

CASE NO.:
Appeal (civil) 6298-99 1995

PETITIONER:
RAMESH K. SHARMA AND ANR.

Vs.

RESPONDENT:
RAJASTHAN CIVIL SERVICES AND ORS.

DATE OF JUDGMENT: 23/11/2000

BENCH:
G.B.Pattanaik, B.N.Agrawal

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T.....T..J

PATTANAİK,J.

These appeals are directed against the common judgment of the Division Bench of the Rajasthan High Court in a bunch of writ petitions, which had been filed against the judgment and order of the Rajasthan Civil Services Appellate Tribunal in a bunch of appeals. The perennial problem of inter se seniority between the two sources has cropped up in these appeals, but the dispute in the present batch of cases is between the direct recruits and the surplus persons who were absorbed as Sales Tax Officers in the Sales Tax Department, the absorption having been made under the Absorption of Surplus Personnel Rules, 1969 (hereinafter referred to as the Absorption Rules). The appellants are the direct recruits to the post of Commercial Tax Inspector and the recruitment to the said post is governed by a set of rules framed under the proviso to Article 309 of the Constitution called the Rajasthan Commercial Taxes Subordinate Service (General Branch) Rules, 1975 [hereinafter referred to as the Recruitment Rules]. The private respondents herein had been appointed to the Land and Building Tax Department and they being found to be surplus personnel, they were absorbed under the Co-operative Department and later on, in the Commercial Tax Department as Commercial Tax Inspectors under the provisions of the Absorption Rules. The inter se seniority between the surplus employee, who is appointed substantively to a permanent post in the service in which he is absorbed and those who are in the parent department, is required to be determined under Rule 15 of the Absorption Rules. Under the said rules, the longer period of continuous substantive service on the post compared to the post in which the absorption takes place is the criteria. The private respondents being original appointees in the Land and Building Tax Department, on their absorption in the Sales Tax Department under the Absorption Rules, for determination of their seniority under Rule 15 of the said Rules, the question for consideration would be, whether the post which they were holding in the Land and Building Tax Department are comparable to the post of Commercial Tax Inspector and if so, whether their appointment to the post

in the Land and Building Tax Department from the inception, was substantive in nature or it became substantive from any later point of time and consequently what period of that service could be counted for the purpose of determining the inter se seniority in terms of Rule 15(1) of the Absorption Rules. The Land and Building Tax Department was created in the year 1973 and pursuant to an advertisement issued for appointment of Trainee Inspectors under the special scheme for providing employment to educated unemployed, the private respondents were appointed on 17th of August, 1973 on a fixed stipend of Rs.150/- per month. W.e.f. 1.3.1974, such trainees were appointed on probation on the temporary post of Second Class Inspector, on successful completion of their training under the said Land and Building Tax Department. By order dated 4.5.1976, the State of Rajasthan substituted the expression on probation by the word temporary and as such, the private respondents were appointed on temporary basis w.e.f. 1.3.1974. The appellants 1 to 4 having been selected by the Rajasthan Public Service Commission under the Recruitment Rules of 1975, were appointed as Commercial Tax Inspectors Grade II on probation by order dated 19.12.1977. Appellants 5 to 10 had been selected by the said Rajasthan Public Service Commission under the Special Recruitment Rules of 1976 and had been appointed to the post of Commercial Tax Inspector, Grade II on 28.7.77. All the appellants were made permanent in the said post of Commercial Tax Officer, Grade II w.e.f. 1.3.80 by order dated 5.5.1982. In the Urban Land and Building Tax Department, the private respondents who had been appointed temporarily, were made permanent w.e.f. 27.2.1981 by order dated 1.9.1981, as 61 temporary posts in the said Urban Land and Building Tax Department were made permanent w.e.f. 27.2.1981. By order dated 26.4.1982, the private respondents herein, were declared as surplus in the Land and Building Tax Department and their services from the post under the said department, stood terminated. Some of these surplus employees were absorbed in the Commercial Tax Department as Commercial Tax Inspectors Grade II by order dated 17.6.1982 and some others were absorbed in the Co-operative Department as Inspectors Grade II by order dated 25.6.1982. Those, who had been absorbed in the co-operative department, represented to the State Government for their absorption in the Commercial Tax Department and the State of Rajasthan absorbed them in the Commercial Tax Department by four different orders, the same being order dated 17.8.82, 20.1.83, 4.3.83 and 10.5.1983. The Association of Commercial Tax Inspectors, submitted a representation to the State Government against the absorption of the employees in their department, who had already been absorbed in the Co-operative Department, essentially, on the ground that no post of Inspector being available, the absorption in the Co-operative department is bad in law. In the seniority list prepared by the department in the cadre of Commercial Tax Inspector Grade II, the appellants had all along been shown senior to the absorber- respondents, who had been absorbed under the Absorption Rules, on being found surplus in their parent department of Land and Building Tax Department. The final seniority list had been published by the State Government on 19.5.1993. The private respondents, who were originally born in the Land and Building Tax Department and had later been absorbed in the Sales Tax Department, approached the Civil Services Appellate Tribunal (hereinafter called the Tribunal), assailing the aforesaid seniority list and the position assigned to the present appellants in the said

list. The Tribunal by its order dated 31.5.94, quashed the seniority list, prepared in 1987, 1990 and 1993. The Tribunal, on interpreting the provisions of Rule 15(1) of the Absorption Rules and looking to the appointment orders of the private respondents and their confirmation thereafter in the Land and Building Tax Department, came to hold that their appointment was substantive in nature, right from the inception on 1.3.1974 and that being the position, their services from 1.3.74 would count for the purpose of seniority. The appellants assailed the legality of the aforesaid order of the Tribunal by filing writ petitions and those writ petitions having been dismissed, the appellants are before this Court. It may be stated at this stage that one Bhanwar Lal Malakar, who was also an employee under the Land and Building Tax Department, like the present private respondents herein and who had been absorbed in the Excise Department under the self-same Absorption Rules, had approached the High Court in Writ Petition No. 1477 of 1990 against the order of the Rajasthan Civil Services Appellate Tribunal and had claimed that his services in the Land and Building Tax Department w.e.f. March 01, 1974, must be held to be substantive in nature and as such should count for the purpose of his seniority under Rule 15(1) of the Absorption Rules. The High Court came to the conclusion in that case that as the appointment in the Land and Building Tax Department had been made after a regular selection by a duly constituted Committee, though against a temporary post, till the post became permanent and the incumbent also became permanent thereafter, it must be held that the appointment was in a substantive capacity and as such, the services of said Shri Malakar w.e.f. 1.3.74 has to be counted for the purpose of his seniority under Rule 15(1) of the Absorption Rules. The aforesaid decision was affirmed by this Court by dismissal of the special leave petition against the same. In fact, in the present case, the Civil Services Appellate Tribunal, in setting aside the seniority list prepared by the department, followed the earlier judgment of the High Court in Malakars case.

Mr. Rajeev Dhavan, the learned senior counsel, appearing for the appellants, vehemently contended that the initial appointment of the private respondents in the Land and Building Tax Department on 1.3.74, cannot, but be held to be ad hoc appointment, in terms of Rule 3A of the Absorption Rules, and, therefore, the Tribunal and the High Court committed error in computing the period from 1.3.74 for determination of their seniority under Rule 15(1) of the Absorption Rules, and thus the impugned decision of the Tribunal and the High Court must be set aside. Mr. Dhavan also further contended that the very absorption of the private respondents under the Absorption Rules, not having been made in accordance with the prescribed procedure contained in Rule 7, the Tribunal and the High Court committed serious error in determining the seniority of such irregular absorbees under Rule 15(1) of the Absorption Rules. Mr. Dhavan also urged that in deciding the status and character of the services which the surplus personnel were holding, prior to their absorption under the Absorption Rules, must get its colour from the nature of absorption itself, in view of indications made in Rule 7 and adjudged from this angle, the conclusion is irresistible that the private respondents in the Land and Building Tax Department were not holding any post on substantive basis and consequently, any period prior to their being permanent on

27.2.81, could not have been counted for the purpose of their seniority under the Absorption Rules. Mr. Dhavan also finally urged that the very appointment of these private respondents in the Land and Building Tax Department, not having been made under any Rules, but on the other hand dehors the rules, such appointment would not count for the purpose of their seniority, even under the principles enunciated by this Court in the Constitution Bench in the Direct Recruit Case.

Mr. P.P. Rao, the learned senior counsel, appearing for the absorbed employees, on the other hand contended that the nature and status of the post held by these respondents in the Land and Building Tax Department, has already been determined in Malakar's case and that decision has reached finality by dismissal of the special leave petition against the same, and, consequently, the Tribunal and the High Court were justified in holding that the appointment of the private respondents w.e.f. 1.3.1974 was of a substantive nature and as such, would count for the purpose of their seniority under Rule 15(1) of the Absorption Rules. Mr. Rao also submitted that these respondents having been selected by a process of selection and having been appointed on being selected and, thereafter having been made permanent, there is no reason as to why their services with effect from the date of their initial recruitment would not count for the purpose of their seniority in the absorbed cadre and both, in law and equity, the seniority has to be determined, taking the entire length of service into account. Mr. Rao also urged that this Court has consistently pronounced that where temporary posts are virtually long-lives, then officiating service in such posts is for all practical purposes of seniority, as good as service on a regular basis and this being the position, in the case in hand, when the posts in the Land and Building Tax Department, itself had been made permanent and the incumbents also have been confirmed, there would be no rationale to exclude their services from the date of appointment till the date of confirmation for the purpose of seniority and in terms of Rule 15(1), the said period cannot, but be held to be substantive in nature and as such, the conclusion of the Tribunal and the High Court remains unassailable.

In view of the rival submissions at the Bar, the crucial question that requires consideration is what is meaning of the expression substantive service and whether the services of the private respondents under the Land and Building Tax Department from 1.3.1974, could be held to be substantive service. There is no dispute that the very post against which the private respondents were appointed temporarily w.e.f. 1.3.1974, became permanent by order dated 27.2.1981 and all these private respondents were also made permanent with effect from the very date, by order dated 1.9.1981. Rule 15 of the Absorption Rules, for better appreciation of the point in issue is extracted herein below in extenso:-

15. Seniority.- (1) The seniority of a surplus employee appointed substantively to a permanent post in the service or cadre in which he is absorbed shall be determined by the appointing authority concerned by placing him below the junior-most permanent employee of the new service or

department who has a longer period of continuous substantive service on the post compared to the continuous substantive service of the surplus employee on equivalent or higher post. The seniority of a surplus employee who is absorbed on a higher posts on officiating basis shall be determined only in respect of his permanent post: [Provided that the seniority of the surplus employee whose length of continuous service in substantive or officiating capacity or in both such capacities is lesser than the length of continuous service in substantive or officiating capacity or in both such capacities of the junior most permanent employee of the service or cadre of the New department in which such surplus employee has been absorbed, shall be determined by placing the surplus employee immediately below the said junior-most permanent employee in the service or cadre or the department in which the surplus employee has been absorbed.] [Provided further that inter-se seniority of the surplus employees absorbed in a department/service/cadre or unit under an Appointing Authority and the employees of the service/cadre of the new department, for promotion to higher post in the service or cadre in which he has been absorbed shall be determined according to the date of continued officiation in a class or category of post concerned or an equivalent or higher post provided such officiation was not of the fortuitous nature or ad hoc or an urgent temporary appointment, notwithstanding their years of substantive appointment or date of confirmation or the length of continuous substantive service in the different cadre post or service.] (2)The seniority of a surplus employee appointed to a new post in a temporary or ad hoc capacity shall, pending his appointment on a substantive basis, be determined in the following manners: (a)In the case of a surplus employee appointed temporarily to a new post his seniority among the temporary employees holding same posts in the service or cadre in which he is absorbed shall be determined by placing him immediately below the temporary employee of the new service or cadre who has rendered a longer period of continuous temporary service compared to the continuous temporary service of the surplus employee on same equivalent or higher post. (b)In the case of surplus employee appointed on ad hoc basis in a new post his seniority among the ad hoc employee holding same posts in the service or cadre in which he is absorbed shall be determined by placing him immediately below the ad hoc employee of the new service or cadre, who has rendered a longer period of continuous service on an ad hoc basis compared to the continuous ad hoc service of the surplus employee on same, equivalent or higher post: Provided that all substantive employees in a cadre or service including substantive surplus employees absorbed therein, shall rank senior to temporary employees appointed or absorbed under these rules in such cadre or service and all such temporary employees shall rank senior to all ad hoc employees appointed or absorbed under these rules or otherwise. [Provided further that the seniority of the employee on a post in a cadre or service including surplus employees absorbed therein and who were substantive on such posts on or before 11th December, 1969, shall be determined according to the provisions of the relevant Service Rules.] (3)The seniority inter se of employees declared surplus from a service or cadre shall on their appointment to new posts in another service or cadre shall be the same as it existed in the former service or cadre.

The private respondents having been absorbed as

Commercial Tax Officer Grade II, their seniority in the cadre of Commercial Tax Officer Grade II will have to be determined on the basis of the aforesaid Rule 15(1). It is also not disputed that the post which these private respondents were holding under the Land and Building Tax Department were equivalent posts of the posts of Commercial Tax Inspector Grade II. The only question, therefore, requires adjudication is whether these private respondents were in continuous substantive service with effect from 1.3.1974 or they would be held in continuous substantive service only after they were made permanent with effect from 27.2.1981. In the Service Jurisprudence a post could be temporary or it could be permanent or it could be created for a definite period to meet a definite contingency. If an incumbent is appointed after due process of selection either to a temporary post or a permanent post and such appointment not being either stop-gap or fortuitous, could be held to be on substantive basis. But if the post itself is created only for a limited period to meet a particular contingency, and appointment thereto is made not through any process of selection but on a stop-gap basis then such an appointment cannot be held to be on substantive basis. The expression substantive basis is used in the Service Jurisprudence in contra-distinction with ad hoc or purely stop-gap or fortuitous. In *Baleshwar Dass & Ors. Etc. vs. State of U.P. & Ors.* (1981) 1 Supreme Court Reports 449, this Court held that when a person holds a post for an indefinite period especially for long duration in contradistinction to a person who holds it for a definite or temporary period or holds that on probation then it must be held that he held a post in a substantive capacity. Further if an appointment to the post is made by the proper authority after the person concerned passes the prescribed test and if a probation period has been prescribed therein, on completion of the probation period his appointment is further approved then also it can be said that he held a post in substantive capacity. This decision in *Baleshwar Dass* case (supra) was followed by this Court in *O.P. Singhal's case* (1985) 1 Supreme Court Reports, 351. It is also quite apparent in Service Jurisprudence that there exists difference between a substantive post as contra-distinguished from temporary post and appointment of an incumbent to these posts could be made either on substantive basis or on ad hoc or stop-gap basis. This being the legal position and in the case in hand the initial appointment to the post in the Land and Building Tax Department of the private respondents having been made after subjecting the incumbent to prescribed test and on being selected after initially making their appointments on probation and thereafter excluding the expression probation from the terms of appointment and continuing them against the temporarily created post till the posts were made permanent and then the incumbents were also made permanent, it cannot but be held that these private respondents had continuously held a post in the Land and Building Tax Department on substantive basis which post is equivalent to the post of Commercial Tax Inspectors Grade II in which these private respondents were absorbed, and consequently, for the purpose of determining the seniority of the appellants who were direct recruits to the post of Commercial Tax Inspector Grade II and the respondents who had held an equivalent post in the Land and Building Tax Department on substantive basis with effect from 1.3.1974 the continuous substantive service from that date will have to be reckoned. In fact in *Malakars* case, who was also a temporary recruit in the Land and Building Tax Department

alongwith the private respondents the High Court has recorded a finding that said Shri Malakar was holding the post in the Land and Building Tax Department in substantive capacity with effect from 1st March, 1974, and the said finding of the High Court was ultimately upheld by this Court in dismissing these Special Leave Petitions against the same. In coming to the aforesaid conclusion the High Court had examined the substance of the matter, namely, the surrounding circumstances, the mode and manner and the term of appointment and all other relevant factors. In the case in hand it is not disputed by Dr. Rajiv Dhawan, learned senior counsel appearing for the direct recruits/appellants that these private respondents had been appointed in the Land and Building Tax Department after a regular selection by a duly constituted committee. In the aforesaid premises, we unhesitatingly come to the conclusion that the appointment of the respondent in the Land and Building Tax Department with effect from 1.3.1974 was on substantive basis.

Dr. Rajiv Dhawan, no doubt, had raised the contention that the absorption of these respondents had not been made in accordance with the procedure prescribed for in the Absorption Rules, inasmuch as, no Absorption Committee had been constituted by the State Government in accordance with Rule 5 of the Absorption Rules, and the procedure prescribed for absorption in Rule 7 had not been followed. If these were the facts then the direct recruits could have assailed the very absorption of the private respondents in the cadre of Commercial Tax Officer Grade II but at no point of time the absorption of the private respondents had been assailed and what had been assailed is the determination of inter se seniority between the direct recruits and such absorbed employees. That apart, having scrutinised the materials available on record, more particularly, the document dated 25.6.1982, issued by the Government of Rajasthan, Administrative Department, indicating the absorption of the surplus employees as well as the document of the said department dated 17.6.1982, for similar absorption wherein it has been clearly indicated that the committee concerned has accepted the question of absorption of the surplus employees, we do not find any substance in the said submission of Dr. Rajiv Dhawan, the learned senior counsel appearing for the appellants.

Dr. Rajiv Dhawan had urged with vehemence that the appointments of the respondents in the Land and Building Tax Department would be ad hoc within the meaning of Rule 3 of Absorption Rules. The said Rule is quoted hereinbelow in extenso:

Rule 3. Definitions.- In these rules, unless the context otherwise requires;-- (a) Ad hoc appointment means temporary appointment made without selection of the candidate by any of the method of recruitment provided under the relevant service rules, or any orders of Government where no service Rules exist and otherwise than on the recommendations of the Commission if the post is in its purview. (b) Appointing Authority means the appointing Authority as defined by the Service rule of the State applicable to a particular post and where not so defined, as defined or constituted by the Rajasthan Civil Services (Classification, Control, and Appeal) Rules, 1958; (c) Committee means the Absorption Committee constituted by

the Government under rule 5 of these rules; (d) Commission means the Rajasthan Public Service Commission; (e) Departmental Examination means the departmental examination held under the provisions of the Rajasthan Civil Services (Departmental Examination) Rules, 1959; (f) Equated post means a post declared by the Committee as equated to the post held by the surplus personnel immediately before his being declared surplus; (g) Equivalent post means a post carrying an identical time scale of pay and involving similar nature of duties and responsibilities; (h) Government and State means respectively, the Government of Rajasthan and the State of Rajasthan; (i) New post means a post on which surplus employee is appointed by absorption under these rules; (j) Previous post means a post held in permanent, officiating, temporary or ad hoc capacity by a surplus employee on the date of his being declared surplus; (jj) Regularly appointed means persons appointed on the recommendations of the Commission if the posts are in its purview and the persons appointed in accordance with the procedure laid down for recruitment to the post or service, as the case may be, but does not include an ad hoc or urgent temporary appointment or officiating appointment which is subject to review and revision by the Departmental Promotion Committee; (k) Schedule means schedule appended to these rules; (l) Surplus Personnel or Surplus Employee means the Government servant to whom the Rajasthan Service Rule, 1951 apply and who are declared surplus by the Government or by the Appointing Authority, under directions of the Government, on their being rendered surplus to the requirements of a particular department of the Government due to the reduction of posts or abolition of offices therein as measures of economy or on administrative grounds but in whose case the Government decides not to terminate their services but to retain them in service by absorption on other posts. Provided that the Committee, appointed under the various Service Rules for adjudging suitability by screening either as an exception to general methods of recruitment or as initial constitution of service, may ex-gratia recommend, if any of the employee with more than three years of service on a post for which he is to be screened is not adjudged suitable and if thereafter has no right to be appointed on a lower post, for such lower post being offered to him by absorption and thereupon such an employee shall be treated as Surplus Employee under the provisions of these rules and such person may be absorbed on the lower post on the recommendations of the Committee subject to the conditions laid down by it. (m) Temporary appointment means a temporary appointment made either against a temporary or permanent post other than an ad hoc appointment. (n) Vacant post means a post under the Government not held substantively by a Government Servant. (o) Substantive Appointment means an appointment made under the provisions of these Rules to a substantive vacancy after due selection by any of the methods of recruitment prescribed under these Rules and includes an appointment on probation or as a probationer followed by confirmation on the completion of the probationary period. Note:- Due Selection by any methods of recruitment prescribed under these Rules will include recruitment either on initial constitution of Service or in accordance with the provisions of any Rules promulgated under proviso to Article 309 of the Constitution of India except urgent temporary appointment.

According to the learned counsel since there was no relevant Service Rules for recruitment to the post under the Land and Building Tax Department it has to be assumed that such appointment has been made without any selection and, as such the appointment would attract the expression ad hoc in Rule 3 (a) of the Absorption Rules. We are not persuaded to accept this contention inasmuch as the expression service rules does not necessarily mean Rules framed by the Governor in exercise of power under the proviso to Article 309 of the Constitution. It is well settled that the service condition including the mode of recruitment to a service could be determined by a set of Administrative Order in the absence of any statutory rule operative in the field. This being the position, and when the very advertisement for filling up of the post in the Land and Building Tax Department is examined it would be apparent that the said advertisement indicated minimum educational qualification, the age of the applicant, the number of vacancies and the mode of recruitment. It was further stipulated that the selection of the candidates will be by the written test in General Knowledge, General English, General Hindi and thereafter the interview. In the aforesaid clear enunciation of the mode of recruitment to the post by the competent Executive Authority, the contention of Dr. Rajiv Dhawan that the appointments of the private respondents had been made without any selection cannot be accepted. Dr. Rajiv Dhawan alternatively argued that the second part of the definition in Rule 3(a) would also be applicable to the case in hand inasmuch as though the temporary appointment of the private respondents to the Land and Building Tax Department had been made by the order of the Government for which there was no service rules and as such, the appointment cannot be ad hoc. This submission also cannot be accepted on a true interpretation of the second part of Rule 3(a). To attract the second part the conditions to be fulfilled are (1) there does not exist any Service Rule for the appointment (2) the appointment is made under the orders of the government and (3) such appointment is made otherwise than on the recommendation of the Commission if the post comes within the purview of the Commission. It is nobody's case that the posts created under the special scheme to which the private respondents had been recruited in the Land and Building Tax Department do come within the purview of the Service Commission. In such a case if there is no service rules appointment is made by an order of the government to the post then also it will not be an ad hoc appointment in terms of Rule 3(a) of the Absorption Rules. But as we have already stated, expression Service Rule cannot be given a restrictive meaning in the absence of the definition of the said term and, therefore, it would include within its sweep the necessary Government Order providing the method of recruitment. In the case in hand in view of our conclusion, the Government Order did prescribe the method of recruitment it would be difficult for us to hold that there was no Rule existing providing the mode of recruitment. Consequently even the second part of the definition of ad hoc appointment contained in Rule 3 (a) of the Absorption Rules to have no application. The contention of Dr. Dhawan, therefore, cannot be sustained.

The last submission of Dr. Dhawan that the status and character of service which the surplus personnel like private respondents were holding, prior to their absorption must get its colour from the nature of absorption itself, as indicated in Rule 7 equally does not appeal to us. Rule 7

merely provides the procedure for absorption of the surplus personnel. After the constituted Absorption Committee allots surplus personnel to different departments for appointment, the appointing authority has to issue orders of appointment of such personnel either on substantive or on officiating or on temporary or on ad hoc basis as indicated in Rule 7. This absorption in question or such orders of appointment issued by the appointing authority under Rule 7 cannot have any bearing to decide as to what was the status and nature of service these surplus personnel were holding prior to being declared as surplus. For the purpose of Rule 15 what is necessary to be examined is the question as to whether the absorbed surplus employees were holding the post from where they are declared to be surplus on substantive basis, and if so, from what date. That question has to be answered on the basis of relevant factors as already discussed, namely nature of post, the nature of test or selection held for filling up the post, the period of duration with which incumbent availed the post and all other relevant materials. This being the position, we do not find any substance with last submission of Dr. Rajiv Dhawan. In the aforesaid premises, these appeals fail and are dismissed. There will be no order as to costs.