

PETITIONER:
R.R.S.CHOUDAN & ORS.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT 28/03/1995

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
MANOHAR SUJATA V. (J)

CITATION:
JT 1995 (3) 400 1995 SCALE (2) 436

ACT:

HEADNOTE:

JUDGMENT:
S.C. AGRAWAL, J.:

1. In this appeal from the judgment dated August 9, 1988 passed by the Central Administrative Tribunal, Jabalpur Bench, Madhya Pradesh [hereinafter referred to as 'the Tribunal'] the question that arises for consideration is whether for the purpose of determination of seniority of the appellants in the Indian Forest Service [hereinafter referred to as 'the Service'] the period of their officiation on the post of Officer on Special Duty [O.S.D.] in the State of Madhya Pradesh since 1977 till the date of their appointment to the Service should be taken into account.

2. Appellants Nos. 1 to 9 were selected for appointment to the post of Assistant Conservator of Forests in the Superior Forest Service of the State of Madhya Pradesh in the year 1964. After completion of their training at the Indian Forest College, Dehradun they were appointed as Assistant Conservator of Forests in the year 1966. Appellants Nos. 10 to 12 were selected for such training in 1965 and on completion of their training they were appointed as Assistant Conservator of Forests in 1967. They were all confirmed on the post of Assistant Conservator of Forests with effect from October 1, 1968. In the year 1966 the Service was constituted under the All India Services Act, 1951. The Service is governed by various rules and regulations, including the Indian Forest Service (Cadre) Rules, 1966 [hereinafter referred to as 'the Cadre Rules'], the Indian Forest Service (Recruitment) Rules, the Indian Forest Service (Appointment by promotion) Regulations, 1966 [hereinafter referred to as 'the Appointment by Promotion Regulations'], the Indian Forest Service (Regulation of Seniority) Rules, 1968 [hereinafter referred to as 'the Seniority Rules'], made by the Central Government. The provisions in these Rules and Regulations are substantially the same as those contained in similar rules and regulations governing the Indian Administrative Service and the Indian

Police Service.

3. By order dated January 23, 1974 the Government of Madhya Pradesh abolished 27 posts in the senior pay scale of Rs.

403

700-1250 in the cadre of the Service and in their place equal number of temporary posts of Officer on Special Duty (O.S.D.) in the pay scale of Rs. 680- 1000-EB- 1 150 were created in the State Forest Service. In the said order it was stated that "this arrangement would remain effective for a period of one year or upto the time of preparation of select list according to Rule 5 of the I.F.S. (Appointment by, Promotion) Regulations, whichever is earlier. By order dated July 11, 1975 the said order dated January 23, 1974 was extended for a further period of one year or till the preparation of select list for the promotion to the Service, whichever is earlier, and by another order dated May 25, 1976 it was further extended for a period of one year or till the preparation of select list for the promotion to the Service, whichever is earlier. By orders dated February 22, 1977, March 5, 1977, March 21, 1977 and April 22, 1977 the appellants were promoted on the posts of O.S.D. in the pay scale of Rs.680-1150. While they were thus officiating the names of the appellants were included in the select list for the year 1978 prepared by the Selection Committee under the Appointment by Promotion Regulations in December, 1977. The said select list contained the names of 67 persons out of which 38 persons were appointed to the Service for the year 1978. Since the appellants were lower down in merit in the said select list they could not be appointed to the Service on the basis of the said select list. The names of the appellants were not contained in the select list for the year 1979 which was prepared on December 19, 1978. The names of some of the appellants were contained in the select list for the year 1980 but the select list of 1981 did not contain the names of any of the appellants. The names of some of the appellants were included in the select lists for the years 1982 and 1983 but in the select list for the year 1984 the same of none of the appellants was included. The select list for the year 1985 contained the names of all the appellants and by order dated September 24, 1985 the appellants were appointed to the Service and were allotted the Madhya Pradesh Cadre. They have been assigned 1981 as the year of allotment for the purpose of seniority in the Service. Their claim is that they should have been assigned 1971 as the year of allotment as they were continuously holding the senior post of Deputy Conservator of Forests a cadre post in the Service uninterruptedly from 1977 till the date of their appointment to the service and V.N. Khare, a direct recruit of 1971 batch, had started officiating on the senior post in 1977. The appellants filed an application (O.A. 25/1988) before the Tribunal for the redress of their grievance. The said position of the appellants has been dismissed by the Tribunal by judgment dated August 9, 1988.

4. Since the main question relates to seniority, a reference may be made to the relevant provisions contained in the Seniority Rules. Rule 3 of the Seniority Rules provides for assignment of year of allotment. The relevant parts of the said Rule are as under :-

"3. Assignment of year of allotment

(1) Every officer shall be assigned a year of allotment in accordance with provisions hereinafter contained in this rule.

(2) The year of allotment of an officer appointed to the Service shall be

(a) x x x x x x xxxxxxxx

404

(b) x x x x xx x x x x xxx

(c) Where an officer is appointed to the Service by promotion in accordance with rule 8 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the Service in accordance with rule 7 or if no such officer is available the year of allotment of the junior most among the officers recruited to the Service in accordance with rule 4(1) of these Rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former :

Provided that seniority of officers who are substantively holding the post of a Conservator of Forests or a higher post on the date of constitution of the Service and are not adjudged suitable by the Special Selection Board in accordance with the Indian Forest Service. (Initial Recruitment) Regulations, 1966, but who may later on be appointed to the Service under Rule 8 of the Recruitment Rules shall be determined ad hoc by the Central Government in consultation with the State Government concerned and the Commission.

Explanation 1.- In respect of an officer appointed to the Service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for the purpose of determination of his seniority, count only from the date of the inclusion of his name in the Select List, or from the date of his officiating appointment to such senior post, whichever is later.

X X X X X X X X X X X X X X

5. Under Rule 3(2)(c) the year of allotment of an officer who has been appointed to the Service by promotion is determined by giving him the benefit of continuous officiation in a senior post and he is given the same year of allotment as is given to the junior most among officers directly recruited in the Service who officiated continuously in a senior post from the date earlier than the date of commencement of such officiation of the promoted officer. Explanation 1 expressly prescribes that the benefit of the period of continuous officiation can be availed by a promoted officer only from the date of the inclusion of his name in the select list or from the date of his officiating appointment to such senior post, whichever is later. This means that the two requirements, namely, officiating appointment to the senior post and inclusion of the name in the select list, must be fulfilled before the benefit of officiation can be availed by a promoted officer for the purpose of seniority. From the said provisions it necessarily follows that both these conditions must be satisfied not only at the stage of commencement of the period of officiation but should continue to be satisfied during the entire period of officiation till appointment is made to the Service. In other words, under Rule 3(2)(c) of the Seniority Rules a promoted officer can avail the benefit of the period of continuous officiation in a senior post for the purpose of Seniority only if the following two

requirements are fulfilled at the time of his appointment to the Service:

- (i) he had been continuously officiating in a senior post; and
- (ii) his name was in the select list during the period of such continuous officiation.

405

6. In order that they may be able to claim the benefit of the aforesaid provisions for the purpose of determination of their seniority in the Service the appellants must first show that they were continuously officiating in a senior post from 1977 till their appointment to the Service in 1985. The expression 'senior post' is defined in Rule 2(g) of the Seniority Rules in the following terms :-

" 'Seniority post' means-

a post included and specified under item 1 of the Cadre of each State in the Schedule to the Indian Forest Service (Fixation of Cadre Strength Regulations, 1966, and includes

a post included in the number of posts specified in items 2 and 5 of the said cadre, when held on senior scale of pay, by an officer recruited to the Service in accordance with sub-rule (1) of rule 4 or rule 7 of the Recruitment Rules."

7. According to the aforesaid definition a senior post is confined to the posts included and specified under item 1 of the Cadre of each State in the Schedule to the Indian Forest Service (Fixation of Cadre Strength) Regulations, 1966 and a post included in the number of posts specified in items 2 and 5 of the said cadre, when held on senior scale of pay, by an officer recruited to the Service in accordance with sub-rule (1) of Rule 4 or Rule 7 of the Recruitment Rules.

8. The question is whether the post of O.S.D. on which the appellants were appointed in 1977 is a senior post under Rule 2(g) of the Seniority Rules. The said post is not a post included and specified under item 1 of the Cadre of the State of Madhya Pradesh in the Schedule to the Indian Forest (Fixation of Cadre Strength) Regulations, 1966. It is also not a post included in the number of posts specified in items 2 and 5 of the said cadre. Moreover, from the order dated January 23, 1974 whereby the posts of O.S.D. were created it would appear that the said posts were created in the State Forest Service in the place of the posts in the senior pay scale Rs. 700-1250 of the Service which were kept in abeyance and the post of O.S.D. had a lower pay scale of Rs. 600-1150. This shows that the post of O.S.D. was not a post equivalent to a cadre post in the senior pay scale of the Service but was a post in the State Service having a lower pay scale than the post in the senior pay scale in the Service.

9. Shri Madhava Reddy, the learned senior counsel appearing for the appellants, has, however, urged that though the appointment of the appellants was made on the posts of O.S.D. but they were actually discharging the duties of Deputy Conservator of Forests during the period 1977-1985 and that the post of Deputy Conservator of Forests is a senior pay scale post in the cadre of the Service and, therefore, the appellants must be treated to have continuously officiated on a senior post in the Service. We find it difficult to accept this contention in view of the provisions contained

in Rules 8, 9 and 10 of the Cadre Rules provide as follows :-

"Rules 8. Cadre posts to be filled by cadre officers. Save as otherwise provided in these rules every cadre post shall be filled by a cadre officer.

Rule 9. Temporary appointment of non-cadre officers to cadre posts.- (1) A cadre post in a State may be filled by a

406

person who is not a cadre officer if the State Government or any of its Heads of Department to whom the State Government may delegate its powers of making appointments to cadre posts is satisfied-

(a) that the vacancy is not likely to last for more than three months;

or

(b) that there is suitable cadre officer available for filling the vacancy.

(2) Where in any State a person other than a cadre officer is appointed to a cadre for a period exceeding three months, the Stat

e

Government shall forthwith report the fact to the Central Government together with the reasons for making the appointment.

(3) On receipt of a report under sub-rule (2) or otherwise, the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officer, and where any direction is so issued, the State Government shall accordingly give effect thereto.

(4) Where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government shall report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission give suitable direction to the State Government concerned.

Rule 10. Report to the Central Government of vacant cadre posts.- Cadre posts shall not be kept vacant or held in abeyance for periods exceeding six months without the approval of the Central Government. For this purpose, the State Government shall make a report to the Central Government in respect of the following matters, namely:-

(a) the reasons for the proposal;

(b) the period for which the State Government proposes to keep the post vacant or hold it in abeyance;

(c) the provisions, if any, made for existing incumbent of the post; and

(d) whether it is proposed to make any arrangements for the performance of the duties of the post to be kept vacant or held in abeyance, and if so, the particulars of such arrangements. "

10. These rules show that while Rule 8 requires that every cadre post shall be filled by a cadre officer, Rule 9 lifts the embargo in certain circumstances and permits a cadre

post to be filled by a person who is not a cadre officer provides the State Government concerned is satisfied that either (i) the vacancy is not likely to last for more than three months, or (ii) there is no suitable cadre officer available for filling the vacancy. In case the appointment is for a period exceeding three months sub-rule (2) of Rule 9 requires that the State Government shall report forthwith to the Central Government the fact of such appointment together with reasons for making such appointment and under sub-rule (3) of Rule 9 on receipt of such report the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officer and where such direction is so issued the State Government is required to give effect thereto. In cases where a cadre post is likely to be

407

filled by a person who is not a cadre officer for a period exceeding six months subrule (4) of Rule 9 further requires that the Central Government shall report the full facts to the Union Public Service Commission with reasons for holding that no suitable cadre officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission give suitable directions to the State Government concerned. Rule 10 lays down that cadre post shall not be kept vacant or held in abeyance for periods exceeding six months without the approval of the Central Government and the State Government is required to make a report to the Central Government in respect of the matters specified in clauses (a) to (d) of the said Rule.

11. As regards keeping in abeyance the posts in the senior pay scale in the Service under order dated January 23, 1974 the stand of the Union of India is that no report was made by the State Government to the Central Government as required by Rule 10 and the Central Government did not give its approval to keep these posts in abeyance. Since, we are not required to consider the legality of the order of the State Government dated January 23, 1974, keeping the said posts in abeyance, we do not propose to go into this question.

12. We will, however, examine whether the provisions of Rule 9 were complied with in so far as the appointment of the appellants on a cadre post is concerned. In this regard both the Union Government as well as the State Government have taken the stand that the appointment of the appellants as O.S.D. was on a post in the State Forest Service and that it was not a cadre post in the Service and, therefore, none of the requirements of Rule 9 of the Cadre Rules was required to be complied with. The appellants can succeed only if they are able to show that they were appointed on the post of Deputy Conservator of Forests a post included in the cadre of the Service in accordance with Rule 9 of the Cadre Rules. We, however, find that the appointment of the appellants was not on the post of Deputy Conservator of Forests but was on the post of Deputy Conservator of Forests but was on the post of OSD, a post carrying lower pay scale and falling in the State Forest Service. Since the appointment of the appellants was not on a post in the cadre of the Service the requirements of Rule 9 were not, complied with in making the appointment and for continuing them on the said post during the period 1977-85. In our opinion, therefore, it cannot be said that the appellants were continuously officiating in a senior post in the Service prior to their appointment to the Service in 1985.

13. Moreover, even if it be assumed that the appellants were continuously officiating in a senior post in the

Service during the period 1977-85 they cannot avail the benefit of the said officiation for the purpose of seniority because after the select list of 1978 which included their names the next select list for the year 1979 did not contain their names and so also their names were not included in the select lists for the years 1981 and 1984. The names of some of the appellants were included in the select lists for the years 1980, 1982 and 1983 and names of all the appellants were included in the select list for the year 1985. The submission of Shri Madhava Reddy is that the non-inclusion of the names of the appellants in the select lists for the years subsequent to the year 1978

408

is of no consequence because the names of the appellants were included in the select list for the year 1978 and since they were officiating on a senior post on the date of such inclusion in 1978 and they continued to officiate till 1985 they are entitled to count the entire period of officiation for the purpose of assignment of year of allotment under Rule 3(2)(c) of the Seniority Rules. We do not find any merit in this submission. As indicated earlier Explanation 1 to sub-rule (2Xc) of Rule 3 envisages that an officer who is appointed to the Service by promotion can take the benefit of the period of continuous officiation in a senior post for the purpose of seniority if, on the date of his appointment to the Service, (a) he had been continuously officiating in a senior post, and (b) his name was in the select list. Both these requirements must co-exist not only at the stage of commencement of the period but also not only at the stage of commencement of the period but also during the entire period for which benefit is claimed. If either of these conditions ceases to exist at any stage before the appointment to the Service, there will be a break in the continuity of officiation and the benefit of officiation would not be available for the purpose of seniority. This may occur either due to posting on a post which is not a senior post in the cadre or due to non-inclusion of the name in the select list for the subsequent year. The consequence in either even is the same and the period of officiation cannot be taken into account for the purpose of seniority. Therefore, the effect of the non-inclusion of the names of the appellants in the select lists for the years 1979, 1981 and 1984 is that one of the requirements of Rule 3(2)(c) of the Seniority Rules which could enable appellants to avail the benefit of continuous officiation had ceased to exist. The fact that the appellants were officiating in the senior post during the period when their names were not in the select list, by itself, would not enable them to obtain the benefit of such officiation for the purpose of seniority. The appellants are, therefore, not entitled to count the period of continuous officiation in the post of O.S.D. during the period 1977-85 for the purpose of determination of their seniority and assignment of the year of allotment and the Tribunal has rightly denied the benefit of such officiation to the appellants.

14. Shri Madhava Reddy has placed reliance on the decisions of this Court in Harjeet Singh etc. v. Union of India & Ors., (1980) 3 SCR 459; Amrik Singh & Ors., v. Union of India & Ors., (1980) 3 SCR 485, and Union of India etc. v. G.N. Tiwari & Ors., (1985) Suppl. 3 SCR 744. In Harjeet Singh (supra) this Court was dealing with the rules governing the Indian Police Service and in the context of temporary appointment of non-cadre officers to cadre post in the Indian Police Service this Court has referred to the requirements of Rule 9 of the Indian Police Service (Cadre)

Rules, 1954 and has observed that such appointment is subject to the directions of the Central Government who may terminate such appointment and that the Central Government too is bound to obtain the advice of the Union Public Service Commission if appointment is to extend beyond six months. In *Amrik Singh (supra)*, which also relates to the India Police Service, this Court was again dealing with Rule 9 of the Indian Police Service (Cadre) Rules, 1954 and has observed:-

409

"In the present case, no such report by the State Government to the Central Government was sent, no consultation by the Central Government with the Commission was done. We are agreed that by-passing the Public Service Commission bespeaks prima facie impropriety, but we are not inclined to consider this grievance as destructive of the officiation of Ahluwalia in the special conspectus of facts present here. For one thing, Ahluwalia has nothing to do with the error; for example, no senior of Ahluwalia suffered, thirdly, the Central Government, in exercise of its power to relax the Rules, in good faith and, indeed in equity, did relieve the officer against this violation." [p.498]

15. In the said decision though this Court has disapproved the violation of the provisions of Rule 9 but in the facts of that case it was held that the officiation could be taken into consideration. In the recent decision in *Syed Khalid Razvi & Ors. v. Union of India & Ors.*, 1993 Supp (3) SCC 575, this Court in the context of rules governing the Indian Police Service, has observed :-

"In other words, where the vacancy/vacancies continue for more than three months, the prior concurrence of the Central Government is mandatory. If it continues for more than six months prior approval of the Union Public Service Commission is also mandatory. Any appointment in violation thereof is not an appointment in accordance with the law," [p.598]

16. In *G.N. Tiwari' (supra)* this Court, in the facts of that case, has held that there was a deemed approval by the Central Government to the officiation in the cadre post of the officers belonging to the State Service since the State Government had sent a report to the Central Government and the Central Government had also asked for consolidated proposal of officiation of non-cadre officers on cadre posts. This decision has no application to the present case because no such report was sent by the State Government and the Central Government was not even apprised of the appointment of the appellants and, therefore, there is no question of deemed approval of the officiation of the appellants on a senior post in the Service by the Central Government.

17. As pointed out earlier, the appellants were never appointed to a cadre post in the Service and their appointment was on the post of O.S.D. in the State Forest Service. The cases on which reliance has been placed by Shri Madhava Reddy do not, therefore, lend any support to the case of the appellants.

18. Another contention that has been urged by Shri Madhava Reddy is that under Rule 4(2) of the Cadre Rules it is incumbent on the part of the Central Government to reexamine the strength and composition of each cadre in consultation

with the State Government concerned at the interval of three years. It has been pointed out that after the constitution of the Service in 1966 the cadre review was due in 1969, 1972 and 1975 but no such review was done till 1977 and thereafter it was done in 1981 and no review was done in 1984. The appellants were included in the select list of 1978 after the review of 1977. The Tribunal has, therefore, rightly pointed out that the appellants cannot be said to be prejudiced because after such review was done in 1977 the names of the appellants were included in the select list of 1977 but in spite of such inclusion they could not be appointed. As regards non-revi-

410

sion of the cadre prior to 1977 the claim of the appellants must be held to be belated and was rightly rejected by the Tribunal.

19. For the reasons aforementioned we do not find any merit in this appeal and it is accordingly dismissed. But in the circumstances the parties are left to bear their own costs.

412