



HIGH COURT OF SIKKIM : GANGTOK
(Civil Extra-Ordinary Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

W.P. (C) No. 39 of 2016

1. Shri Samdup Tsh. Bhutia,
Presently posted as ACF at Fambonglho
Wildlife Sanctuary,
Headquarter at Deorali,
Gangtok, East Sikkim.
2. Shri Phurba Rinchen Bhutia,
Presently posted as ACF at Block
Administrative Centre,
Ranka, East Sikkim.
3. Shri Kul Bahadur Ghaley,
Presently posted as ACF at Survey and
Demarcation, Headquarter at Deorali,
Gangtok, East Sikkim.
4. Shri Nandu Lamichaney,
Presently posted as ACF (RVP)
South and West, Headquarter at Deorali,
Gangtok, East Sikkim.
5. Shri Kamal Subba,
Presently posted as ACF (FCA),
Headquarter at Deorali,
Gangtok, East Sikkim.
6. Shri Prem Prasad Silwal,
Presently posted as ACF at BAC,
Dentam, West Sikkim.
7. Shri Sonam Zangpo Bhutia,
Presently posted as ACF (IWMP),
Headquarter at Deorali,
Gangtok, East Sikkim.



8. Shri Surya Kumar Subba,
Presently posted as ACF (Social Forestry)
Namchi, South Sikkim.
9. Shri Chitra Prasad Sharma,
Presently posted as ACF at Social Forestry,
Headquarter at Deorali,
Gangtok, East Sikkim.
10. Shri K.B. Basnet,
Presently posted as ACF at Working Plan,
Headquarter at Deorali,
Gangtok, East Sikkim.
11. Shri D.K. Rai,
Presently posted as ACF,
BAC Nandu Gaon-Jorethang,
South Sikkim.
12. Shri Rapden Bhutia,
Presently posted as ACF (Monitoring),
Headquarter at Deorali,
Gangtok, East Sikkim.
13. Shri Sonam Wangdi Bhutia,
Presently posted as ACF at BAC,
Chungthang, North Sikkim.
14. Shri Suk Bahadur Subba,
Presently posted as ACF (Environment & Soil
Conservation), Headquarter at Deorali,
Gangtok, East Sikkim.
15. Shri S.T. Lachungpa,
Presently posted as ACF (KNP), North,
Chungthang, North Sikkim.
16. Shri Pempa Tsh. Lepcha,
Presently posted as ACF, BAC Yangang,
South Sikkim.
17. Shri Tilak Kumar Mukhia,
Presently posted as ACF (Wildlife),
Namchi, South Sikkim.



18. Shri James S. Lepcha,
Presently posted as ACF (Territorial),
Gangtok, East Sikkim.

... **Petitioners.**

versus

1. State of Sikkim,
Through Chief Secretary,
Government of Sikkim,
Gangtok.
2. Principal Secretary,
Department of Personnel, AR & Training,
Public Grievance,
Government of Sikkim,
Gangtok.
3. PCCF-cum-Principal Secretary,
Department of Forest,
Government of Sikkim.
4. Shri Tenzing Norbu Bhutia,
Presently posted as ACF (Territorial),
Soreng, West Sikkim.
5. Shri Palzor Ongda Bhutia,
Presently posted as ACF (Wildlife),
Ravangla, South Sikkim.
6. Miss Tshering Denka Bhutia,
Presently posted as ACF (Territorial),
Gyalshing, West Sikkim.
7. Miss Karma Choden Bhutia,
Presently posted as ACF (Wildlife),
Mangan, North Sikkim.
8. Miss Dichen Namdul,
Presently posted as ACF (Wildlife),
Headquarter at Deorali,
Gangtok, East Sikkim.



9. Miss Arati Basnet,
Presently posted as ACF (SBB),
Headquarter at Deorali,
Gangtok, East Sikkim.
10. Miss Sewani Pradhan,
Presently posted as ACF (Silviculture),
Headquarter at Deorali,
Gangtok, East Sikkim.
11. Miss Nisha Subba,
Presently posted as ACF (Wildlife),
Soreng, West Sikkim.
12. Miss Yangchen Bhutia,
Presently posted as ACF (Utilization),
Headquarter at Deorali,
Gangtok, East Sikkim.
13. Miss Peggy Tshering Venchungpa,
Presently posted as ACF (Territorial),
Namchi, South Sikkim.
14. Miss Srijana Chettri,
Presently posted as ACF (Wildlife),
Ravangla, South Sikkim.
15. Mr. Jigme Tsewang Sharngoe,
Presently posted as ACF (Territorial),
Attach with CCF (T/HQ), Deorali,
Gangtok, East Sikkim.
16. Miss Smita Shilai,
Presently posted as ACF (Territorial),
Rongli, East Sikkim.
17. Miss Marmit Lepcha,
Presently posted as ACF (Social Forestry),
Namchi, South Sikkim.
18. Miss Merab Basnet,
Presently posted as ACF at NTFP (East),
Headquarter at Deorali,
Gangtok, East Sikkim.



19. Shri Sonam Norden Bhutia,
Presently posted as ACF (Survey &
Demarcation),
Headquarter at Deorali,
Gangtok, East Sikkim.
20. Miss Bhumka Rai,
Presently posted as ACF (Territorial),
Pakyong, East Sikkim.
21. Miss Angela Ongmu Chettri,
Presently posted as ACF (SBFP),
North and East,
Headquarter at Deorali,
Gangtok, East Sikkim.
22. Shri Hem Bdr. Rai,
Presently posted as ACF at
Himalayan Zoological Part,
Bulbulay, East Sikkim.

... **Respondents.**

Petition under Article 226 of the Constitution of India

Appearance:

Mr. B. Sharma, Sr. Advocate with Mr. Bhola N. Sharma and Mr. Sajal Sharma, Advocates for the Petitioners.

Mr. J.B. Pradhan, Additional Advocate General with Ms. Pollin Rai, Asstt. Govt. Advocate and Ms. Rita Sharma, Advocate for State-Respondents No. 1 to 3.

Mr. Jorgay Namka, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates for Respondents No. 4 to 22.



J U D G M E N T
(13.09.2017)

Satish K. Agnihotri, CJ

Assailing the correctness of the seniority list published vide, Notification No. 114/G/DOP dated 01st September 2016 (Annexure P-12) (hereinafter referred to as "the impugned notification"), whereunder the petitioners were placed below the 4th respondent to 22nd respondent, the petitioners have come up with this petition.

2. The petitioners seek quashing of the said impugned notification, a direction to place the petitioners above the private respondents, considering their officiation on the post of Assistant Conservator of Forest (hereinafter referred to as "ACF") and also to consider their promotion to the post of Divisional Forest Officer (hereinafter referred to as "DFO") in officiating capacity on permanent basis.

3. The chronological events leading to filing of the instant petition are that the petitioners, initially appointed as Block Officers, were promoted to the post of Range Officers on 19th August 2000 (Annexure P-2). Thereafter, the petitioners were promoted as ACF in an officiating capacity vide, Office Orders No. 2633/G/DOP dated 12th February 2010 and No. 466/G/DOP dated



05th August 2010 (Annexure R-16 and Annexure R-17 respectively). Subsequently, the petitioners were promoted on permanent basis on the post of ACF vide Office Order No. 3691/G/DOP dated 19th March 2013 (Annexure R-21). It appears that the official respondents have issued a provisional seniority list vide Memo No. 9021/G/DOP dated 10th July 2014 (Annexure P-14), placing the petitioners down below the direct appointee/private respondents, which prompted the petitioners to make a representation on 04th August 2014 (Annexure P-10) and also to send a legal notice on 04th April 2016 (Annexure P-11) seeking grant of seniority with effect from the date of officiation and their placement above the direct recruits, who completed their probation on 21st May 2013. The instant petition is filed on 12th September 2016, resubmitted on 13th September 2016, after a period of two years from the date of issuance of provisional seniority list on 10th July 2014.

4. Mr. B. Sharma, learned Senior Counsel assisted by Mr. Bhola N. Sharma and Mr. Sajal Sharma, learned Advocates, would contend that the petitioners were promoted as ACF on officiating capacity against the existing vacancies and their services continued without interruption till they were confirmed on 19th March 2013, before completion of probation period of private respondents on 21st May 2013. The appointment of the



petitioners was in accordance with the Rules against the clear vacancies and, as such, the petitioners are entitled to seniority with effect from the date of their promotion on the post of ACF, on officiation.

5. Mr. Sharma further contended that the private respondents were appointed on probation, which came to end on 21st May 2013. Thus, they become members of service only on completion of probation. In that event, the petitioners were senior, as they were confirmed on the post on 19th March 2013. It is also urged that the Principal Secretary-cum-Principal Chief Conservator of Forest has recommended for protection of seniority of the petitioners vide notings dated 19th December 2013 (Annexure P-7). The Chairman, Law Commission of Sikkim has strongly observed that it is well-settled law that in absence of any rule to the contrary, the continuous service on confirmation cannot be ignored for determining the place in seniority list. Mr. Sharma would lastly submit that in the facts of the case wherein the petitioners were promoted on officiating basis, in accordance with rule, and thereafter confirmed on the post, the petition deserves to be allowed with a direction to place the petitioners above the private respondents in the seniority list, who were recruited subsequently and to grant subsequent promotion and other consequential benefits.



6. Mr. Sharma, in support of his case relied on *S.B. Patwardhan and another v. State of Maharashtra and others*¹, *Pran Krishan Goswami and others v. State of West Bengal and others*², *G.K. Dudani and others v. S.D. Sharma and others*³, *G.C. Gupta and others v. N.K. Pandey and others*⁴, *State of W.B. and others v. Aghore Nath Dey and others*⁵ and *B. Amrutha Lakshmi v. State of Andhra Pradesh and others*⁶.

7. Resisting, Mr. J.B. Pradhan, learned Addl. Advocate General assisted by Ms. Pollin Rai, learned Assistant Government Advocate and Ms. Rita Sharma, learned Advocate, would contend that under sub-rule (2) of Rule 4 of the Sikkim State Forest Service (Recruitment) Rules, 1976 (hereinafter referred to as "the Recruitment Rules"), 50% post of ACF is to be filled up by direct recruitment through open competitive examination and 50% by promotion. The total sanctioned strength of ACF on the relevant date was 87. On 06th February 2007, it was proposed to fill up 21 posts of ACF by direct recruitment and as more than 50% of quota was utilized by promotion from the post of Range Officers. As on relevant date, altogether 71 persons were

¹ AIR 1977 SC 2051

² AIR 1985 SC 1605

³ AIR 1986 SC 1455

⁴ (1988) 1 SCC 316

⁵ (1993) 3 SCC 371

⁶ AIR 2014 SC 751



working as ACF from promotion quota. In pursuance thereof, an advertisement for filling up of 21 posts of ACF was published on 07th June 2010. In response thereto, the private respondents participated successfully in competitive examination and were accordingly appointed. The result was declared on 28th March 2011 and a list of selected candidates was sent to the Department of Personnel, Government of Sikkim on 15th April 2011 (Annexure R-1). Out of 21 posts, two posts, namely, MBC and MBC (W) could not be filled up and the same was carried forward due to non-availability of eligible candidates. The appointment orders were issued in the months of May and June 2011. The promotion of the petitioners to the post of ACF on officiation was subject to two conditions, namely,

- (i) the officiating capacity shall not confer any right for regular promotion and shall not be counted towards senior; and
- (ii) regular promotion shall be made on the recommendation of the Sikkim Public Service Commission,

which was made subsequently leading to regularization of the petitioners. The said conditions were accepted by the petitioners without a demur or protest.

8. The petitioners were appointed as ACF in officiating capacity against the direct recruitment quota, as the appointment against direct recruitment had taken some time. 14 persons



were already serving as ACF on substantive capacity and 12 persons were serving as DFO on officiating capacity, continuing to hold their lien in the cadre of ACF. As such, 91 ACFs, including the petitioners, against the cadre strength of 87, were working as ACF.

9. Mr. Pradhan would further contend that in order to accommodate the petitioners, Department of Personnel, issued two notifications dated 31st October 2011 (Annexure R-22) and 12th February 2013 (Annexure R-23), relaxing the method of recruitment after creation of substantive vacancies of ACFs, under promotion quota, the petitioners were confirmed and granted regular promotion.

10. In support, Mr. Pradhan, relies on *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others*⁷, *State of W.B. and others v. Aghore Nath Dey and others*⁸, and *M.P. Palanisamy and others v. A. Krishnan and others*⁹.

11. Adopting the arguments advanced by learned Additional Advocate General, Mr. Jorgay Namka, learned counsel appearing for the private respondents/direct recruits, would

⁷ (1990) 2 SCC 715

⁸ (1993) 3 SCC 371

⁹ (2009) 6 SCC 428



submit that the appointment of the petitioners on the post of ACF was purely temporary on officiating basis, in excess of the quota reserved for promotees against direct appointee vacancy. The petitioners were appointed to perform the duties and functions of ACFs, as no officers appointed in accordance with rules were available. The appointment was purely a stop-gap arrangement. It is further contended that the appointment order of the petitioners, appointing them on officiating basis as ACF, clearly indicate that the appointment was not against a regular substantive vacancy. Thus, the petition deserves to be dismissed maintaining the seniority of the private respondents above the petitioners, as private respondents have completed their probation within the prescribed time and as per rules seniority relates back to the date of initial appointment on completion of probation period in time.

12. Having given my anxious consideration to the submissions put forth by the learned counsel appearing for the parties, on examination of the pleadings and documents appended thereto, it is manifest that the petitioners' appointment vide orders dated 12th February 2010 (Annexure R-16) and 05th August 2010 (Annexure R-17) was conditional, as clearly stated in the order itself. The petitioners have not protested at any point of time to the conditions, which were duly accepted by



them at the time of their appointment on the post of ACF on officiating basis. The orders seeking appointment of officiating basis clearly prescribed that their officiating capacity shall not confer any right for regular promotion and shall not be counted towards seniority. The appointment to the regular promotion was subject to recommendation of the Sikkim Public Service Commission.

13. On examination of the documents produced by the parties, it is proven that as on the relevant date, the sanctioned strength of the cadre of ACF was 87, as enhanced vide Notification dated 18th December 2006 (Annexure R-13). Out of 87 posts, 10 posts were filled up by direct recruits. For filling up of 21 posts of ACF, necessary steps were initiated on 06th February 2007. The advertisement for filling up of 21 posts of ACF was published on 07th June 2010, which culminated into appointment of the 4th to 22nd respondents vide orders dated 21st May 2011 (Annexure R-2), 25th May 2011 (Annexure R-3), 26th May 2011 (Annexures R-4 and R-5) 27th May 2011 (Annexure R-6), 31st May 2011 (Annexure R-7) and 01st June 2011 (Annexures R-8 and R-9). Indisputably, all the private respondents (4th to 22nd respondents) have completed their probation in time, on expiry of a period of two years and as such they are entitled to their seniority from the date of their initial



appointment, as per Rule 7(A) of the Sikkim Government Establishment Rules, 1974.

14. As contemplated under the provisions of the Sikkim State Services (Regulation of Seniority) Rules, 1980 (hereinafter referred to as "the Seniority Rules, 1980"), which is applicable to the forest service as prescribed under Rule 18 (A) of the Recruitment Rules, it is well established that a direct recruit is entitled to seniority from the date of initial appointment on completion of probation within the prescribed time i.e. two years. In the case on hand, all the direct recruits, 4th to 22nd respondents, have completed their probation in two years time and as such they became members of the Service from the initial date of appointment.

15. Rule 4 of the Recruitment Rules contemplates "Method of Recruitment to the Service", which reads as under: -

- "4. METHOD OF RECRUITMENT TO THE SERVICE:- (1) Recruitment to the Service after the commencement of these rules shall be by the following methods, namely: -
- (a) By the Competitive Examination to be held by the Commission;
 - (b) By selection from among persons holding the post of Range Officer or any other post or posts declared equivalent thereto by the Government.
- (2) The proportion of vacancies to be filled in any year in accordance with clauses (a) and (b) above, shall be 50 : 50 respectively:



Provided that the number of persons, recruited under clause (b) above, shall not at any time exceed 50% of the total strength of the Service.

(3) Notwithstanding anything contained in sub-rule (1), if in the opinion of the Government, the exigencies of the service so require, the Government may, after consultation with the Commission, adopt such method of recruitment to the Service, other than those specified in the said sub-rule, as it may, by Notification in this behalf, prescribe."

Sub-rule (2) of Rule 4 of the Recruitment Rules provides that the vacancies of a cadre to be filled up by the competitive examination in accordance with clause (a) and by selection from among persons holding the post of Range Officers as per clause (b) in 50 : 50 ratio. Proviso to sub-rule (2) further provides that the number of persons, recruited under clause (b) shall not at any time exceed 50% of the total strength of the Service. It is established in this case that out of total 87 cadre strength, 43 or 44 posts were to be filled up by promotion. When the petitioners were promoted on officiating basis on the post of ACF vide order dated 12th February 2010 and 05th August 2010, there were already 56 promotee ACFs working in the cadre. Thus, the appointment of the petitioners was in excess of the requisite limit, as prescribed under the Rules. In such a situation, whether it can be held that the appointment of the petitioners was in accordance with the rules?

16. The subsequent regularization or absorption of the petitioners on permanent cadre was done by the Government



after relaxation in the rules, as evident from the notifications dated 31st October 2011 and 12th February 2013 (Annexures R-22 and R-23 respectively), exercising power under sub-rule (3) of Rule 4 of the Recruitment Rules. In such factual matrix, the ineluctable conclusion is that the appointment of the petitioners as ACF on officiating basis was not in accordance with the law i.e. the Recruitment Rules, as it was clearly indicated in the appointment order itself and such their claim to seniority from initial date of officiating appointment merits rejection.

17. Recommendation of the Principal Secretary-cum-Principal Chief Conservator of Forest, Government of Sikkim for grant of seniority to the petitioners vide his notings dated 19th December 2013 and also the observation made by the Chairman, Law Commission, are not relevant and binding in the facts of the case.

18. The 'officiating appointment' is defined under the Sikkim Government Service Rules, 1974 (hereinafter referred to as "Service Rules of 1974") in clause (13) of Rule 5, as under: -

"(13) 'Officiating appointment' - A Government Servant is said to be holding an officiating appointment, when he performs the duties of a vacant or newly created temporary post on which no Government Servant holds a lien without completing the minimum number of qualifying years of service as may have been or as may be prescribed by the Government from time to time."



Bare perusal of the definition clearly provides that the appointment is to perform the duties of a vacant post without holding a lien in the service.

19. In ***S.B. Patwardhan***¹, cited by the learned Senior Counsel appearing for the petitioners, interpretation of the provisions of the Bombay Service of Engineers (Class I and Class II) Recruitment Rules, 1960, was involved, wherein the Supreme Court held Rule 8 (iii) as unconstitutional, holding that the valuable right of seniority may not depend upon the mere confirmation.

20. In ***Pran Krishan Goswami***², referred by learned Senior Counsel for the petitioners, the W.B. Services (Determination of Seniority) Rules, 1981, was under examination, wherein some Sub-Inspectors of Police have been officiating for almost three decades, without examining the fact as to whether there officiation was against the substantive vacancy, the Supreme Court held that the Sub-Inspectors are entitled to benefit of their continuous officiating service as Sub-Inspectors of Police.

21. In ***G.K. Dudani and others***³, again referred by the learned counsel appearing for the petitioners, wherein the Mamlatdars were promoted and appointed to hold ex-cadre



posts, it was held that it could not be said not to have been regularly appointed. In such factual background, they were held to be entitled to seniority of their continuous officiation.

22. In ***G.C. Gupta and others***⁴, it was held that the temporary Assistant Engineers on absorption were entitled to seniority from the date on which their service were regularized i.e. the date from which they became members of the service.

23. Mr. J.B. Pradhan, learned Addl. Advocate General, referring to an observation made by the Supreme Court in ***M.P. Palanisamy and others***⁹ submit that the petitioners have accepted the conditions of appointment on officiation. Thus, they cannot be permitted to retrace back and take a contrary stand. The Supreme Court held as under: -

"31. The panel is absolutely correct in the light of GOMs No. 1813. The appellants merely raised a lame plea that they did not challenge GOMs No. 1813, as they were expecting themselves to be placed over and above the T.N. PSC-selected candidates. Such could never be the position in the wake of plain language of GOMs No. 1813. This is one of the main reasons why the claim of the appellants has to be rejected. The aspect of conditional regularization, therefore, had to be kept in mind."

24. In ***O.P. Garg and others v. State of U.P. and others***¹⁰, the Supreme Court examined the seniority and

¹⁰ 1991 Supp (2) SCC 51



promotion of Judicial Officers under the U.P. Higher Judicial Service Rules, 1975 and held as under: -

"26. We have given our thoughtful consideration to the arguments of the parties. This Court has time and again held that when an incumbent is appointed to a post in accordance with the Service Rules his seniority has to be counted on the basis of continuous length of service and not in reference to the date of confirmation. Even in the present case the promotees have been confirmed long after the availability of permanent vacancies. This Court in *S.B. Patwardhan v. State of Maharashtra* : (1977) 3 SCC 399 observed that "confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies". A Constitution Bench of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra* : (1990) 2 SCC 715 approved *Patwardhan case* and laid down the following propositions in this respect:

"(A) 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 stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the 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.

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

27. Keeping in view the scheme of the 1975 rules, we are of the view that first proviso to Rule 26(1)(a) of the 1975 Rules which links the seniority with the date of confirmation is on the face of it arbitrary and as such violative of Article 16 of the Constitution of India. Since the recruitment to the service is from three sources the existence of a vacancy either permanent or temporary is the sine qua non for claiming benefit



of continuous length of service towards seniority. The period of officiation/service which is not against a substantive vacancy (permanent or temporary) cannot be counted towards seniority. While striking down first proviso to Rule 26(1)(a) of the 1975 Rules we hold that the continuous officiation/service by a promotee shall be counted for determining his seniority only from the date when a substantive vacancy against a permanent or temporary post is made available in his quota under the 1975 rules."

25. In ***Keshav Chandra Joshi and others v. Union of India and others***¹¹, wherein fixation of seniority of the petitioners, who were promoted during the period from 13th March 1974 to 21st November 1981, as Assistant Conservator of Forest, on ad hoc basis was involved. In 1976, some direct recruits were appointed on probation against substantive vacancies. When the petitioners became due for promotion as Deputy Conservator of Forest, the promotees claimed seniority over the direct recruits. The promotion of the petitioners as ad hoc was in excess of quota and had to be resorted to because of non appointment of direct recruits due to litigation, the Supreme Court observed as under: -

"19. The heart of the controversy lies in the question as to when a person is appointed to a post in the service in a substantive capacity within the meaning of Rule 3(h) read with Rules 5 and 24 of the Rules. Under Rule 5 read with Rule 3(h) a member of the service means a person, be it direct recruit under Rule 5(a) or promotee under Rule 5(b), appointed in a substantive capacity to the service as per the provisions of the rules. In order to become a member of the service he/they must satisfy two conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service

¹¹ 1992 Supp (1) SCC 272



according to rules and within the quota to a substantive vacancy. There exists marked distinction between appointment in a substantive capacity and appointment to the substantive post. Therefore, the membership to the service must be preceded by an order of appointment to the post validly made by the Governor. Then only he/they become member/ members of the service. Any other construction would be violation of the Rules.

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24. It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad-hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Articles 14 and 16(1). Therefore, the rules must be carefully applied in such a manner as not to violate the rules or equality assured under Article 14 of the Constitution. This Court interpreted that equity is an integral part of Article 14. So every attempt would be made to minimise, as far as possible, inequity. Disparity is inherent in the system of working out integration of the employees drawn from different



sources, who have legitimate aspiration to reach higher echelons of service. A feeling of hardship to one, or heart burning to either would be avoided. At the same time equality is accorded to all the employees.

X X X

34. Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on ad-hoc basis as a stop-gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are de hors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority. The Governor shall have to make recruitment by promotion to substantive vacancies in the posts of Asstt. Conservator of Forest, if not already made, in accordance with Rule 5(b) read with Appendix 'B' and Rule 6. Their seniority shall be counted only from the respective dates of appointment to the substantive posts in their quota under Rule 6 as per the rules. The direct recruits having been appointed in accordance with Rule 5(a) read with Appendix 'A', their seniority shall be counted from the date of their discharging the duties of the post of Asstt. Conservator of Forest and the seniority of the direct recruits also shall accordingly be fixed. The inter se seniority of the direct recruits and promotees shall be determined in accordance with Rules 5, 6 and Rule 24 in the light of the law declared in the judgment. All the employee are entitled to all consequential benefits. On account of the pendency of judicial proceedings, if any of the employees became barred by age for consideration for promotion to cadre posts, the appropriate Governments would do well to suitably relax the rules and do justice to the eligible conditions."

26. In ***State of W.B. and others vs. Aghore Nath Dey and others***⁸, the Supreme Court clarified the ratio laid down earlier in ***Direct Recruit Class II Engineering Officers' Assn.***⁷
case:-

"22. There can be no doubt that these two conclusions have to be read harmoniously, and



conclusion (B) can not cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority'. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop-gap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) can not include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the later expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such



cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stop-gap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A)."

27. In ***P.K. Singh vs. Bool Chand Chablani and others***¹², the Supreme Court has clearly held that when ad hoc appointment is made de hors the rules, such appointment does not enure to the benefit of the appointee for the purpose of determining seniority in the cadre.

28. In ***Radha Mohan Malakar and others v. Usha Ranjan Bhattacharjee and others***¹³, the Supreme Court observed as under:

¹² (1998) 5 SCC 726

¹³ (2009) 14 SCC 619



"23. In our opinion the principle of the decision in *N. K. Chauhan v. State of Gujarat : (1977) 1 SCC 308* can be illustrated by taking a hypothetical example. Suppose in a particular service 50% of the vacancies are to be filled in by promotion and 50% by direct recruitment, and suppose there is a rule that the inter se seniority of direct recruits and promotees is to be fixed according to the rotation of vacancies between direct recruits and promotees in the manner that the first post will go to a promotee, the second to a direct recruit, the third to a promotee, the fourth to a direct recruit, and so on. Even here the ordinary rule that seniority will depend on the length of the continuous officiating service has to be followed *unless the quota of direct recruits or of the promotees has been exceeded*. It is only if the said quota is exceeded that the appointees have to be pushed down in the seniority, otherwise seniority has to be taken from the date of continuous officiating service.

24. In the present case it is admitted that the quota of direct recruits has not been exceeded. Hence, in our opinion, the seniority of direct recruits (the appellant) has to be taken from the date of their initial appointment and they cannot be pushed down in seniority. The promotees (the respondents herein) were appointed to Grade II of TCS after the appointments of the direct recruits (the appellants). Hence the former have to be treated as junior to the latter. The earlier Division Bench decision of the High Court dated 29.7.1992 has to be understood in the light of the decision of this Court in *N.K. Chauhan case* (supra)."

29. From the judicial pronouncements made by the Supreme Court in various cases, as aforesaid, it is well established that the length of service of appointment on promotion made on ad hoc or temporary basis or on officiation in accordance with law against the substantive vacancies, may be counted for the purpose of seniority from the date of initial appointment. In the case on hand, all the appointments were made in excess of their quota, not in accordance with rules,



subject to conditions enshrined in the order, stating that the appointees shall not claim seniority or regular promotion on the said basis. The petitioners are not entitled to the benefit of period of officiation on the post of ACF before their appointment on permanent basis, on recommendation of the Sikkim Public Service Commission, as required under the Rules as well as under the conditions of the appointment of officiating basis. The petition is bereft of merits.

30. Resultantly, the writ petition is dismissed. No order as to costs.

Chief Justice
13.09.2017

jk	Approved for Reporting	: Yes/No.
	Internet	: Yes/No.