Public Service Commission. Therefore, the word "may" must be construed as to mean "shall" and it is mandatory on the part of the Governor to consult the Public Service Commission before exempting or relaxing the operation of rule regarding conditions of the service of a member to relieve him from undue hardship and to cause just and equitable results.

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5.3 There is a distinction between "rules of recruitment" and "conditions of service". The rules relating to recruitment to the service either under rule 5(a) or 5(b) or the manner of recruitment to service as per Appendix 'A' or 'B' are basic rules of recruitment to service. They are not subject to rule 27.

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Narendra Chadha v. Union of India & Ors., [1986] 1 S.C.R. 211; referred to.

CIVIL APPELLATE JURISDICTION: Writ Petition Nos. 626/86 & 660/87.

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(Under Article 32 of the Constitution of India).

Gobinda Mukhoty, R.K. Garg, and D.K. Garg for the Petitioners.

Prithviraj, P.F. Rao, Sr. Advocates, Ms. S. Dikshit, Ms. Sushma Suri, Prashant Bhushan and Madan Lokur, for the Respondents.

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Shashi Kant, A.K. Jain and Sudhershana Singh (NP) Respondents in person.

The Judgment of the Court was delivered by.

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

of the substantive appointment as illegal and violative of Arts. 14 and 16 of the Constitution of India; (b) to declare Rule 4 of the Indian Forest Service (Recruitment) Rules, 1966 and Regulation 5 of Indian Forest Service (Appointment by promotion), Regulation 1966 as violative of Arts. 14 and 16 etc., the details of which are not material since the petitioners have given up their challenge before us. The only plea put forth is that the promotees should be declared to have been regularly appointed from the respective dates of their initial promotion as Asstt. Conservators with all consequential benefits. The contention of M/s. Mukhoty and Garg, their learned Senior counsel is that though the promotees were appointed on *ad-hoc* basis due to non-availability of direct recruits to the vacant posts of Asstt. Conservator of Forest, they are continuing for well over 5 to 12 years discharging the same duties, drawing the same scale of pay without any reversion. The posts held by the petitioners are not fortuitous, nor stop gap. The entire continuous length of service from the dates of their initial promotion should be counted towards their seniority. They strongly relied on *Narendra Chadha v. Union of India*, [1986] 1 SCR 211; *Baleshwardas v. State of U.P.*, [1981] 1 SCR 449; *N.K. Chauhan v. State of Gujarat*, [1977] 1 SCR 1037 and proposition 'B' in paragraph 47 in *Direct Recruits Class II Engineering Officers' Association v. State of Maharashtra*, 4(1990) 2 SCC 715, page 47, Prop. 'B' for short 'Direct Recruits' case' in their support.

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

- A** promotion. He placed reliance on *A.J. Patel & Ors. v. State of Gujarat & Ors.*, AIR 1965 Guj. 23 (F.B.)

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

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

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- (b) by promotion in the manner prescribed in Appendix 'B' to these rules of all permanent Forest Rangers of the Subordinate Forest Service who—

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- (i) hold a certificate of the Forest Rangers' College, Dehra Dun and

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

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

- H** "Number of appointments to be made—The Governor shall decide the number of vacancies to be filled from each

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

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

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

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

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

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

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

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

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

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

A (ii) he has passed all the tests prescribed in Rule 15 or has been exempted from passing such tests; and

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

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

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

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

D Rule 24 adumbrates to fix seniority thus:

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

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

F Proviso 2 and 3 are not relevant hence omitted.

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

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

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

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

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

Then the procedure was prescribed for selecting the candidates by promotion, the details of which are not material. Para 4 postulates that the "names shall be arranged in the order of merit and not in accordance with seniority". Paragraph 5 enjoins that the Chief Conservator of Forest shall also draw up a supplementary list containing names of officials whom he considers suitable for "officiating" or "temporary appointments" during the course of the year keeping in view the possible approximate vacancies and the candidates recommended by him to be suitable shall be approximately equal to the vacancies expected to occur during the course of the year.

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

- A suitability for confirmation and to pass an order confirming the promotee in a substantive capacity to a substantive vacancy.

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

G The heart of the controversy lies in the question as to when a person is appointed to a post in the service in a substantive capacity within the meaning of rule 3(h) read with Rules 5 and 24 of the Rules. Under Rule 5 read with Rule 3(h) a member of the service means a person, be it direct recruit under rule 5(a) or promotee under Rule 5(b), appointed in a substantive capacity to the service as per the

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

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

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

In a democracy governed by Rule of Law, it is necessary for the appropriate governance of the country that the political executive should have the support of an efficient bureaucracy. Our Constitution enjoins upon the executive and charges the legislature to lay down the

- A policy of administration in the light of the directive principles. The executive should implement them to establish the contemplated egalitarian social order envisaged in the preamble of the Constitution.

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

- It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. *Ad-hoc* or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Art. 14 read with Art 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority

would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or 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 Arts. 14 and 16(1). Therefore, the rules must be carefully applied in such a manner as not to violate the rules or equality assured under Art. 14 of the Constitution. This Court interpreted that equity is an integral part of Art. 14. So every attempt would be made to minimise, as far as possible, inequity. Disparity is inherent in the system of working out integration of the employees drawn from different sources, who have legitimate aspiration to reach higher echelons of service. A feeling of hardship to one, or heart burning to either would be avoided. At the same time equality is accorded to all the employees.

In Direct Recruits' case the Constitution Bench of this Court in which one of us (K. Ramaswamy, J.) was a member, in Proposition 'A' & 'B' in paragraph 47 at page 475 stated:

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

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

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

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

- E As stated, the counsel for the promotees placed strong reliance on proposition 'B' while the counsel for the Direct Recruits relied on proposition 'A'. The controversy is as to which of the propositions would apply to the facts of this case. The proposition 'A' lays down that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The latter part thereof amplifies that where the initial appointment is only *ad-hoc* and not according to rules and is made as stop-gap arrangement, the period of officiation in such post cannot be taken into account for reckoning seniority. The quintessence of the propositions is that the appointment to a post must be according to rules and not by way of *ad-hoc* or stop-gap arrangement made due to administrative exigencies. If the initial appointment thus made was de hors the rules, the entire length of such service cannot be counted for seniority. In other words the appointee would become a member of the service in the substantive capacity from the date of his appointment only if the appointment was made according to rules and seniority would be counted only from that date. Propositions 'A' and 'B' cover different aspects of the situation.
- F
- G
- H

One must discern the difference critically. Proposition 'B' must, therefore, be read alongwith Para 13 of the judgment wherein the ratio *decidendi* of Narendra Chadha was held to have considerable force. The latter postulated that if the initial appointment to a substantive post or vacancy was made deliberately, in disregard of the rule and allowed the incumbent to continue on the post for well over 15 to 20 years without reversion and till the date of regularisation of the service in accordance with the rules, the period of officiating service has to be counted towards seniority. This Court in Narendra Chadha's case was cognizant of the fact that the rules empower the Government to relax the rule of appointment. Without reading paragraph 13 and Proposition 'B' and Narendra Chadha's ratio together the true import of the proposition would not be appreciated. We would deal with the exercise of power of relaxing the rule later. After giving anxious consideration, we are of the view that the latter half of Proposition 'A' would apply to the facts of the case and the rule laid down in that half is to be followed. If the concerned rules provide the procedure to fix *inter se* seniority between direct recruits and promotees, the seniority has to be determined in that manner.

Realising that applicability of Proposition 'B' to the facts would run into rough weather the counsel for the promotees attempted to anchor it by reiterating that so on date the Public Service Commission found the promotees eligible for confirmation as per rules, the entire length of service would be counted for their seniority. We express our inability to accede to the contention. It is seen that appointment of the promotees as Assistant Conservators of Forest was not in accordance with rule 5(b) read with appendix 'B' of the rules. Admittedly the promotees were on *ad-hoc* basis pending direct recruitment and are in excess of the quota prescribed under rule 6. By no stretch of imagination it could be said that the promotions were made to a substantive post in accordance with the rules. Therefore, the promotees do not hold the post in substantive capacity.

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

In an appropriate case if the court finds that wanton or deliberate

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

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

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

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

H It is true that in *Narendra Chadha's* case this Court noticed that appointments by promotion were not made in accordance with the rules and rule 16 of Indian Economic/Indian Statistics Service Rules,

1961 as was in force empowers the Govt. to relax "*any provision of the rules*" to such an extent as (emphasis supplied) may be necessary to ensure satisfactory working or removing inequitable results held that as the Government deliberately deviated from the rules and allowed the promotees to be in continuous service without reversion for well over 15 to 20 years, the Government must be deemed to have relaxed the rules. While holding so at page 238 it was stated that:

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

In those peculiar circumstances this Court though recognised that appointment according to rules is a condition precedent, adopted the rule of deemed relaxation and deemed promotion to the service in accordance with the rules. Rule 27 of the Rules gives power to the Governor that if he is satisfied that the operation of any rule regarding conditions of service of the members caused undue hardship in a particular case; he may consult the Public Service Commission; notwithstanding anything contained in the Rules he may dispense with or relax the requirement of the conditions of service and extend the necessary benefit as is expedient so as to relieve hardship and to cause just and equitable results. The word "may" consult the Commission has been used in the context of discharge of statutory duty. The Governor is obligated to consult the Public Service Commission. Therefore, the word "may" must be construed to mean "shall" and it is mandatory on the part of the Governor to consult the Public Service Commission before exempting or relaxing the operation of rule regarding conditions of the service of a member to relieve him from undue hardship and to cause just and equitable results. There is a distinction between "rules of recruitment" and "conditions of service". To become a member of the service in a substantive capacity, appointment by the Governor shall be preceded by selection of a direct recruit by the Public Service Commission; undergoing training in Forestry for two years in the College and passing Diploma are conditions precedent. If the contention of the promotees that rules of recruitment are conditions of service is accepted, it would be open to the Governor to say that "I like the face of 'A' and I am satisfied that he is fit to be

- A appointed; I dispense with the rules of recruitment and probation and appoint 'A' straight away to the service in a substantive capacity as Asstt. Conservator of Forest. Take another instance. Passing the prescribed tests during probation is a condition of service. Similarly efficiency bar stands as an impediment for the promotee's confirmation.
- B On consideration of the record and on objective satisfaction, in an appropriate case, the Governor may relax those or other similar conditions. So passing the tests prescribed is a condition of service. Therefore, the rule which effects the right to confirmation or similar provision is a condition of service. The rules relating to recruitment to the service either under rule 5(a) or 5(b) or the manner of recruitment to service as per Appendix 'A' or 'B' are basic rules of recruitment to service.
- C Satisfaction of the Governor that the operation of the rules regarding the conditions of service would cause undue hardship in a particular case or cases and the need to relieve hardship and to cause just and equitable results is a pre-condition. Even otherwise the court cannot substitute its satisfaction for the satisfaction of the Governor in exercise of the power of deemed relaxation. In *Narendra Chadha's*
- D case the power to relax was wide enough to cover 'any rule' and there was no pre-condition of objective satisfaction by the Governor. We hold that rule 5(a) and (b) and Appendix 'A' and 'B' are basic rules of recruitment and would not be subject to Rule 27.

- E Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on *ad-hoc* basis as a stop-gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are dehors the rules and untill they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity.
- F Continuous length of *ad-hoc* service from the date of initial appointment cannot be counted towards seniority. The Governor shall have to make recruitment by promotion to substantive vacancies in the posts of Asstt. Conservator of Forest, if not already made, in accordance with rule 5(b) read with Appendix 'B' and rule 6. Their seniority shall be counted only from the respective dates of appointment to the substantive posts in their quota under rule 6 as per the rules.
- G The direct recruits having been appointed in accordance with rule 5(a) read with Appendix 'A', their seniority shall be counted from the date of their discharging the duties of the post of Asstt. Conservator of Forest and the seniority of the direct recruits also shall accordingly be fixed. The *inter se* seniority of the direct recruits and promotees shall be
- H determined in accordance with Rules 5, 6 and rule 24 in the light of the

law declared in the judgment. All the employee are entitled to all consequential benefits. On account of the pendency of judicial proceedings, if any of the employees became barred be age for consideration for promotion to cadre posts, the appropriate Government would do well to suitably relax the rules and do justice to the eligible conditions.

A

B

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

T.N.A.

Petitions allowed.