

(1993) 08 GAU CK 0007

Gauhati High Court

Case No: Civil Rule No. 4581 of 1991

Bharat Baruah

APPELLANT

Vs

State of Arunachal Pradesh

RESPONDENT

Date of Decision: Aug. 3, 1993**Citation:** (1998) 3 GLJ 475**Hon'ble Judges:** S.K.Homchaudhuri, J**Bench:** Single Bench**Advocate:** A.C.Bora, A.B.Choudhary, A.Roy, A.Sharma, A.M.Majumdar, R.K.Jaitly,
M.Hazarika, D.K.Bhattacharyya, B.M.Choudhary, Advocates appearing for Parties

Judgement

1. In this petition vexed question of fixation of inter se seniority between the petitioner (a promotee) and the respondent Nos. 4 to 9 (the direct recruits) in the cadre of Grade II of Arunachal Pradesh Civil Service (Class I) is involved.
2. Petitioner's case is that he was initially appointed as Base Superintendent in the then North East Frontier Administration, (now Arunachal Pradesh) in the 1963. Subsequent to the appointment of the petitioner, the post of Base Superintendent was redesignated as Circle Officer. The petitioner received commendation certificate in the year 1970 in recognition of his sincere and efficient discharge of duties. In the year 1974, the President of India in exercise of power conferred by proviso to Article 309 of the Constitution framed the Arunachal Pradesh Civil Service Rules, 1974, hereinafter mentioned as "the Rules". As per Rule 5 of the Rules 50% of the posts in the service should be filled up by direct recruits and 50 % by promotion. Feeder posts to be filled up by promotion in the service has been mentioned in Schedule II of the Rules which are Circle Officer and Deputy Director of Supply and Transport Department.
3. By the notification No.APTT. 14/77 dated 29.4.77 the petitioner along with 8 others were appointed to officiate in Grade II post of Arunachal Pradesh Civil Service (Class I) on temporary basis with effect from the date of their taking over charge.

The appointment was made under Rule 22 read with Rule 23 of the Rules. Since then the petitioner continued to work in the Grade II cadre of the Arunachal Pradesh Civil Services (Class I). In the year 1981, the respondent Nos 4 to 9 were recruited directly in the Grade II cadre of the APCS (Class I). By notification dated 1.10.81 inter se seniority of the officers in Grade II of APCS (Class I) was published and the petitioner's inter se seniority was shown below the respondent Nos 4 to 9. The respondent Nos 4 to 9 were confirmed in the cadre with effect from 10.4.83 while the petitioner was confirmed with effect from 1.5.83. The petitioner submitted a representation against fixation of seniority below respondent Nos 4 to 9 in the cadre of Grade II APCS (Class I), but no order was passed on the representation. Again by notification dated 15.4.86 another seniority list was circulated without making any modification of the seniority list published on 1.10.81. The petitioner made representation on 23.3.86 against fixation of his seniority below the respondent Nos 4 to 9. On 7.11.89 the final seniority list was published showing the petitioner's seniority in the Grade II APCS (Class I) cadre correctly above the respondent Nos 4 to 9. Thereafter, the petitioner was placed in the Selection Grade of the APCS and was appointed as Additional Deputy Commissioner, Roing by notification dated 24.10.89. The respondent Nos 4 to 9 were also placed in the Selection Grade in the service at the same time. The petitioner's appointment to the post of Additional Deputy Commissioner was extended from time to time by subsequent notifications dated 9.2.90, 3.5.90 and 4.9.90. While the petitioner was working as Additional Deputy Commissioner, the Govt of Arunachal Pradesh, Appointment Department by the order dated 23.7.91, allowed him to officiate in the IAS cadre and posted him as Deputy Commissioner, Anini. However, by the impugned notification dated 29.10.91 the Govt of Arunachal Pradesh, Appointment Department, cancelled the seniority list circulated by letter dated 17.11.89, fixing the petitioner's inter se seniority above the respondent Nos 4 to 9 and restored the seniority list circulated by the Govt letter dated 15.4.86 with amendments, if any. Consequently the petitioner's inter se seniority has been pushed down below the respondent Nos 4 to 9. Feeling aggrieved, the petitioner has approached this Court in this writ petition.

4. Petitioner's contention is that being appointed in the Grade II cadre of Arunachal Pradesh Civil Service (Class I), hereinafter referred to as APCS, in April 1977, much earlier to respondent Nos 4 to 9, the petitioner's inter se seniority was rightly fixed above respondent Nos 4 to 9 by the seniority list circulated by the Govt letter No. APTT. 176/75/11 dated 17.11.89 and the impugned order dated 29.10.91 purporting to cancel the said inter se seniority list, is arbitrary, illegal and cannot be sustained.

5. The respondent No. 1, has resisted the contentions by filing affidavit in opposition as well as additional affidavit in opposition. In the affidavit in opposition the respondent No. 1 has contended that the petitioner was appointed in the cadre of Circle Officer on 12.11.63 and was confirmed in the said post on 10.9.69. The petitioner along with other Circle Officers were appointed under Rule 22 of the Rules to officiate in the post of Grade II APCS (Class I). The Selection Board constituted as

per the provision of the Rules met on 21.1.80 for selecting the officers for appointment to Grade II of APCS (Class I) in the substantive capacity by promotion, and the Selection Board recommended 28 officers out of whom 17 officers in order of merit could be appointed against the existing substantive vacant post of Grade IIAPSC (Class I) by order dated 19.5.80, published in the Gazette dated June 16,1980. The Selection Board in its subsequent meeting dated 8.6.81 observed that out of 28 selected officers, who were left out, should be appointed in substantive capacity in the subsequent vacancies as and when would arise. Out of the 17 officers appointed in Grade II APCS by the order dated 19.5.80, serial Nos 2 to 17 were senior to the petitioner in the cadre of Circle Officer and were officiating in the Grade II APCS before they were appointed. Shri NB Tamang, was at the relevant time was holding the post of Circle Officer, but because of his merit and suitability, he was recommended by the Selection Board in its meeting held on 21.1.80 for appointment to the Grade APCS (Class I). The petitioner was recommended but he having not found place amongst the first 17 in the select list, he was accommodated in Grade II APCS (Class I) by order dated 25.2.84. The petitioner was confirmed by the said order with effect from 1.5.83 in the Grade II APCS (Class I) as per the recommendation of the Selection Board made in its meeting dated 8th and 9th June, 1981. The respondent No. 1 has further contended that the petitioner was not a member of Grade II APCS (Class I) service before he was accommodated by order dated 25.2.84 with effect from 1.5.83 and, as such, he cannot claim seniority above respondent Nos 4 to 9, who became member of the service before the petitioner.

6. Respondent Nos 4 to 9 have filed counter contending that they were appointed by order dated 26.3.81 in the Grade II of APCS (Class I) directly against the posts reserved for direct recruits as probationer and after successful completion of probationary period they were confirmed in the service with effect from 10.4.83. All of them were appointed in substantive capacity before the petitioner. The petitioner did not become a member of the service till he was appointed in substantive capacity in the service by order dated 25.2.84 with defect from 1.5.83. As such, inter se seniority circulated by letter dated 15.11.89 was apparently wrong and the Govt has rightly cancelled the order and restored their seniority above the petitioner.

7. I have heard Mr. A. Sarma, learned counsel for the petitioner, Mr. AM Majumdar, learned Advocate General assisted by Mr. A. Roy, learned Govt Advocate, Arunachal Pradesh and Mr. DK Bhattacharyya, learned counsel for the respondent Nos 4 to 9.

8. Mr. Sarma has submitted that admittedly the petitioner was confirmed in the post of Circle Officer in 1969. As per Schedule I of the Rules, permanent strength of the service in APCS was 65. The petitioner being a confirmed Circle Officer, having rendered about 14 years service, was eligible for selection and appointment in the cadre in the year 1977 when he was appointed temporarily in the cadre under Rule 22 read with Rule 23 of the Rules. The petitioner admittedly continued to serve in the cadre till he was confirmed with effect from 1.5.83 by order dated 25.2.84. Mr.

Sarma submitted that it is well settled that seniority of the officers is to be counted from the date of his appointment and not from the date of confirmation. It cannot be said that the petitioner's initial appointment in the service was not in accordance to the Rules. Services rendered by the petitioner on and from the date of his appointment in Grade II of APCS (Class I) by order dated 29.4.77, is also not fortuitous, but regular. It is not the case of respondents that at the time of appointment of the petitioner by order dated 29.4.77 there was no vacancy in the permanent strength of service. On the other hand, the materials on records ie the inter se seniority list published from time to time clearly shows that there were vacancies in the permanent strength of service when the petitioner was appointed in the year 1977. Mr. Sarma has placed reliance in a decision of the Five Judges Bench of the Hon"ble Supreme Court in the case of Direct Recruit Class II Engineering Officers" Association vs. State of Maharastra, reported in AIR 1990 SC 1607. The principle enunciated by the Hon"ble Supreme Court in the said decision after taking into consideration of the earlier decisions as regards fixation of seniority are amongst other :

" (i) 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 a stopgap arrangement, the officiation in such post cannot be taken into account for considering the seniority:

(ii) If the initial appointment is not made by following procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted;

(iii) When appointment are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if the rules are framed in this regard they must ordinarily be followed strictly;

(iv) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed for a number of years use it was impossible to do so the inference is irresistible that the quota rule had broken down."

9. Mr. Sarma has further submitted that it is not the case of the respondents that existing quota rule was strictly adhered to. It is apparent from the record that the quota rules was not followed continuously for a number of years and as such, as per the law laid down by the Hon"ble Supreme Court in the case of Direct Recruit Class II Engineering Officers" Association (supra) for the purpose of fixation of inter se seniority, services, rendered by the petitioner on and from the date of appointment in the Grade II APCS (Class I) by order dated 29.4.77 is to be counted.

10. The learned Advocate General, Arunachal Pradesh on the other hand, has drawn my attention to Rule 2 (d) of the Rules which provides that "member of the service" means a person appointed in a "substantive capacity" to either grade of the service and includes persons appointed on probation to Grade II of the service. The petitioner was appointed on substantive capacity by order dated 25.2.84 with effect from 1.5.83. The petitioner for the first time was selected by the Selection Board for appointment in substantive capacity in the service in the year 1980 and that his position in the select list being much lower, he could not be appointed in the substantive capacity in 1980 against the vacancies to be filled up by promotion and he was appointed substantively after retirement of one KV Chari. The respondent Nos 4 to 9 were appointed in substantive capacity in the service as direct recruits before the petitioner and were confirmed in the cadre with effect from 10.4.83. As such, seniority of respondent Nos 4 to 9 have been rightly fixed above the petitioner. There was obvious mistake in the seniority list circulated in the letter dated 17.11.89 and the mistake was rectified by the impugned order dated 29.10.91.

11. Mr. DK Bhattacharyya, learned counsel for the respondent Nos 4 to 9 in adopting the submissions made on behalf of the respondent No.1 has submitted that the petitioner was not a member of the service before he was appointed in substantive capacity by order dated 25.2.84 whereas the respondent Nos 4 to 9 were appointed in the respective quota for direct recruit in the year 1981 initially as probationer and thereafter they were confirmed in the service with effect from 10.4.83, much earlier to the petitioner. Mr. Bhattacharyya, has further submitted that the period of service rendered by the petitioner in officiating capacity till he was appointed in substantive capacity cannot be counted for fixation of inter se seniority inasmuch as the service rendered by the petitioner during that period was fortuitous and cannot be counted towards inter se seniority.

12. Mr. Bhattacharyya has submitted that the ratio decidendi in the case of Direct Recruit Class II Engineering Officers' Association (supra) is distinguishable on the facts of the present case and the points involved in the present case is covered by the latest decision of the Hon"ble Supreme Court in the case of AN Sehgal vs. Raja Ram Seo Ram, reported in 1992 Suppl (1) SCC 304, as well as the decision in the case of SL Chopra vs. State of Haryana, reported in 1992 Suppl (1) SCC 391.

13. In the case of AN Sehgal (supra) on the question of fixation of inter se seniority between the direct recruits and promotees for the Haryana Services Engineers Class IPWD (Roads and Building Branch) Rules, 1969, the Hon"ble Supreme Court has held that promotees officiating against excadre posts does not become member of the service till appointed substantively to that cadre post and that his service prior to membership is to be treated as fortuitous and cannot be counted for seniority. Seniority of promotee is to be reckoned only from the date of availability of the cadre post. The officiating period of service from the date of initial promotion to the date of availability of the cadre post, would thus be rendered fortuitous and stand

excluded. In the case of SL Chopra (supra) on the question of fixation of inter se seniority between the direct recruits and promotees as per provision of Punjab Service Engineers Class I, PWD (Public Health Branch), the Hon'ble Supreme Court amongst other held that seniority of direct recruits in the cadre would be from the date of their initial appointment as Assistant Engineer, while the period of service rendered by the promotees from the date of initial promotion till date of availability of the cadre post would be fortuitous. Direct recruits though promoted later would become senior to the promotees and would be entitled to promotion to the next higher post of Superintending Engineer within their quota.

14. I have considered the submissions made on behalf of the petitioner as well as on behalf of the respondents. It is apparent from the admit of facts, that the petitioner possessed the requisite qualification for appointment to Grade II APCS (Class I) service in substantive capacity when he was appointed temporarily by order dated 29.4.77 in the service under Rule 22 of the Rules. Rule 22 of the Rules contemplates that officiating appointment in the service should be made on the basis of selection made by the Selection Board constituted under Rule 6 of the Rules. Authorised permanent strength of the service at the initial constitution, as can be gathered from Schedule I, was 65. It is not the case of the respondent No. 1 that at the time of appointment of the petitioner by order dated 29.4.77 in Grade II APCS (Class I), no post in the authorised strength of the service was lying vacant. Rule 22 of the Rules provides that when the Administrator was of the opinion that number of the officers available in the list referred to in subrule (3) of Rule 13 for appointment in the Grade II APCS (Class I) was not adequate having regard to the existing vacancies in the service, he might direct the Board to consider the case of the officers who have officiated for a period not less than 3 years in any of the post mentioned in Schedule II of the Rules and to prepare the select list. It is neither the case of the respondent No. 1 nor it is available from the records that the select list under subrule (3) of Rule 13 of the Rules for appointment to Grade II APCS (Class I) in substantive capacity was made by the Selection Board prior to appointment of the petitioner in the service by order dated 29.4.77. The petitioner was confirmed in the post of Circle Officer (a feeder post for recruitment to Grade II APCS) in the year 1969 and rendered about 14 years service as Circle Officer when he was temporarily appointed in Grade II APCS by order dated 29.4.77. It is also not the case of the respondents that the quota rule as regards appointment to Grade II APCS (Class I) was followed soon after framing of the Rules. Stand of the respondent No. 1 in this regard is illusory. Had the quota rule had been adhered to soon after constitution of the service, then it would have been possible to consider whether the petitioner was appointed to officiate against post falling within the quota of direct recruits, or not. From the records it appears that after absorbing the incumbents who held posts equivalent to post of Grade II and Grade I of APCS at the initial constitution of the service as per Rule 15 of the Rules, no selection either under Rule 7 or Rule 13 was made till 1980 and 1981 respectively. It is apparent that either the quota rule was

not followed or it was not possible to adhere to the quota rule till 1981 when for the first time the respondents Nos 4 to 9 were appointed as direct recruits in the Grade II APCS. The respondents are silent as to whether the posts in the permanent strength in Grade II APCS was available at the time when the petitioner was appointed temporarily by order dated 29.4.77. However, from the provisional seniority list published in the year 1981 it can be gathered that against authorized permanent strength of 65 in the service, 34 incumbents were absorbed in the service at its initial constitution leaving as many as 31 posts in the permanent strength of service vacant. As such it can safely be held that the petitioner's temporary appointment in Grade II APCS was made against vacant post in the permanent strength of the service and not against ex cadre post. It is also not the case of the respondent No. 1 that the petitioner was appointed to officiate against the vacant post which fell within the quota of direct recruit. Stand of the respondent No. 1 is that before passing of the order dated 25.2.84, confirming the petitioner in Grade II APCS with effect from 1.5.83, the petitioner did not become a member of the service. But the confirmation in service and appointment in the service in substantive capacity is not same. Appointment in substantive capacity means, appointment against substantive post in a service. Confirmation in service may take place later.

15. Undisputedly, the petitioner was qualified for appointment in Grade II APCS against existing vacant post in permanent strength of service when he was appointed temporarily in the service by order 29.4.77. It is also found that at that time vacant posts in the permanent strength of service was available and the petitioner's appointment was against vacant post in the permanent strength of service.

16. Rule 18 of the Rules contemplates that every person appointed under Rule 5 and 15 of the Rules to Grade II of the service shall be on probation for a period of 2 years and that the Administrator in case of any person may extend or reduce the period of probation. As per Rule 33 of the Rules the Administrator is empowered to relax any provision of the Rules, if in his opinion, it is expedient to do so in respect of a particular case. As already observed by order dated 25.2.84, the petitioner was confirmed in the Grade II APCS with effect from 1.5.83. As such, on the facts and circumstances of the case, it is to be presumed that the Administrator in the exercise of power under Rule 33 of the Rules, relaxed the provision of Rule 18 of the Rules in the case of the petitioner.

17. The ratio decidendi in the case of AN Sehgal (supra) as well as SL Chopra (supra), in my opinion, has no application on the facts and circumstances of the case inasmuch as, in both the cases the quota rule for filling up vacant posts in the respective services by direct recruits and promotees were followed and that the promotee in question was officiating either against ex cadre post or against the post which fell in the quota of direct recruits. In my opinion, the ratio decidendi in the

case of Direct Recruit Class II Engineering Officers" Association (supra) squarely applies on the fact of the present case. Although the petitioner's initial appointment was not made under subrule (3) of Rule 13 of the Rules, he having got requisite qualification for appointment in the Grade II APCS (Class I) service in substantive capacity at the time of his temporary appointment by order dated 29.4.77 and having rendered uninterrupted continuous service till his confirmation in the service with effect from 1.5.83 by order dated 25.2.84, the period of service rendered by the petitioner from the date of his appointment (29.4.77) till his confirmation in the service is to be counted towards fixation of inter se seniority in Grade II APCS (Class I).

18. For the reasons stated above, the petition, is allowed. The petitioner shall be deemed to be senior to respondent Nos 4 to 9 in cadre of Grade II of Arunachal Pradesh Civil Service (Class I). The respondents are directed not to give effect to the impugned notification dated 29.10.91 so far as it purports to affect the petitioner's inter se seniority above respondent Nos 4 to 9. I make no order to costs.