

PETITIONER:
BAIDYANATH JENA & ANR.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 18/09/1998

BENCH:
SUJATA V. MANOHAR, G.B. PATTANAIK.

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Mrs. Sujata V. Manohar, J.
Delay condoned.
Leave granted.

These appeals are from a judgment of a Full Bench of the Central Administrative Tribunal dated 29.9.1988 delivered T.A. No.90 of 1987 along with O.A No.146 of 1986. By a subsequent amendment in these appeals, the consequential judgment of the Central Administrative Tribunal dated 6.8.1993 in T.A. No. 90 of 1987 along with O.A. No. 146 of 1986, giving effect to the said Full Bench judgment of the Tribunal and also decoding another issue raised in O.A.No.140 of 1986, has also been allowed to be challenged. The appeals are filed by the State of Orissa the Union of India as also senior officers of the Orissa State Police Service who were on the Select List, of 1983 for promotion to the Indian Police Service and who have been thereafter promoted to the Indian Police Service. The original application before the central Administrative Tribunal who are now respondents before us were senior officers in the Orissa State Police Service whose names were included in the Select List of 1962 for promotion to the Indian Police Service; but whose names did not find a place in the Select List of 1983 for promotion to the Indian Police Service.

The promotion from the Orissa State Police Service to the Indian Police Service is governed by the Indian Police Service (Appointment by Promotion) Regulation of 1955 as amended from time to time. Under Regulation 3 of the Indian Police Service (Appointment by Promotion) Regulation of 1955, a Committee is required to be set up as provided therein for preparation of a list of suitable officers for promotion to the Indian Police Service. The preparation of such a list by the Committee is governed by Regulation 5. The relevant provisions of Regulation 5 for our present purposes are as follows :

"5. Preparation of a list of Suitable officers.

(1) Each Committee shall ordinarily meet at intervals not exceeding one year and

prepare a list of such members of the State Police Service as are held by them to be suitable for promotion to the Service. The number of members of the State Police Service included in the list shall not be more than twice the number of substantive vacancies anticipated in the course of the period of twelve months, commencing from the date of preparation of the list, in the posts available for them under rule 9 of the Recruitment Rules, or 5 per cent of the senior posts shown against items 1 and 2 of the cadre schedule of each State or group of States, whichever is greater.

(2) The Committee shall consider for inclusion in the said list, the cases of member of the State Police Service in the order of seniority in that service of a number which is equal to three times the number referred to the sub-times the number referred to in sub-regulation (1) : Provided that

Provided further that in computing the number for inclusion in the field of consideration, the number of officers referred to in sub-regulation (3) shall be excluded :

Provided also

(2A)

(3) The Committee shall not consider the cases of the Members of the State Police Service who have attained the age of 54 years on the first day of January of the year in which it meets :

Provided that a member of the e State Police Service whose name appears in the Select List in force immediately before the date of the meeting of the Committee shall be considered for inclusion in the fresh list, to be prepared by the Committee, even if he has in the meanwhile attained the age of 54 years.

Provided further

(4)

(5)

(6) The list so prepared shall be reviewed and revised every year.

(7) Select List (1) The Commission shall form the Select List of the members of the State Police Service.

(2)

(3) The list as finally approved by the Commission shall form the Select List of the members of the State Police Service.

(4) The Select List shall ordinarily be in force until its review and revision, effected under sub-regulation (6) of regulation 5, is approved under sub-regulation (1) or, as the case may be, finally approved under sub-regulation (2).

Provided that"

Regulation 5(1), therefore requires the Committee to meet once a year to prepare a Select List. The number of

State Police Service members to be included in the Select List depends upon the number of substantive vacancies anticipated in the course of the coming 12 months. The total number on the list is required to be twice the number of such vacancies, where no vacancies are anticipated in the coming years, the rule requires that the number equivalent to 5 per cent of senior posts shown against item 1 and 2 of the cadre schedule of the concerned State should be considered as the number of vacancies for calculating the number to be included in the Select List. Under sub-regulation (2), for the purpose of inclusion in the Select List the Committee shall consider in the order of seniority three times the number required in the Select List under sub-regulation (1) of Regulation 5.

Accordingly a Select List of 1982 was prepared on the basis of anticipated vacancies in the forthcoming year. The names of the original applicants before the Central Administrative Tribunal were included in the Select List of 1982. The applicants were, however, not appointed during the next year 1983. In December 1983, the Committee met and prepared on 27.12.1983 a Select List of 1983. For the forthcoming year there were no anticipated vacancies. Therefore, under sub-regulation (1) of Regulation 5, the Committee considered 5 per cent of the senior posts shown against items 1 and 2 of the cadre schedule for the State of Orissa to decide the number of anticipated vacancies. The number came to three "vacancies". On that basis, the Committee under sub-regulation (2) considered the names of the members of the Orissa State Police Service "In the order of seniority for inclusion in the Select List prepared in 1983. The original applicants did not find a place in the Select List of 1983.

According to the original applicants every person who was on the previous Select List of 1962 is entitled to be considered for inclusion in the Select List for the next year i.e. Select List of 1983. The applicant rely upon the proviso to Sub-regulation (3) of Regulation 5 in support of their contention. To examine this contention it necessary to look at the scheme of Regulation 5. Regulation 5(1) prescribes the method by which the number of persons on the Select List will be determined. Under sub-regulation (2) for putting the names of persons on the Select List the Committee is required to consider, in the order of seniority, three times the number referred to in sub-regulation (1). The second proviso to sub-regulation (2), however, provides that in considering the names in the field of consideration the officers who are referred to in sub-regulation (3) shall be excluded. Sub-regulation (3), therefore, is meant to exclude certain people who may otherwise, be in the zone of consideration, Sub-regulation (3) provides that those who have attained the age of 54 years on the 1st day of January of the year in which the Committee meets, shall not be within the zone of consideration. The proviso to sub-regulation (3), however, makes an exception. It provides that if a person who has so attained the age of 54 years was in the previous Select List, his name shall be considered. The Tribunal has interpreted this proviso to mean that every person whose name was in the previous Select List shall be included in the subsequent Select List. This interpretation is not borne out by the scheme of sub-regulation (3) read with subregulation (2). The proviso to sub-regulation (3) is an exception to the Rule in sub-regulation (3) that those who have attained the age of 64 years shall not be included in the Select List. The only exception is in the case of those

persons whose names were in the previous Select List and who have attained, in the meanwhile, the age of 64 years. All these persons are required to be considered. The proviso to sub-regulation (3), therefore, covers only those persons who have attained the age of 64 years and whose names were in the previous Select List.

Similar, Regulations for promotion to the Indian Administrative Service were considered in *Ramnand Prasad Singh and Anr. etc.v. Union of India and Ors. etc.* ([1996] 4SCC 64). Regulation 6 of the I.A.S. Promotion Rules which is similar to Regulation 6 in the present case, was interpreted for the purpose of deciding who were within the zone of consideration under Regulation 5. This Court said that zone of selection under Regulation 5 consists of three parts, (i) Officers who fall within Regulation 5(2) after excluding all those officers falling under Regulation 3, (ii) Officers who have attained the age of 54 years who are carried forward from the earlier selection list in force, (iii) Officers above the age of 54 who have been deprived of their chance of being considered due to non-holding of meeting of the Selection Committee [second proviso to sub-regulation (3)]. Hence sub-regulation (3) does not provide for considering all those persons who were in the previous Select List for selection to the Select List for the subsequent years. The list has to be prepared in accordance with Regulation 5(2). The only exception is in respect of those in the previous Select List who have attained the age of 54 years.

The original applicants contend that under Regulation 7 of the Indian Police Service (Appointment by Promotion) Regulations, sub-regulation (4) of Regulation 7 provides that the Select List shall ordinarily be in force until its review and revision effected under sub-regulation (6) of Regulation 5. Regulation 5(6) also states that the list has to be reviewed and revised every year. They submit that the residue of the previous list must, therefore, form a part of the new list because Regulations 7(4) and 5(6) talk about review and revision of the Select List. However, Regulation 5 of which sub-regulation (6) forms a part, quite clearly lays down the manner in which the list has to be annually reviewed and revised. A new list has to be prepared every year and the list so prepared is a reviewed/revised list for that year. From these sub-regulations one cannot spell out that the members on the old list will continue to form a part of the new Select List when the provisions of Regulation 5 are expressly to the contrary. A similar agreement was rejected by this Court in the case of *Union of India v. Mohan Lal Capoor & Ors.* ([1974] 1 SCR 797, 803). It said that although the new Select List was called a review/revision of the previous list, it was to be prepared on the basis of fresh assessment. Inclusion in the Select List for one year was not an entitlement to inclusion in the next List. The direction given by the Full Bench of the Tribunal, therefore, that the applicants who were in the Select List of 1982 are required to be considered for the Select List of 1983, cannot be sustained. The consequential directions given by the Tribunal in the impugned judgment of 6.8.1993 also have to be set aside.

The next question that we have to consider pertains to an individual respondent one Raiguru who had filed O.A. No.146 of 1986 before the Central Administrative Tribunal. He contended that his officiating service in the Indian Police Service should count for seniority in the Indian Police Service. Raiguru who was a senior officer in the

Orissa State Police Service and was in the Select List for 1982 was given an officiating promotion to the Indian Police Service under an order of 18.6.1982 and he started officiating in the Indian Police Service with effect from 23.6.1982. Despite being on the Select List of 1982 Raiguru, however, could not be promoted regularly to the Indian Police Service with effect from 23.6.1982. Despite being on the Select List of 1982 Raiguru, however, could not be promoted regularly to the Indian Police Service before the Select List of 1983 was finalised. His name was not included in the Select List for 1983, Thereafter by an office order dated 22.7.1983 Raiguru was again allowed to officiate against a post of Additional S.P. in the Indian Police Service cadre for a period not exceeding three months under Rule 9 of the I.P.S. Cadre for a period not exceeding three months under Rule 9 of the I.P.S. (cadre Rules), 1954 was again granted on 5.7.1985.

Thereafter by a notification of 10.1.1986 a number of officers belonging to the Orissa Police Service including Raiguru were allowed to officiate in Orissa Police Service Senior Class I on ad hoc basis for a period of one year or till the recommendations of the Orissa Public Service Commission was received, whichever was earlier. The appellant was granted a post in the Orissa Police Service Senior Class I as Additional Superintendent of Police, Balasour. However, by an office order dated 16.5.1987 he was again allowed to officiate against a post of Additional S.P. in the I.P.S. Cadre for a period not exceeding three months under Rule 9 of the I.P.S. (Cadre) Rules, 1954, By a notification dated 30.4.1988, Raiguru who was described there as Orissa Police Service Class I Additional Superintendent of Police, Bolangir, was transferred and his service was placed at the disposal of Commerce and Transport (Transport) Department for his posting as Chief Vigilance Officer under the Orissa Transport Company Limited, Berhampur. These orders show some postings in the I.P.S. Cadre under Rule 9 and at least two postings in the Orissa Police Service (OPS) Cadre or elsewhere during the period 23.4.1982 to 30.4.1988.

Under an order of the Central Administrative Tribunal dated 19.3.1990 in O.A.No. 97 of 1989 filed by Raiguru, (who seems to have a penchant for filing OAS) the Tribunal has given a deemed date of 1st of February, 1989 as the date of regular promotion of Raiguru to the I.P.S. Cadre. This date has not been challenged. Raiguru has claimed that his officiating service in the I.P.S. Cadre from 23.6.1982 should count for seniority in the I.P.S. Cadre which relief has been granted to him.

To examine the question of seniority it must firstly, be borne in mind that during the period 23.6.1982 until 1.2.1989, the deemed date of promotion to the I.P.S. Cadre, Raiguru's appointment to the I.P.S. Cadre was only temporary and in an officiating capacity under Rule 9 of the I.P.S. Cadre Rules. Rule 9 of the Indian Police Service (Cadre) Rules, 1954 provides as follows :-

"Temporary appointments of non-cadre officers to cadre posts, (1) A cadre post in a State may be filled by a 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 no suitable cadre officer available for filling the vacancy; Provided where a cadre post is filled by a non-Select List officer, or a Select List officer who is not next in order in the Select List, under this sub-rule, the State Government shall forthwith report the fact to the Central Government together with the reasons for making the appointment."

Therefore, office orders of 22.7.1983, 5.7.1985 and 16.5.1987 are all office order of temporary appointment to a cadre post in the I.P.S. and the same is the position with regard to the first order of 18/23.6.1982.

The seniority in the Indian Police Service (I.P.S.) is governed by Indian Police Service (Regulation of Seniority) Rules, 1954 (hereinafter referred to as the Seniority Rules). Under Rule 3(1) every officer shall be assigned a year of allotment in accordance with the provisions hereinafter contained in the said Rule. Sub-rule (3) of Rule 3 is as follows :-

Sub-rule(3) of Rule 3: The year of allotment of an officer appointed to the Service after the commencement of these rules shall be -

(a) where the officer is appointed to the Service on the results of a competitive examination the year following the year in which such examination was held;

(b) where the officer is appointed to the Service by promotion in accordance with rule 9 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the Service in accordance with rule 7 of these Rules who officiated continuously in the senior post from a date earlier than the date of commencement of such officiation by the former:

Provided that the year of allotment of an officer appointed to the Service in accordance with rule 9 of the Recruitment Rules who started officiating continuously in a senior post from a cadre earlier than the date on which any of the officers recruited to the Service, in accordance with rule 7 of those Rules, so started officiating shall be determined ad hoc by the Central Government in consultation with the State Government concerned.

.....
Explanation 1: In respect of an officer appointed to the Service by promotion in accordance with sub-rule (1) of rule 9 of the Recruitment Rule, the period of his continuous officiation in a senior post shall for the purposes 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:

Provided

Explanation 2- An officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation in the senior grade he continuous to hold without any break or reversion a senior post otherwise than as a purely temporary or local arrangement.

Explanation 3- An officer shall be treated as having officiated in a senior post during any period in respect of which the State Government concerned certifies that he would have so officiated but for his absence on leave or training."

The reference to Rule 9 of the Recruitment Rules in the said sub-rule (3) of Rule 3 is to recruitment by promotion from the State Police Service. Therefore, Rule 3(3)(b) provides for the manner in which the year of allotment has to be assigned to an officer promoted from the State Police Service. Under Explanation 1, the period of his continuous officiation in a senior post shall, for the purpose of determining seniority, count only from the date of inclusion of his name in the Select List or from the date of his officiating appointment to such senior post, whichever is later. Explanation 2 provides that an officer shall be deemed to have officiated continuously in a senior post in the I.P.S. Cadre if, during the period from that date to the date of his confirmation, he continues to hold without a break or reversion such a post otherwise than as a purely temporary or local arrangement.

Therefore, officiation in a senior post in the I.P.S. Cadre will count for seniority provided such officiation is continuous and the post is not held as a purely temporary or local arrangement. From the available material, it is difficult to see how Raiguru could be said to have held the post in the I.P.S. Cadre continuously till his deemed regular appointment on 1.2.1989. Even if we assume that in the interregnum between the different office orders he continued to hold the same post, this cannot be considered as regular officiation in the absence of any order. Moreover, the notifications of 10.1.1986 and 30.4.1988 show that pursuant to those notifications he was given postings in the Orissa Police Service Senior Class I post and later he was also given a posting as Chief Vigilance Officer in the Orissa Transport Company. Therefore, it cannot be said that till 1st of February, 1989 which has been accepted by all sides as the deemed date of regular promotion to the I.P.S. Cadre of Raiguru, he was continuously officiating in a senior post in the I.P.S. Cadre otherwise than as a purely temporary or local arrangement.

The appellants have also pointed out that on 7.7.1988 six temporary posts in Orissa Police Service Senior Class I in the rank of Additional S.P. were created in order to regularise the officiation of six officers including Raiguru in the I.P.S. Cadre posts. Against the name of Raiguru the period of irregular officiation is mentioned as 23.6.1982 to 31.1.1986. In paragraph 4 of the letter of sanction dated 7.7.1988, it is stated that "officers concerned were allowed to officiate as Additional S.P. against cadre post of I.P.S. for a period of three months under Rule 9 of I.P.S.(Cadre) Rules but continued to hold a post of Additional S.P. without any further extension by the Government. Since the Government by creating post of Additional S.P. (unspecified) in O.P.S.

Senior Class I, it is necessary now to fix up their pay during the period of their officiation as mentioned in the Government Order". Clearly, therefore, the officiation in the I.P.S. Cadre beyond a period of three months under each of the orders was irregular officiation which had to be regularised by creating posts in the Orissa Police Service Senior Class I Cadre. There is another order of 9.7.1991 by the Under Secretary to the Government of India to give effect to the judgment dated 31.3.1989 in T.A. No. 2 of 1988 filed by Raiguru under which the Tribunal had directed that Raiguru be given the allowances attached to the post of Additional S.P. during the period of his officiation). To give effect to this order, the Government of India, in order to regularise the payment of such pay and allowances, in compliance with the said Judgment, approved the creation of a temporary post of Additional S.P. to the I.P.S. Cadre of Orissa for the period from 23.6.1982 to 7.7.1988. This creation of a post was pursuant to the order of the Tribunal in T.A. No.2 of 1988 and was only for the purpose of regularising payment of pay and allowances to Raiguru under that order. It does not give him any right to claim seniority on the basis of the order of 9.7.1991. The said order cannot and is not meant to give him any benefit of seniority on that basis. The order is merely to regularise payment of allowances of an Additional S.P. to Raiguru because of the judgment of the Tribunal in T.A. No.2 of 1988.

Apart from a question mark against his continuous officiation, there is another hurdle in the way of counting such officiation for seniority. Explanation 1 to Rule 3(3)(b) of the Seniority Rules requires that such officiation must be during the period when the officer's name is on the select list. Otherwise, officiation does not count for seniority. We have not been shown that from 1983 to 1989, Raiguru's name was on the select list for each of those years. The Tribunal was, therefore, not right in granting to the appellant seniority on the basis of his temporary officiation commencing from 23.6.1982 when there are Seniority Rules which expressly lay down the manner in which such seniority Rules which expressly lay down the manner in which such seniority is to be given. Those Rules have to be followed.

Our attention was drawn to a decision in the case of Union of India etc. v. G.N. Tiwari, K.L. Jain & Ors. [(1985) Supp. 3 SCR 744], where this Court considered similar Rules pertaining to the Indian Administrative Service. In that case the concerned person had officiated in a senior post under Rule 9 of the corresponding I.A.S. Cadre Rules from 10.11.1975 and he had continued to officiate until he was regularly appointed to the I.A.S. on 7.12.1926. On that basis he was assigned a year of allotment under Rule 3(3)(b) of the I.A.S. (Seniority) Rules. The Court held that his continuous officiation should count for the purposes of Rule 3(3)(b) of the I.A.S. (Seniority) Rules. This was a case where a person was appointed under Rules. This was a case where a person was appointed under Rule 9 of the Cadre Rules to officiate in a senior post and he continued to so officiate until his actual regular appointment. In these circumstances, the Court held that his continuous officiation must count for the purposes of seniority under Rule 3(3)(b) of the Seniority Rules.

Another case where the same Rules with which we are concerned came up for consideration was the case of M.V. Krishna Rao and Ors. v. Union of India and Ors. ([1994]

Supp. 3 SCC 553). In that case the appellant had been appointed to officiate in a senior post under Rule 9 of the I.P.S. Cadre Rules. There was a challenge to his continuous officiation under Rule 9 as being not in accordance with Rule 9. Nevertheless, the person had continued to officiate in the senior post. While so officiating he was included in the Select List with effect from 9.1.1978. Pursuant to the inclusion in the Select List, he was appointed regularly to I.P.S. on 19.12.1978. The Court said that in view of Explanation 1 to Rule 3(3) which provides for counting continuous officiation only from the date of inclusion in the Select List, the appellant was entitled to count his seniority in the I.P.S. post from 9.1.1978. The Court rejected various objections relating to that person's officiation as not being entirely in accordance with Rule 9. Nevertheless, what was important was that the person had officiated in a senior post continuously until his name was included in the Select List and until his regular appointment. Although he had officiated prior to the inclusion of his name in the Select List, he was given seniority only from the date of inclusion of his name in the Select List.

The provisions of Rule 3(3)(b) of the Seniority Rules have been interpreted by this Court in paragraph 8 of that judgment. In respect of the promotes the Court has said that under Rule 3(3)(b), in the case of a promotee his year of allotment shall be the year of allotment assigned to the junior-most among the direct recruits who officiated continuously in a senior post from a date earlier than the date of commencement of officiation by such promotee. In the case of a promotee the period of his continuous officiation in a senior post shall count from the date of inclusion of his name in the Select List or from the date of his continuous officiating appointment whichever is later. Explanation 2 seeks to exclude the period of temporary posting made by way of local arrangement from the purview of continuous officiating service.

Therefore, in the present case it is necessary to establish (1) the period of continuous officiation in the senior post by Raiguru; and (2) the period of continuous officiation, if any, after his inclusion in the Selection and officiation must coincide and should be continuous to form a basis for granting seniority. When the first order of 18.6.1982 was issued under Rule 9 Raiguru was on the Select List of 1982. However, when the next order of 22.7.1983 was issued under Rule 9 Raiguru was not in the Select List for that period. There are two subsequent orders of 1985 and 1987 for his continuous officiation. It is not shown whether during this entire period the name of Raiguru was on the Select List. Then in 1986 he was clearly not officiating in a senior post but he was posted in the Orissa Police Service Senior Class I Service and the same is the case with the order of 30th of April, 1988. In the order of 30th of April, 1988, Raiguru is described as holding the post in Orissa Police Service Senior Class I. In the light of these facts it is not possible to hold that prior to his deemed date of promotion on 1.2.1989 he was continuously officiating a senior post in the I.P.S. Cadre or that such officiation was at a time when his name was on the Select List because unless such officiation is during the period when the name of the officer is on the Select List it will not count for seniority under Explanation 1 to Rule 3(3)(b). This not being the case here, the respondent-Raiguru cannot be given the benefit of the so called continuous officiation for his seniority.

Learned counsel for the respondent-Raiguru has relied upon Union of India and Anr. v. Harish Chander and Ors. ([1995] 2 SCC 48), where this Court held that officiation for a long period would count for seniority. He has also relied upon case cited there. However, when there are express Rules which prescribe how and when continuous officiation will or will not count for seniority, such Rules have to be enforced and one cannot resort to any general legal formulation. Three other cases were cited before us relating to seniority and year of allotment. These are Harjeet Singh v. Union of India 9[1980] 1 SCC 37) and Ramchandra Dayaram Gawande v. Union of India and Ors. ([1996] 10 SCC 420). All these cases deal with seniority and year of allotment. However, each of them turns upon its own special facts and have no application to the present case.

In the premises respondent-Raiguru is not entitled to claim seniority from 23.6.1982 or for any part of the period prior to 1.2.1989.

The appeals are accordingly allowed and the impugned judgment and orders of the Tribunal dated 29.9.1988 and 6.8.1993 are set aside and the original writ petition/applications are dismissed. There will, however, be no order as to cost.