

(1981) 12 CAL CK 0014

Calcutta High Court

Case No: C.R. No's. 2859 (W) and 4034 (W) of 1978

Biplab Bhushan Mazumdar and

APPELLANT

Another

Vs

State of West Bengal

RESPONDENT

Date of Decision: Dec. 11, 1981

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 226, 309
- Essential Services Maintenance Act, 1968 - Section 3
- Government of India Act, 1935 - Section 241(2)(b)

Citation: 86 CWN 302

Hon'ble Judges: M.M. Dutt, J; A.K. Sarkar, J

Bench: Division Bench

Advocate: P.K. Sen Gupta, Sakti Nath Mukherjee, Bhagabati Prosad Banerjee, Ashim Ghosh and Partha Sen Gupta, for the Appellant; N.N. Gooptu, Senior Govt. Pleader, Suproakash Banerjee, Arun Prokash Sircar, Jamini Kr. Banerjee, Indrajit Sen and Pulak Ranjan Mondal, Somnath Chatterjee and Nigam Chakravarti, for the Respondent

Judgement

M.M. Dutt, J.

In these two Rules, the petitioners have challenged the validity of two Circulars dated March 28. 1978 and May 6. 1978, both issued by the State Government, consequent upon the cancellation of their officiating appointments or promotions and reversion to their substantive ranks. The writ petitions, out of which these two Rules arise, have been filed by the petitioners in representative characters under rule 11 of the Rules framed by this Court relating to Article 226 of the Constitution of India. The petitioners are either Lower Division Assistants or Upper Division Assistants in different Government departments. By the Circular dated December 1, 1972 issued by the Finance Department Audit Branch of the Government of West Bengal, certain guidelines for promotion were laid down. The guidelines were inter alia as follows :

1, (a) A Government servant should be selected for promotion on the ground of merit and suitability in all respects and not of seniority.

(b) Seniority should be taken into account only when it is impossible to - choose between two or more persons on grounds of merit alone.

2. It is considered necessary to indicate some guidelines in determining merit. The following facts should therefore be taken into consideration in deciding merit :

(b) An annual confidential report, off, the competent officer in the prescribed form should be given due weight in considering cases of promotion taking into account reports relating to paragraphs (b) and (c) below :

(b) Satisfactory work based on periodical reports which in case of certain categories will involve reports on maintenance of cast records, diaries etc. and an output of work according to the approved form.

(c) -The conduct of Government servants who resort to cease work and or indulge in acts of indiscipline like slogan-shouting, holding meetings etc. within office premises during the prescribed office hours and or report to or in any way abet strike for any period in violation of the provisions of Rule 3C of the West Bengal Service Rules, Part I and Rule 27 of the West Bengal Government Servants" Conduct Rules.

2. The Audit Branch of the Finance Department, Government of West Bengal, issued another Circular dated May 21, 1974 inter alia to the following effect. The question, whether in deciding promotion, confirmation, crossing of efficiency bar and marginally noted ancillary benefits as admissible to the State Government employees under the existing rules and orders of the Government, their presence or absence of days of Bundhs, cease work or strikes should be taken into account, has been under consideration of the Government for some time past.

After considering the question in all its aspects, the Governor has been pleased to lay down the following principles for. guidance of all concerned :

(a) In deciding the cases of promotion confirmation, crossing of efficiency bar and marginally noted ancillary benefits in respect of Government employees, their presence or absence on days of Bundhs, cease work or strikes shall also be taken into consideration along with other relevant factors. In this connection, attention is drawn to Rules 3B and 3C of the West Bengal Service Rules, Part I and Rule 27 of the West: Bengal Government Servants" Conduct Rules, 1959,

(b) In all pending cases of promotion, confirmation crossing of efficiency bar and other marginally noted ancillary benefits no order shall be passed and no order in this respect which has not yet been implemented shall be implemented until the records of the employee concerned are verified and or relevant facts including his attendance and non-attendance" on days when calls for Bundhs, cease work or strikes were given are ascertained. A sample form with a set of likely entries in this

respect is enclosed herewith for guidance and use.

3. The marginally noted benefits as referred to in the said Circular are as follows :

- (a) Declaration of quasi-permanent service with permanent status in the case of temporary Government employees;
- (b) Class IV contingency staff under Regular Temporary Establishment, and
- (c) Observation of work-charge staff in the Regular Establishment".

The pro-forma that has been annexed to the said Circular contains entries of the presence or absence of a Government employee on the days of strikes, cease work and Bundhs and the grounds of such absence, namely, whether on medical leave or no medical leave or without making any application. The respective days on which the strikes, cease work and Bundhs had taken place have been mentioned in the sample form.

4. By virtue of the said two Circulars dated December 1, 1972 and May 21, 1974, out of 30 petitioners in Civil Rule No. 2859(w) of 1978, 14 were granted officiating promotions to higher posts and 16 were granted New/Intermediate Selection Grades on an officiating basis. In Civil Rule No 4034(w) off 1978 all the petitioners were granted New/Intermediate Selection Grades on officiating basis. It is not disputed that the posts to which some of the petitioners in C. R. 2859(w) of 1978 were granted officiating promotions and the posts having New/Intermediate Selection Grades to which all the petitioners in Civil Rule No 4034(w) of 1978 and the rest of the petitioners in Civil Rule No. 2859(w) of 1978 were promoted on officiating basis, are all selection posts. The granting of officiating promotions or officiating selection grades to the petitioners in these two rules were on the basis of merit and suitability and not of seniority which was taken into account only when it was impossible to choose between two or more employees on the ground of merit alone as directed in the Circular dated December 1, 1972 There is also no dispute that in considering the question of promotions or granting of selection grades on officiating basis, the authorities concerned had taken into consideration the conduct of the Government servants who had absented themselves on the days of strikes, cease work and Bundhs without any application explaining such absence. It is obvious that as a result of absence of some Government employees on the days of strikes, cease work and Bundhs without any application explaining such absence, such Government employees incurred disqualifications, and such disqualifications were taken, into account by the authorities concerned while considering the question of promotions or grant of selection grades on officiating basis in terms of the said two Circulars.

5. It may be stated that the said Circulars and all other Circulars issued in connection with the implementation of the same were. however, cancelled by a Government Order as contained in the Memorandum No 3414-F dated April 23, 1977.

6. While the petitioners had been in the officiating positions either in higher posts or in selection grades, there was a change of Government, and it appears that there was a change of policy of the new Government, which is the present Government, with regard to promotion, confirmation, granting of selection grades etc On March 28, 1978. a Circular was issued by the Government in supersession of previous orders that confirmation, selection and promotion to higher grades of Class III and Class IV services and posts should be on the basis of seniority and not on the basis of annual confidential reports except in certain cases with which we are not concerned. Further, in paragraph 2 of the said Circular it has been laid down that the above principles would apply, mutatis mutandis to appointments to selection grades in Class III and Class IV services and posts. Thereafter, the Government also issued another Circular dated May 6, 1978 which is set out below :

Government of West Bengal

Finance Department

Audit Branch

No. 5357 (35C)-F

Calcutta, the 6th day of May, 1978.

ORDER

Due to operation of Finance Department Memo No. 5009 F dated 21.5.74 and Para 2(c) of Government Order No. 7119 F dated 1.12.72, a large number of Govt., employees could not get their "promotion to higher posts (including appointment to higher posts while having no lien on the lower feeder posts) and appointment to New/Intermediate Selection Grade posts as also the benefit of confirmation either in the basic posts or in the posts to which they were earlier promoted or appointed. In &II these respects, these employees happened to be superseded by their junior colleagues. Finance Department Memo No. 5009 F dt. 21.3.74 has since been withdrawn and para 2(c) of Government Order No. 7119-F dated 1.12.72 also deleted. A question has been under consideration of the Government for quite some time past as to the appropriate action to be taken for redressal of the grievances of the employees already deprived of the benefits of promotions and appointments to higher posts and Selection Grades as well as confirmation by virtue of operation of the Finance Department Memo and the Govt. Order referred to.

2. I am now directed by order of the Governor to say that after careful consideration of the matter the Governor has been pleased to direct that action be taken on the following lines :

I. (a) Those employees who have been already confirmed in the posts to which they were earlier promoted or appointed after superseding their senior colleagues need not be disturbed.

(b) The employees who were superseded by their junior colleagues as in (a) above should substantially be promoted to higher posts or appointed to Selection Grade posts, as the case may be, by creation of an equivalent number of such posts on substantive and supernumerary basis.

(c) The seniority of the employees thus promoted or appointed substantively to the supernumerary posts should be reckoned with effect from the date on which the last of the employees as in (a) above was confirmed in the cadre concerned;

"(d) The substantive supernumerary posts created as in (b) above will be subject to future adjustment and during" the continuance of the supernumerary posts an equal number of posts belonging to the cadre lowest in the ladder of feeder posts" will be kept vacant (Example: If a substantive post of Head Asstt. is required to be created, a post of Lower Division Clerk will remain Vacant)

(e) Sub", paras (a), (b), (c) and (d) above would equally apply, mutatis mutandis, to those cases where" the confirmation in supersession of senior colleagues was made in basic posts.

(f) Where the supersensitive of senior colleagues was made in consultation with the P. S. C, action as indicated in (b) and (c) above should also be taken in consultation with the P. S. C

II. (a) Those employees who are still unconfirmed in the posts (including Selection Grade Posts) to which they were earlier promoted or appointed after superseding their senior colleagues should be reverted to their former posts in the lower rank after necessary cancellation of the orders of their officiating promotion or appointment.

(b) The vacancies thus caused may then be filled up, according to rules, by promotion from amongst the superseded and -reverted employees. In the matter of selection, promotion to higher grades of Class III and Class IV services and posts, the principles laid down in Finance (Audit) Department's Memo No. 3940 (280)-F dt. 28th March, 1978 should be followed.

(c) The promotion or appointment to higher grades of services and posts as referred to in II (b) above should take retrospective effect from the dates on which the employees in II (a) above were originally promoted or appointed. To give retrospective effect in this manner, an appropriate number of supernumerary posts should be created on a temporary basis for the specific period from the date on which a particular posts was originally filled up till the date of cancellation as in II (a) above. In the cases of the persons who may be repromoted after reversion on the strength of this order no supernumerary posts will be required to be created.

(d) Where The supersession of senior colleagues was made in consultation with the P. S. C, action indicated as in II (b) above should be taken in consolation with the P. S. C.

(e) After cancellation of earlier orders of officiating promotion or appointment as in II (a) above, an employee having lien on the lower feeder post will come over to his substantive post "and an employee having no such lien will be, appointed to the post which he held prior to holding of the post in respect of which the appointment has been cancelled. The pay of an employee having no lien on any post will be fixed in relaxation of normal rules on his appointment to the lower post which he was holding before appointment to the higher post, in the same manner in which his pay would have been fixed had he had lien on the lower post.

3. It has been decided that the above mentioned measures will come into force with immediate effect and all appointing authorities should be in stroked accordingly.

Sd/- A. K. Sen,

Chief Secy, to the Govt, of West Bengal.

7. In terms of the directions contained in clause II (a) of the said Circular dated May 6, 1978, the officiating promotions of the petitioners either to higher posts or the grant of selection. grades on officiating basis were cancelled and they were reverted to their substantive posts or ranks with immediate effect. The petitioners being aggrieved by the said two Government Circulars dated March 28, 1978 and May 6, 1978 have challenged the validity thereof in the writ petitioners. It has been prayed that the impugned Circulars should be declared ultra vires, void and of no effect and*an order may be passed or direction given commanding the respondents to forthwith recall, cancel or withdraw the impugned Circulars and to forbear from giving any effect thereto. The petitioners have also prayed for the issue of a writ in the nature of Certiorari for the quashing of the two impugned Circulars.

8. The respondents have opposed both the two Rules by tiling affidavits-in-opposition. Mr. Nara Narayan Goop to, learned Senior Government Pleader appearing on behalf of the Government respondents has placed reliance on one of such affidavits-in-opposition affirmed by the respondent no. 4, Mangazhi Gov. indan Kutty, Secretary, Finance Department, Government of West Bengal. In Clauses (a) and (b) of paragraph 5 of the affidavit, the purport of the said Government Circulars dated December 1, 1972 and May 21, 1974 have been given. Thereafter, in clause (c) of paragraph 5, it has been stated as follows :

(c). The- Departmental authorities were asked to implement the above directions very strictly. This laid on one hand to deprivation of the many senior and experienced employees of their due service benefits and on the other hand awarding of very undue and premature benefits in quick succession to very junior employees on the principal consideration of their mere presence on the days of Strikes Bundhs without proper regard whatsoever for suitability "and or efficiency to carry on the duties and responsibilities attached to the posts to which they were being appointed or promoted, here by resulting in a serious loss of efficiency in the administration Such deprivation of the service been Hs to the "employees

concerned, who were otherwise eligible to be promoted or confirmed, created frustration in their minds as well as in their future, ser: vice career and this also resulted in i serious loss of efficiency in the administration.

(d). With a view to restoring efficiency in the administration in the interest of public service and also with a view to undoing the wrong perpetuated on the employees so long because the Finance Department Memorandum as aforesaid and further with a view to meeting out justices to the employees as well under the Government of West Bengal, the State Government had to take the policy decision, as contained in the Government Order No. 5357 (35c)-F, dated May 6, 1978 (a copy whereof is Annexure "D" to the said petition) with a bona fide and or good intention to give equal opportunity to the Government employees in the case of promotion and to remove the discriminatory treatment, The said decision was made in the general interest of the employees under the Government of West Bengal on the principle of natural justice. It also seeks for redressal of the grievance of the employees already deprived of various service benefits because of their physical absence on the days of Strikes or Bundhs.

9. On a comparison of the case sought to be made out in the said affidavit in-opposition with the impugned Circular dated May 6, 1978, we find that there is a substantial difference between the two. The impugned Circular was issued inter alia directing the cancellation of officiating promotions or appointments only on the ground that such officiating promotions or appointments were given to Government employees superseding their senior colleagues. Nowhere in the impugned Circular it has been stated that such officiating promotions or appointments were given without proper regard for suitability and or efficiency as alleged in clause (c) of paragraph 5 of the affida-vit-in-opposition. Indeed, by the rules framed in the shape of executive instructions as contained in the impugned Circular dated March 28, 1978, it has been directed that confirmation, selection and promotion for higher grades for Class III and Class IV services and posts should be on the basis of seniority, and not on the basis of their annual confidential reports. Thus it appears that by the impugned Circular dated March 28 1978, the Government purports to do away with the consideration of merit in granting promotions. What appears from the two impugned Circulars is that as certain Government" employees who happened to be seniors to those who were granted officiating promotions were not granted such promotions on a consideration of merits which also included the disqualification because of their participations in the Strikes or Bundhs, the Government issued the two impugned Circulars. The affect of the impugned Circulars is that promotions will be made on the basis of seniority without any consideration of merits, even though, admittedly, the promotional posts in question are selection posts.

10. It has been urged by Mr. Provat Kumar Sen Gupta, learned Counsel appearing on behalf of the petitioners in C. R. No. 4034(w) of 1978 and Mr. Sakli Nalh

Mukherjee, learned Counsel appearing on behalf of the petitioners in C. R. No. 2859(w) of 1978, that Government has no right and authority to prejudicially affect the rights of Government servants and take away the benefit that has already accrued to them under the pre-existing rules. It is submitted that vested rights cannot be taken away and rules cannot be framed, for less "executive instructions or orders, with retrospective effect unless such rules are statutory rules and are expressly authorised by the statute concerned in that regard. Our attention has been drawn by the learned Counsel for the petitioners to clause 11(c) of the impugned Circular dated May 6, 1978 where it has been directed that the promotions or appointments to higher grades of services and posts should be with retrospective effect from the dates on which the employees were originally promoted or appointed. It is contended on behalf of the petitioners that the said direction simply means that although the petitioners were granted officiating promotions on a consideration of their merits such promotions are sought to be cancelled, and promotions would now be given on the basis of seniority only with retrospective effect from the dates when the petitioners were granted such promotions. It is urged that the impugned Circulars read together lead to the only conclusion that the rights of the petitioners to be considered on merits as per the rules of promotions contained in the earlier Circulars dated December 1, 1972 and May 21, 1974 have been taken away with retrospective effect. The impugned Circulars are, therefore, arbitrary and discriminatory in nature and are violative of Articles 14 and 16 of the Constitution. It is submitted that such action on the part of the Government to deprive the petitioners, who were legally promoted, of such promotions is neither justified nor permissible under the law.

11. On the other hand, it is submitted by Mr. Gootu, learned Senior Government Pleader appearing on behalf of the Government respondents that the impugned Circulars are prospective and not retrospective in operation. It has been strenuously urged by him that as the petitioners were granted officiating promotions, they have no right to the posts to which they were promoted and, consequently, such officiating promotions or appointments can be terminated at any time. The petitioners having been reverted to their substantive posts which they were holding immediately before they were granted officiating promotions there is no question of the rules contained in the said impugned Circulars being retrospective in operation, such rules are very much prospective inasmuch as they are applicable to future promotions to be granted in accordance therewith. The further submission of the learned Counsel is that by the impugned rules equal opportunity has been given to all Government employees in regard to their promotions to higher posts or to New intermediate selection grade posts and, therefore, there is no question of arbitrary or discriminatory treatment in violation of the provision of Articles 14 and 16 of the Constitution.

12. Before we consider the respective contentions of the parties as noted above, we may consider the implication of an officiating promotion or appointment. In the

leading case of Parshotam Lal Dhingra Vs. Union of India (UOI), the majority view as expressed by S. R. Das C. J. regarding officiating appointments or promotions is that an appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to an end on the return of the incumbent substantively, holding the post from leave in the former case or on a substantive appointment being made to that permanent post in the latter case or on the service of a notice of termination as agreed upon or as may be reasonable under the ordinary law. It is, therefore, quite clear that appointment to a permanent post in a Government service, either on probation or on an officiating basis, is, from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. Further, it has been observed by the learned Chief Justice that an appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and the service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service.

13. The above observation in Dhingra's case lays down the circumstances under which an officiating promotion or appointment is made. Such appointment or promotion on an officiating basis gives no right to the Government servant concerned to the post and his service may be terminated. In *State of Bombay v. E. A. Abraham*, AIR 1962 SC 794 another circumstance has been" pointed out by the Supreme Court when an officiating appointment may be made, namely, sometimes a person is given officiating post to test his suitability to be made permanent in it later, and it has been observed that in such a case, it is an implied term of the officiating appointment that if he is found unsuitable, he would have to go back. If, therefore, the appropriate authority have found him unsuitable for the higher rank and then revert him back to his original lower rank, the action taken is in accordance with the terms on which the officiating post had been given. It is in no way a punishment and no question of reduction in rank is involved.

14. In the instant "case, the officiating promotions were given to the petitioners not on any of the grounds as mentioned in Dhingra's case (supra), but it might be on the ground to test their suitability to be made permanent in the posts later as pointed out in Abraham's case (supra). There cannot be any doubt that the petitioners could be reverted to their substantive posts if they were found unsuitable for the higher posts or for the selection grades to which they were granted officiating promotions. That is, however, not the case of the respondents. The ground up in which the petitioners have been sought to be reverted to their substantive posts has been already indicated, namely, they had superseded there

senior colleagues by virtue of the earlier rules for promotion as contained in the Circulars dated December 1, 1972 and May 21, 1974. The question, therefore, naturally arises whether on this ground the petitioners could be reverted under the law.

15. The peculiar feature of this case is that "the petitioners have been reverted to their substantive posts not on any of the usual grounds but on the basis" of the rules subsequently framed by the impugned Circular dated March 28, 1978. It is true that Government servants holding posts of officiating basis have no right to such posts, and they are liable to be reverted at any time. But such reversion should not be made arbitrarily. There must be sufficient and valid reasons justifying such reversions. When a person is removed from an officiating position on the ground of his inefficiency or unsuitability, he will have no right to complain against the same. If, however, the ground of reversion is either mala fide or illegal, it will be struck down. It has been observed by the Delhi High Court in *C.B. Dubey v. Union of India*, 1975 (1) SLR 580 that an officiating or ad hoc or a temporary appointee who does not have a right to hold a post can be reversed only for valid reasons. The above view finds support from the decision of the Supreme Court in *E. R. Royappa v. State of Tamil Nadu*, AIR 1974 S C 555, where it has been observed by Bhagwati J that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post, and that even if a public servant is in an officiating position he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine. So, in view of the said observation, if an order of reversion is violative of the provisions of Articles 14 and 16, it can be struck down-- no matter that the Government servant concerned is merely holding the post in an officiating capacity having no right to the post.

16. Again, in the case of *Manager, Govt. Branch Press v. D. B. Belliappa*, AIR 1 379 SC 429, Bhagwati J observes :

The executive, no less than the judiciary, is under a general duty to act fairly. Indeed fairness founded on reasons is the essence of the guarantee epitomised in Arts 14 and 16(1).

The reasons, in our opinion, should be valid reasons and not founded on arbitrariness or illegality

17. Let us now consider whether or not the reasons or grounds for reversions of the petitioners are legally valid. The promotional posts or the New; intermediate Selection Grade posts from which the petitioners have been reverted are selection posts. There can be no doubt and it is also an accepted rule that promotions of Government servants to selection posts are made on merit basis and not on the basis of seniority except that in a case where two or more candidates for promotion are found to have equal merit, then only their seniority is taken into consideration. The Supreme Court in *Sant Ram Sharma Vs. State of Rajasthan and Another*, has

observed that the principle is when the claims of officers to selection posts are under consideration, seniority should not be regarded except where merit of the officer is judged to be equal and no other criterion is, therefore, available, apart from the above principles, in the instant case, the Government by the Circular dated December 1, 1972 directed that a Government servant should be selected for promotion on grounds of merit and suitability in all respect and not of seniority which would be taken into account only when it is impossible to choose between two or more persons on grounds of merit alone. This direction is quite consistent with the accepted principles noticed above. The impugned Circular dated March 28, 1978 laying down a rule to the contrary, that is to say, promotions will be made on the basis of seniority, is not legal.

18. We are, however, concerned with the question whether the rules laid down by the impugned Circular dated March 28, 1978 can affect the officiating promotions granted to the petitioners long before the issuance of the impugned Circular in accordance with the rules contained in the Circular dated December 1, 1972. In other words, whether the impugned Circular can be given retrospective effect. It is contended by the learned Government Pleader that the impugned Circular dated March 28, 1978 is prospective and it will not be correct to say that it is retrospective in operation. It is submitted by him that the impugned Circular has nothing to do with the reversions of the petitioners and it will apply to the considerations of future promotions to the petitioners and other Government servants who were superseded by the petitioners. Counsel argues that by reversion all are brought to the same level and then for the purpose of considering the promotion of the reverted and the superseded Government employees the rule contained in the impugned Circular, namely, promotions will be given on the basis of seniority and not on merit basis, will be applied.

19. The impugned Circular dated March 28, 1978 no doubt looks to be prospective. But in order to construe it properly other facts are to be taken into consideration. The petitioners were rented after the impugned Circulars dated March 28, 1978 and May 6, 1978 were issued, and it has been already noticed that such reversions were made on the ground that they had superseded their senior colleagues. The cumulative effect of these two Circulars have led to the purported reversions of the petitioners. The petitioners were granted officiating promotions to higher posts or to selection grade posts on the basis of merit and not on the basis of seniority. As the rule for promotion has been changed by the impugned Circular dated March 28, 1978, the petitioners were reverted. It thus follows that the impugned Circulars prejudicially affected the promotions granted to the petitioners long before the impugned Circulars were issued. Indeed the promotions that will be granted-as per the impugned Circular dated May 6, 1978 will be with retrospective effect from the dates on which the petitioners and, others were originally promoted as provided in clause II (c) of the Circular dated May 6, 1978. It is thus manifestly clear that the Circular dated March 28, 1978 laying down the purported rule for promotion on the

basis of seniority is retrospective in operation as it purports to affect the promotions of the petitioners. It is true that by the Government Memo No 3414-F dated April 23, 1977, the Circular dated May 21, 1974, on the basis of which the petitioners and others were promoted, was withdrawn as pointed out to us by Mr. Gooptu but, in our opinion, that did not affect the promotions of the petitioners. The said Memo dated April 23, 1977 had no retrospective operation and so it did not interfere with the promotions of the petitioners. On the other hand the two impugned Circulars adversely affected the promotions of the petitioners on the sole ground of seniority resulting in the cancellation, of the promotions of the petitioners and their consequent reversions to their substantive ranks. We are, therefore, unable to accept the contention made on behalf of the respondents that the Impugned Circulars are prospective and not retrospective in operation.

20. The petitioners had undoubtedly no right to the posts to which they were granted officiating promotions but at the same time, they had the right to continue in the said posts so long as they were not reverted on valid grounds. If the rules framed in the shape of executive instructions are not given effect to, it can be withdrawn by subsequent executive instructions. For instance, if the rules contained in the Circulars dated December 1, 1972 and May 21, 1974 on the basis of which the petitioners had been granted officiating promotions had not been given effect to, in other words, if the petitioners had not been promoted in accordance with the said Circulars, the same could be withdrawn or modified by a subsequent Circular. But after the Circulars had been given effect and the petitioners were promoted, such promotions cannot be set at naught by subsequent rules in the form of executive instructions. The criteria for promotion that were laid down in the said Circulars dated December 1, 1972 and May 21, 1974 which, after being acted upon and promotions granted accordingly, cannot be changed so as to adversely affect the promotions already given on the ground that those who were promoted had superseded the other senior Government servants, although seniority was not the basis of such promotions. It has been observed by Chandra Hud J (as his Lordship then was) in [S.B. Patwardhan and Another Vs. State of Maharashtra and Others](#), that the executive instructions, unlike rules regulating recruitment and conditions of service framed under the proviso to Article 309 of the Constitution or section 241 (2)(b) of the Government of India Act, 1935, cannot have retrospective effect. In an earlier decision of the Supreme Court in [Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another](#), Mathew J observed that the condition of service was not liable to be altered or modified to the prejudice of the appellant by a subsequent Army instruction with retrospective effect. Even a statutory rule cannot be given retrospective effect unless it is expressly provided for in the statute concerned. In this regard, the Supreme Court in the [Accountant General and Another Vs. S. Doraiswamy and Others](#), has observed that it is settled law that unless a statute confirming the power to make rules provides for the making of rules with retrospective operation the rules made pective operation only;

an exception, pective operation only; an exception, however, is the proviso to Article 309 of the Constitution.

21. Mr. Gooptu has, however placed strong reliance on a decision of the Supreme Court in the The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others, . In that case. Chandrachud J (as his Lordship then was) observed as follows :

It is wrong to characterise the operation of a service rule as" retrospective for the reason that it applies to existing employees. A rule which classifies such employees or promotional purposes, undoubtedly operates on those who entered service before the framing of the rule but it operates in future, in the sense that it goviwns the future right of promotion of those who are already in service. The impugned rules do not recall the promotion already made cr reduce a pay-scale already granted.

The above observation does not at all support the contention of the respondents that the Circulars are not retrospective in operation. The impugned Circulars undoubtedly recall the promotions already given to the petitioners and it must be held to be retrospective in operation. We have also considered the statement in Craise on Statute Law, 7 th Edition, Page-387 as to the meaning of retrospective effect relied on by Mc Gooptu, but we do not think that the statement at all. militates againsti the view we have taken. Therefore, as the rules framed by the impugned Cir-* culars operate with retrospective effect affecting the rights of the petitioners such rules must, therefore, be held to be illegal. As there is no valid reason or ground for the cancellation of the promotions of the petitioners either to higher posts or to New|Intermediate Selection Grade posts and their reversions to their substantive post, such cancellation or reversions cannot" be upheld.

22. It is, however, pointed out by Mr. Gooptu and also by Mr. Somnath Chatterjee, learned Counsel for some of the private respondents that the Circa lars dated December 1, 1972 an May 21 1974 which, when laying down inter alia that the presence or absence of Govern ment servants on the days of Bundhs, cease work or strikes shall also be taken into consideration along with other relevant factors in deciding the cases of promotion," confirmation, crossing of efficiency bar and other ancillary benefits, refer to rules 3B and 3C of the West Bengal Government, Servants" Conduct Rules, 1959. It is contended by them that rules 3B and 3C are limited in they application to certain cases of abstent on from or refusal of, work arid participation in strikes. These rules do not apply to ail cases of absence on days of cease work, strikes, Bundhs etc. particularly to those. mentioned in the said Circulars dated December 1, 1972 and May 21, 1974. It is urged that the cases of absence on days of strikes,. Bundhs or cease" work as mentioned in the said Circulars not being covered by the provisions of rules 3B and 3C of the West Bengal Service Rules, Part I and rule 27 of the West Bengal Government Servants" Conduct Rules, 1959, and not being also supported by any other statutory rule, the said Circulars are illegal. The legality of the said two Circulars on the basis of which the

petitioners were granted officiating promotions are, therefore, under challenge by the respondents. It may be mentioned here that the legality of the two Circulars has not been called in question in the an-davit-in-opposition of the respondents, nor were the impugned Circulars laying down the rules for promotion with retrospective effect on the basis of seniority, issued on the ground that the said Circulars dated December 1, 1972 and May 21, 1974 were illegal. At the time the impugned Circulars were issued, the Circulars dated December 1, 1972 and May 21, 1974 ceased to be operative in view of the said Memo dated April 23, 1977. No reason has been given in the said Memo and there is also no in direction as to the illegality of the earlier Circulars.

23. Be that as it may, when the validity of the previous Circulars has been challenged by the respondents, we propose to consider the same. It may be conceded that rules 3B and 3C of the Most Bengal Service Rules, Part I and rule 27 of the West Bengal Government Servants" Conduct Rules, 1959 do not include the cases of absence from work; on the days of strikes, Bundhs or cease work as mentioned in the said Circulars dated December 1, 1972 and May 21, 1974. Mr. Mukherjee, however, has drawn our attention to rule 26 of the West Bengal Government Servants" Conduct Rules which, it is submitted by him, is more wide and includes the cases of absence from duty, on the days of Bundhs, strikes.or cease work as mentioned in the Circulars dated December 1, 1972 and May 21, 1974. Sub-section (1) of rule 26 is as follows :

Taking part in politics and electi-one -- (1). No Government servant shall be a member or be otherwise associated with, any political party or any organisation which takes part in obligation nor shall he take part in, subscribe in aid of, or assist in any other manner, any political movement or activity," It is submitted by Mr. Mukherjee that the absence from duty on the days of strikes or Bundhs called by political parties will bring a Government servant within the mischief of rule 26 (1) unless such absence or cease work is explained. It is contended by him that a call of strike.or Bundh by any political party should be regarded as a political movement or activity within the meaning of rule 26) and any abstention from duty by any Government servant on the days of such strikes and Bundhs will be in aid of such political movement or activity-unless, of course, the Government servant concerned has some explanation to offer and has submitted such explanation. In the instant case it is pointed out, the Government servants who had absented themselves from duty on the days" of Bundhs and strikes without any explanation therefore as required by the Circular dated May 21, 1974 were taken into consideration in deciding the question of promotions. It is contended that the Circulars dated December 1, 1972 and May 21, 1974 were quite legal and valid, they being consistent with rule 26(1).

24. After considering the submissions made by the learned Counsel of the parties and the provision of rule 26(1), we are of the view that rule 26(1) is of wide

application and includes the cases of strikes and Bundhs as mentioned in the Circulars dated December 1, 1972 and May 21, 1974. The said Circulars, therefore, cannot be held to be illegal as contended on behalf of the respondents.

25. It has been already stated that the legality of the Circulars dated December 1, 1972 and May 21, 1974 has not been challenged, nor was the purported illegality formed the basis of impugned Circulars. Be that as it may, in our opinion, the earlier Circulars are in accordance with the provision of rule 26 of the West Bengal Government Servants' Conduct Rules, 1959. The contention of Mr. Somnath Chatterjee that the decision of the Supreme Court in [Shiv Singh Vs. Union of India \(UOI\) and Others](#), is not applicable to the instant case inasmuch as there is no statutory ban for absence from duty on the days of strikes and Bundhs cannot be accepted. In the Supreme Court case, strikes in the Posts and Telegraph Services were banned by an order of the Central Government u/s 3 of the Essential Services Maintenance Ordinance, 1968. In spite of that order, the petitioner and others struck work on September 19, 1968. There was also an office Memorandum of the Ministry of Home Affairs, issued on October 19, 1968" to the effect that the adverse entry in the character roll of an employee who took part in the strike would be taken into consideration for promotion or confirmation. The Supreme Court rejected the plea of the petitioner that he had been reverted mala fide on account of his participation in the strike. It was held that the petitioner became ineligible for promotion on account of the said office memorandum. In the instant case also, the Circulars dated December 1, 1972 and May 21, 1974 clearly laid down that absence from duty, on the days of Bundhs, strikes or cease work would be taken into consideration for promotion, confirmation etc. of Government servants. In spite of these Circulars certain Government employees absented themselves on those days and did not explain such absence by any application as required under the Circular dated May 21, 1974. Such absence was taken into consideration against them at the time of promotion, confirmation etc. and in consequence of which they were not promoted. In our opinion, the instant case and the said decision of the Supreme Court in Shiv Singh's case are on all fours.

26. So far as the appointments to New/ Intermediate Selection Grade posts are concerned, those are admittedly governed by the West Bengal Services (Revision of Pay and Allowance) Rules, 1970. Sub-rule (2) of rule 12 of the said rules as amended by Notification No. 3816 F dated May 12, 1976 under the proviso to Article 309 of the Constitution of India is as follows :

(2) Appointment to the selection grades shall be made from amongst eligible Government servant with due regard to their merit and seniority.

The petitioners in C. R. No. 4034(w) of 1978 and some of the petitioners in C. R. No. 2859 w) of 1978 were granted promotions to selection grades or New/Intermediate Selection Grades in accordance with Rule 12(2) of the" West Bengal Services (Revision of Pay and Allowance) Rules, 1970, that is to say, with due regard to their

merit and seniority. By the impugned Circular dated March 28, 1978 it has been laid down that promotion to higher grades will be on the basis of seniority only. This is clearly contrary to Rule 12(2). There can be no doubt that by executive instructions rules framed under the proviso to Article 309 of the Constitution cannot be varied or modified. By the impugned Circular that has been sought to be done. The impugned Circular, therefore, is clearly ultra vires Rule 12(2) so far as the appointments or promotions to selection grades including the New/Intermediate Selection Grades are concerned. Apart from what has been stated above the cancellation or the appointments or promotions of the petitioners to selection grades and their reversions from such grades are illegal also because the impugned Circular contravenes Rule 12(2).

27. For the reasons aforesaid, we hold that the impugned Circulars dated March 28, 1978 and May 6, 1978 and the cancellation of officiating promotions of the petitioners in these two Rules either to higher posts or to selection grades including New/Intermediate Selection Grade posts are illegal and should be set aside.

28. Before we part with these cases, we may notice one argument made on behalf of the petitioners in C. R. No. 4034 of 1978. It is contended by Mr. Sen Gupta that there cannot be any officiating promotion or appointment to selection grades, and that once such appointment or promotion is given, there cannot be any reversion from the same. We are unable to accept the contention. It may be that the posts having selection grades and the posts without such selection grades are the same and are included in the same cadre, but it is not correct to say that the benefit of selection -grades cannot be granted on a temporary or officiating basis. Indeed, the orders for appointments or promotions of the petitioners to selection grades clearly indicate that such appointments or promotions are on officiating basis. As it has been found by us that the cancellation of such officiating promotions of appointment to selection grades and the consequent reversions are not supported by any valid reason and, further, that the impugned Circular dated March 28, 1978 is also illegal being contrary to Rule 12(2) of the West Bengal Services (Revision of Pay and Allowance) Rules, 1970, it is" not necessary for us to any further dilate on the point.

29. In the result, the impugned Circulars dated March 28, 1978 and May 6, 1978 are declared illegal, inoperative and void. Further, the cancellation of the officiating promotions of the petitioners to higher posts and selection grades and their consequent reversions to their substantive ranks and grades are also illegal, inoperative and void. The impugned Circulars and the orders of cancellation of the officiating promotions and of reversions of the petitioners are quashed. The respondents in C. R. No. 4034(w) of 1978 and the respondents nos. 1 to 11 in C. R. No. 286 of 1978 are directed not to give any effect or further effect to the said impugned Circulars and orders of cancellation of promotions and reversions of the petitioners. Let appropriate writ or writs issue in the above terms.

30. Both the Rules are thus made absolute. There will, however, be no order as to costs. As prayed for on behalf of the respondents, we direct that the operation of these judgments will remain stayed till January 18, 1982.

A.K. Sarkar, J.

I agree.