

FINAL ORDER
5-10-1987

CENTRAL ADMINISTRATIVE TRIBUNAL
MADRAS BENCH

Application Nos:-

T.A. 51/1987
T.A. 262/1986
T.A. 88/1987
T.A. 318/1986
D.A. 482/1986

No. TA 51/1987

1. D. Sundara Rao
2. Kaushal K. Srivastava
3. K. Balachandran Thampi

Applicants in TA 51/1987

Versus

1. State of Kerala represented by Chief Secretary to Govt., Trivandrum.
2. Union of India represented by Secretary to Govt., Ministry of Home Affairs, New Delhi.
3. Agricultural Production Commissioner, Trivandrum.
4. Secretary, Ministry of Agriculture, New Delhi.
5. Accountant General of Kerala, Trivandrum.
6. Chief Conservator of Forests, Trivandrum.
7. S. John Koilparambil
8. P. Premachandran Nair
9. P. Vijayaraghavan
10. K. Achuthan
11. A.F. Paul
12. T.K. Mathew
13. P.S. Nagur Meeran Rawther
14. V.R. Krishnan Nair

Respondents in TA 51/1987

.....II

K. Ramakumar
M/s T.R. Govinda Wariyar,
Sebastian Davis and P.V.
Jyothi Prasad

Counsel for applicants
in TA 51/1987

Shri P.V. Madhavan Nambiar

Counsel for R 2, 4 & 5

Government Pleader

Counsel for R 1, 3 & 6

Shri C.R. Natarajan

Counsel for R 9

Shri M. Rajagopalan

Counsel for R 7 & 12

M/s S. Parameswaran and
Babu Paul

Counsel for R 10

No. 262/1986

1. Vijayakumar Sinha
2. Shyam Dhar

Applicants in TA 262/1986

Versus

1. Chief Conservator of Forests,
Trivandrum.
2. Agricultural Production
Commissioner, Trivandrum.
3. State of Kerala represented
by Chief Secretary, Trivandrum.
4. Union of India represented by
Secretary, Ministry of Home
Affairs, New Delhi.
5. Secretary, Ministry of
Agriculture, New Delhi.
6. V.K. Ramachandran
7. Babuji A. George

Respondents in TA 262/1986

M/s T.R. Govinda Wariyar,
Sebastian Davis and P.V.
Jyothi Prasad

Counsel for applicants
in TA 262/1986

Senior Govt. Pleader : Counsel for R 1, R 2 & R 3

Shri P.V. Madhavan Nambiar, SCGSC : Counsel for R 4 & R 5 in TA 262/1986

M/s T.P.K. Nambiar, P.G.Rajagopalan : Counsel for R 6 & R 7 & Mrs P. Devaky Kutty

No. TA 88/1987

S. John Koilparambil : Applicant in TA 88/1987

Versus

1. **Union of India represented by** Secretary, Deptt. of Personnel and Administrative Reforms, New Delhi.
2. State of Kerala, represented by Chief Secretary, Trivandrum.
3. R.P. Sharma, Saw Milling Officer, Dehra Dun.
4. T.M. Manoharan
5. R.S.R. Prasad
6. V.K. Sinha
7. Shyam Dhar
8. K.K. Shrivastava
9. D.S. Rao
10. P.N. Unnikrishnan
11. S.P. Singh
12. N.N. Thrivedi Babu
13. V. Gopinath
14. P. Prasad Babu
15. K. Balachandran Thampi

Respondents in
TA 88/1987

Shri S. Parameswaran : Counsel for applicant

Shri P.V. Madhavan Nambiar, SCGSC : Counsel for R 1

Govt. Pleader : Counsel for R 2

Shri H. Sivaramakrishna Iyer	: Counsel for R 3
Shri C.S. Rajan	: Counsel for R 3 & R 4
Shri K. Ramakumar	: Counsel for R 7 to 9
Shri T.R. Govinda Wariyar	: Counsel for R 4, R 7 to R 9

No. T.A. 318/1986

P. Vijayaraghavan : Applicant in TA 318/1986

Versus

1. State of Kerala represented by
Chief Secretary, Trivandrum
2. Union of India represented
by Secretary, Ministry of
Home Affairs, New Delhi.
3. Union Public Service Commi-
ssion, New Delhi.
4. K. Sasidharan Nair
5. M. Govinden Kutty
6. P.K. Surendranathan Asari
7. K.V. Sankaran Nair
8. Rajendra P. Sharma
9. T.M. Manoharan
10. John Koilparambil
11. P. Premachandran Nair
12. Sundara Rao
13. R. Sharada Ranjan Prasad
14. Shyam Dhar

Respondents in
TA 318/1986

M/s C.R. Natarajan, M.K. Anantha-
krishnan, R. Bhaskaran

Counsel for applicant
in 318/1986

Shri P.V. Madhavan Nambiar,
SCGSC

: Counsel for R 2 and R 3

M/s T.R. Govinda Wariyar,
K. Ramakumar & V.R. Ramachandran
Nair

: Counsel for R 12 to
R 14

.....V

M/s C.S. Rajan, Thomas John
P. Sankaran Kutty Nair &
T.V. Ajayakumar

Counsel for R 9 in
TA 318/1986

M/s S. Parameswaran, Babu Paul,
Lovely Poulose & P.V. Lonachan

Counsel for R 10

No. O.A. 482/1986

Rajendra P. Sharma

: Applicant in OA 482/1986

Versus

1. Union of India represented by Secretary, Ministry of Environment & Forests, New Delhi.
2. State of Kerala represented by Chief Secretary, Trivandrum.
3. K. Sasidharan Nair
4. M. Govindan Kutty
5. P.K. Surendranathan Asari

Respondents in
CA 482/1986

Shri H. Sivaramakrishna Iyer

: Counsel for applicant

Shri P. A. Mohamed

: Counsel for R 1

Government Pleader

: Counsel for R 2

Shri V.M Nayanar

: Counsel for R 3 & R 4

M/s P Sukumaran Nair,
A.K. Chinnan and K Padmanabhan
Nair

Counsel for R 5

CORAM:

Hon'ble Shri C. Venkataraman, Member(Administrative)

Hon'ble Shri G. Sreedharan Nair, Member (Judicial)

T.A.Nos.51/87,262/86, 88/87 and 318 of 1986 and O.A.No.482 of 1986.

(The Order of the Tribunal was delivered by Shri G.Sreedharan Nair,
Judicial Member)

The core of the controversy in these cases relates to the inter se seniority between certain direct recruits to the Indian Forest Service, for short 'the I.F.S.' and some promotees to the I.F.S. from the State Forest Service.

The three applicants in T.A.51 of 1987(O.P.7140 of 1983 on the file of the High Court of Kerala) Shri D.Sundara Rao, Shri Kousal K. Srivatsava and Shri K.Balachandran Thampi, and the two applicants in T.A.262 of 1986(O.P.323 of 1983 on the file of the High Court of Kerala) Shri Vijayakumar Sinha and Shri Shyam Dhar are direct recruits of the year 1977. The 4th respondent in T.A.88 of 1987(O.P.8997 of 1983 on the file of the High Court of Kerala) Shri T.M.Manoharan is a direct recruit of the year 1976, while the third respondent therein Shri Rajendra P. Sharma, who is the applicant in O.A.482 of 1986 is a direct recruit of the year 1975. Respondents 7 to 14 in T.A.51 of 1987 are promotees from the State Forest Service. Of them, the 7th respondent Shri S.John Koilparambil is the applicant in T.A.88 of 1987 and the 9th respondent Shri P.Vijayaraghavan is the applicant in T.A.318 of 1986(O.P.348 of 1984 on the file of the High Court of Kerala). Respondents 4 to 6 in T.A.318 of 1986 are respondents 3 to 5 in O.A.482 of 1986.

In T.A.51 of 1987, the applicants have prayed for fixation of their seniority above the respondents 7 to 14 therein. In T.A.88 of 1987, the applicant has prayed for declaring his seniority above respondents 3 and 4. A similar claim is urged by the applicants in T.A.318 of 1986 as well wherein respondents

3 and 4 in T.A.88 of 1987 have been impleaded as respondents 8 and 9. Both these applicants claim the year 1969 to be assigned to them as the year of allotment. In O.A.482 of 1986, the applicant has prayed that he be declared as senior to respondents 3 to 5 therein, who are respondents 4 to 6 in T.A.318 of 1986.

In the applications filed by the direct recruits there is also a claim for salary in the senior time scale with effect from the date of their confirmation in service. The applicants in T.A.51 of 1987 and T.A.262 of 1986 have prayed for this relief from 1-3-1980, while the applicant in O.A.482 of 1986 has claimed it with effect from 5-3-1978.

The applicants in T.A.51 of 1987 and in T.A.262 of 1986 seek to quash G.O.Rt.No.3336/79/GAD dated 25-5-1979 issued by the Government of Kerala making a pass in the departmental examination a condition for promotion of an officer to the senior scale of the I.F.S. in the case of officers of the year of allotment 1977 onwards.

The direct recruits allege that none of the promotees had continuously officiated in a senior post prior to their appointment to the I.F.S. on a regular basis on 12-9-1980 and as such their earlier service cannot be reckoned in assessing their seniority vis-a-vis the direct recruits. According to them, Shri Rao, the first applicant in T.A.51 of 1987, who happens to be the junior-most among the direct recruits of 1977, was continuously officiating in a senior post from 16-7-1980 onwards. On this premise it is urged that the promotees cannot claim an year prior to 1977 as the year of allotment and that they have to be ranked below the direct recruits of 1977. As against this, the contention of the promotees is that the applicants in T.A.51 of 1987 commenced their officiation in the senior time scale only in 1981 and in 1982, whereas the promotees had rendered continuous officiation in a senior post with effect from 20-11-1978

pursuant to G.S.Ms.No.516/78/GAD dated 20-11-1978 issued by the Government of Kerala. It is emphasised that ever since that order they had been officiating in senior posts without break or reversion. The specific case put forward by the applicant in T.A.88 of 1987 and in T.A.318 of 1986 is that the direct recruit who has officiated in a senior post prior to their date of continuous officiation is Shri C.T.S.Nair and as his year of allotment is 1969, they are also entitled to be assigned that year. Since respondents 4 to 7 in T.A.318 of 1986 have been selected to the I.F.S. prior to these applicants, the applicants do not claim seniority as against them. Both the applicants in T.A.318 of 1986 and in T.A.88 of 1987 have stressed that in any event as their names have been included in the list prepared by the Selection Committee on 21-12-1979, atleast from that date they have to be treated as officiating in a senior post and thus on any account, the direct recruits who have started officiation in the senior time scale only later cannot be placed above them.

For a proper appreciation of the dispute, and for an effective adjudication of the same, the genesis of the I.F.S., the rules relating to the recruitment, appointment by promotion, regulation of seniority and allied matters have to be scanned.

The I.F.S. was constituted after the constitution of the Indian Administrative Service and the Indian Police Service. The Indian Forest Service (Recruitment) Rules 1966 provides the method of recruitment to the service. After the initial constitution of the service, the subsequent recruitment to the service is from three streams - from the open market by a competitive examination; by selection of persons from amongst

the commissioned officers and by promotion of substantive members of the State Forest Service. The Indian Forest Service (Appointment by Promotion) Regulations, 1966, lays down the provisions dealing with promotion of State Forest Service Officers. According to Regulation 3 a Committee is to be constituted for the purpose of preparing a list of suitable officers from the State Forest Service for promotion to the I.F.S. The list is to be forwarded to the U.P.S.C by the State Government and the list as finally approved by the U.P.S.C. shall form the select list of the members of the State Forest Service. Regulation 8 provides that appointment of the members of the State Forest Service from the select list to posts borne on the State cadre shall be made in accordance with the provisions of Rule 9 of the I.F.S. (Cadre) Rules. But, where administrative exigencies so require, a member of the State Forest Service whose name is not included in the select list may be appointed to a cadre post in certain conditions. The Indian Forest Service (Cadre) Rules, 1966, defines cadre post as meaning any of the posts specified under item 1 of each cadre in the Schedule to the Indian Forest Service (Fixation of Cadre Strength) Regulations, 1966, and provides that the strength and composition of each of the cadres shall be as determined by Regulations made by the Central Government in consultation with the State Government. Temporary appointment of non-cadre officers to cadre posts is regulated by Rule 9 which is as follows:-

"9. Temporary appointment of non-cadre officers to cadre posts.--

(1) A cadre post in a State may be filled by a person who is not a cadre officer if the State Government or any of its Heads of Department to whom the State Government may delegate its powers of making appointments to cadre posts, is satisfied--

(a) that the vacancy is not likely to last for more than
three months; or

- (b) that there is no suitable cadre officer available for filling the vacancy;

Provided that where a cadre post is filled by a non-select list officer, or a select list officer who is not next in order in the select list, under this sub-rule, the State Government shall forthwith report the fact to the Central Government together with the reasons therefor.

(2) where in any State a person other than a cadre officer is appointed to a cadre post for a period exceeding three months, the State Government shall forthwith report the fact to the Central Government together with the reasons for making the appointment.

Provided that a non-select list officer, or a select list officer who is not next in order in the select list, shall be appointed to a cadre post only with the prior concurrence of the Central Government.

(3) On receipt of a report under sub-rule (2) or otherwise, the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officer, and where any direction is so issued, the State Government shall accordingly give effect thereto.

(4) Where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government shall report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission give suitable direction to the State Government concerned."

On a conspectus of the above rule, certain propositions, which are fundamental, emerge. They are:-

- (i) Normally every cadre post is to be filled by a cadre officer;
- (ii) Such a post can be filled by a non-cadre officer only when the appointing authority is satisfied that the vacancy is not likely to last for more than three months or that there is no suitable cadre officer available for filling the vacancy;
- (iii) Where a cadre post is filled by a non-select list officer, the State Government is to report the fact to the Central Government together with reasons therefor;
- (iv) It is open to the State Government to fill up a cadre post by a select list officer provided it lasts only for three months;
- (v) Where a person other than a cadre officer is appointed to a cadre post for a period exceeding three months, the State Government is to report the fact to the Central Government together with the reasons for making the appointment;
- (vi) A non-select list officer can be appointed to a cadre post only with the prior concurrence of the Central Government, if the appointment is for a period in excess of three months; and
- (vii) If a cadre post is proposed to be filled by a person who is not a cadre officer, for a period exceeding six months, the Central Government is to report to the U.P.S.C. and to give suitable directions to the State Government on its advice.

The Indian Forest Service (Fixation of Cadre Strength) Regulations, 1966, provides that the posts borne on, and the strength and composition of the cadre of the I.F.S. in each of the States shall be as specified in the Schedule to the Regulations. The assignment of the year of allotment is governed by the Indian Forest Service (Regulation of Seniority) Rules, 1968. According to clause (a) of Sub-rule (2) of Rule 3, the year of allotment of an officer appointed to the service by direct recruitment, shall be the year following the year in which the competitive examination was held. Clause (c) of Sub-rule (2) of Rule 3 deals with the year of allotment to be assigned to a promoted. It is extracted hereunder:-

"(c) where an officer is appointed to the Service by promotion in accordance with rule 8 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the Service in accordance with rule 7 or if no such officer is available the year of allotment of the junior most among the officers recruited to the Service in accordance with rule 4(1) of these Rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former;"

There are four Explanations to the clause of which Explanations 1 and 2 which are very relevant in these cases are also extracted hereunder:-

"Explanation 1.-- In respect of an officer appointed to the Service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for the purposes of determination of his seniority, count only from the date of

the inclusion of his name in the Select list, or from the date of his officiating appointment to such senior post, whichever is later.

Provided that where an officer is appointed to the Service by promotion under rule 3 of the Recruitment Rules on the basis of his name having been included in the first Select List prepared by the Selection Committee constituted under regulation 3 of the Indian Forest Service (Appointment by Promotion) Regulations, 1966, the period of his continuous officiation in a senior post or post declared equivalent thereto prior to the date of the inclusion of his name in the first Select List shall also count, if such officiation is approved by the Central Government in consultation with the Commission.

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

The fixation of pay of the officers in the Service is governed by the Indian Forest Service (Pay) Rules, 1968.

The year of allotment to which the promotees, mainly the applicant in T.A.88/87 and in T.A.318/86 are entitled to will have to be decided first. Since Shri John, the applicant in T.A.88/87, is the senior among the two, and as the inter se seniority cannot be questioned, it falls to be decided as to from which date, if any, Shri John had been officiating in a senior post, for, according to clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules his year of allotment is to be fixed with reference to such date, and having regard to the year of allotment of the junior-most

direct recruit, Shri Rao. At this juncture, an argument advanced both by Advocate Mr.T.R. Govinda Warier appearing on behalf of the applicants in T.A.51/87 and T.A.262/86 and by Shri C.S. Rajan on behalf of the 4th respondent in T.A.88 of 1987 and the 9th respondent in T.A.318/86 has to be referred to, as it would affect the interpretation to be placed on clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules. It was submitted by them that the former portion of the clause stands by itself, and giving the ordinary grammatical meaning to it, as is required to be given, since there is no ambiguity, the provision has to be interpreted as meaning that where an officer is appointed to the service by promotion in accordance with Rule 3 of the Recruitment Rules, the year of allotment shall be the year of allotment of the junior-most among the officers recruited to the service in accordance with Rule 7. It was pointed out that the words 'who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former' govern only the junior-most officer recruited to the service in accordance with Rule 4(1) of the Rules and not the junior-most among the officers recruited in accordance with Rule 7. We do not agree. Even on a grammatical interpretation, we are of the view that the concluding portion of the clause applies both to the recruits under Rule 7 and to those under Rule 4(1) of the Recruitment Rules.

It is quite obvious that the object of the clause is for fixation of seniority of the promotees vis-a-vis the direct recruits. It is too well-known that the promotees obtain promotion after a pretty long tenure in the State Forest Service. No doubt, a direct recruit may desire to have the seniority of the promotee reckoned only from the date of his entering the I.F.S. But the promotee

would like to have it even from the date of entry into the State Forest Service. The manifest object behind the clause is to maintain a balance between the two. A similar provision is there in the Indian Administrative Service (Recruitment) Rules and in the Indian Police Service (Recruitment) Rules. All along the Supreme Court and the various High Courts have been interpreting the clause making the concluding portion applicable both to the direct recruits as well as to the recruits under Rule 4(1) of the Recruitment Rules. A Bench of this Tribunal, to which one of us was a party (Shri G Sreedharan Nair) has also taken the same view in the decision in K. Ramachandran vs. Union of India and others (Order in T.A. No.536 of 1986 dated 13th April 1986).

For a proper determination of the year of allotment of the promotee, the first thing to be done is to fix the date of commencement of his officiation in a senior post. Then it has to be ascertained who is the junior-most direct recruit who was continuously officiating in a senior post immediately before that date. In view of Explanation 1 to clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules, in the case of a promotee the period of his continuous officiation in a senior post shall, for the purpose of determination of his seniority, count only from the date of the inclusion of his name in the select list, or from the date of his officiating appointment to such senior post whichever is later. The promotee may continuously officiate in a senior post even before the inclusion of his name in the select list. It is also possible that he may start his officiation only subsequent to the inclusion of his name in the select list. But in either case, continuous officiation is a must,

for the attraction of clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules. Naturally, in case there is no such officiation, there is no scope for fixation of seniority and assignment of the year of allotment under the aforesaid clause, and going by general principles, the seniority will be governed only by the date of regular appointment to the I.F.S.

There was considerable discussion at the bar on the question whether even if there is officiation in a senior post by a promotee, it can do duty, if it is not sanctioned by the Rules and is illegal on that account. The question that arises in that context is whether the services rendered by a promotee in a cadre post to which he is appointed not in compliance with Rule 9 of the I.F.S. Cadre Rules would amount to officiation in that post for the purpose of clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules. As has been pointed out earlier, normally a cadre post is to be filled only by a cadre officer. The power of the State Government to fill up a cadre post with a non-select list officer is fettered by the two provisos, the first one to Sub-rule (1) of Rule 9 and the other to Sub-rule (2) of the Rule. Indeed, the State Government has the power of making the appointment only if it is satisfied that the vacancy is not likely to last for more than three months or that there is no suitable cadre officer available for filling the same. Besides, there is the obligation on the part of the State Government to forthwith report the fact to the Central Government. A non-select list officer can be appointed to a cadre post only with the prior concurrence of the Central Government.

On behalf of one of the promotees, Advocate Shri R Bhaskaran appearing for the applicant in T.A. 318 of 1936 invited our attention to the decision of the Supreme Court in Union of India vs. G.S. Tiwari (A.I.R. 1936 S.C. 340) where on an analysis of clause (b) of Sub-rule (3) of Rule 3 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954, and of Rule 9 of the Indian Administrative Service (Cadre) Rules, 1954, which contain identical provisions as in clause (c) of Sub-rule (2) of Rule 3 of the Indian Forest Service (Regulation of Seniority) Rules and in Rule 9 of the I.F.S. (Cadre) Rules, it was held that there is no provision in the Cadre Rules empowering the Central Government to direct the curtailment of the period of officiation of a non-cadre officer on a cadre post for purposes of reckoning his year of allotment and that such a power cannot be spelt out from the Cadre Rules which confers power on the Central Government to direct termination of appointment of a non-cadre officer to a cadre post. It was also held that the non-cadre officers could not be denied the benefit of continuous officiation in a senior post merely because the State deputation reserve quota was over-utilised. By the aforesaid decision, the Supreme Court was upholding the judgement of the High Court of Madhya Pradesh. Placing reliance on this judgement, it was submitted by the counsel for the promotees that the appointment of the promotees to cadre post, before the inclusion of their names in the select list, and the consequent officiation in those posts have to be recognised for determining the year of allotment. We are afraid that we cannot accept this submission. It is clear from a careful reading of the judgement of the Supreme Court that what was considered in that case was the scope of Rule 9 of the Indian Administrative Service (Cadre) Rules, 1954, without

the two important provisos to the Sub-rules (1) and (2) of the Rule, which were added to the Rule only by way of an amendment by the notification dated 30-9-1976. Rule 9 of the I.F.S. (Cadre) Rules also was originally in that form. There also the provisos were added only by the notification dated 30-9-1976. The first proviso makes it obligatory on the part of the State Government to report the temporary appointment of a non-cadre officer to a cadre post to the Central Government together with the reasons therefor. As regards the appointment of a non-select list officer or a select list officer who is not next in order in the select-list to a cadre post, the second proviso lays down that it shall only be with the prior concurrence of the Central Government. As a result of these provisos, if an appointment is made by the State Government against the mandate thereof, it cannot be considered as a valid appointment to a cadre post, so that the person appointed can claim its benefit for the purpose of fixation of his seniority in terms of clause (c) of Sub-rule (2) of Rule 3 of the Seniority Rules.

From the facts in G.S.Tiwari's case, it is clear that the appointment by the State Government to the cadre post had been made in the year 1975, while the two provisos were not there in the Rule. Moreover, the Central Government had specifically accorded its approval to the appointment.

Counsel of the direct recruits brought to our attention the decision of the Andhra Pradesh High Court in K.Muralidhar Vs. State of Andhra Pradesh (1986 (4) S.L.R.206). In that decision, it has been held that if there is no compliance with Rule 9 of the Indian Administrative Service (Cadre) Rules, the officiating service cannot be counted for the purpose of assignment of the year of allotment. The orders of the Central Government, not

accounting a portion of the officiating service of the petitioners in that case, on account of non-compliance of Rule 9 was held to be unexceptional. The strong reliance placed upon the decision of the Supreme Court in Harjeet Singh's case (A.I.R. 1980 S.C.1275), wherein it was held that merely because there has been over-utilisation of deputation reserve, the continuous officiation of select-list officers should not be ignored, was held to apply only where the conditions prescribed by Rule 9 of the Cadre Rules are fulfilled. We are in respectful agreement with the view taken in that decision. The dictum laid down in Harjeet Singh's case is only that if non-cadre officers are appointed to cadre post in accordance with Rule 9 of the Cadre Rules, there is no justification for denying the benefit of officiation on the ground that more cadre officers had been deputed for service elsewhere. There was no dispute in that case that the conditions prescribed by Rule 9 of the Cadre Rules were not fulfilled.

We hold that only if a non-cadre officer is appointed fulfilling the various conditions stipulated in Sub-rules (1) and (2) of Rule 9 of the I.F.S.(Cadre) Rules, can he claim the benefit of officiation in that post in the matter of fixation of his seniority under clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules. We would also add that "for ante-dating their baptism to the I.F.S.", to borrow the expression used by Justice V.R. Krishna Iyer, the promotees have to render continuous officiation which is valid and which has the sanction of law.

At this stage, it will be useful to examine whether the claim of the promotees that they have been continuously officiating in a senior post from 20-11-1970 pursuant to their postings under G.O.Ms.No.516/70/GAD dated 20-11-1970 is sustainable. According to

the G.O. the applicant in T.A.88/87 is posted as Deputy Conservator in the I.F.S. Cadre. Admittedly, he was only an Assistant Conservator at that time and was on deputation to the Hindustan Paper Corporation Limited. By the G.O. he was allowed to continue on deputation. There is no case that the post in the Hindustan Paper Corporation Limited is a Cadre post. Unless one holds the duties of a post or discharges an office, one cannot be considered as officiating in a post. Hence his officiation in that post pursuant to the G.O. does not amount to an officiation in a cadre post. It is on record that till 13-3-1980 he was continuing with the Hindustan Paper Corporation Limited and that he took charge as Divisional Forest Officer, Kottayam, only on 19-3-1980 pursuant to G.O.Rt.No.1220/80/GAD dated 19-2-1980. From 13-3-1980 to 19-3-1980 he was not discharging the duties of any post. It is also significant to note that his posting at Kottayam was in the vacancy that arose as a result of the retirement of an Assistant Conservator of Forests, which is not a cadre post. Subsequently by G.O.Rt.No.1969/80/AD dated 10-7-1980 he was appointed as Special Officer, Inspection, in the office of the Additional Chief Conservator of Forests, Trivandrum, which again, is a non-cadre post. It was after availing joining time that he joined the post. Between 27-7-1980 and 13-8-1980 he had to wait for another posting and during this period of compulsory wait, admittedly he did not officiate in any post. It was only by G.O.(Rt.) No.6314/80/GAD dated 14-8-1980 that he was posted as Assistant Chief Conservator of Forests, Trivandrum. On 12-9-1980, he was appointed to the I.F.S. It may also be noted that till then he was never in receipt of salary in the senior scale of I.F.S.

The posting of the applicant in T.A.88/87 in the I.F.S. cadre by the order dated 20-11-1978 is evidently not in compliance with Rule 9 of the I.F.S. Cadre Rules. The prior concurrence of the

Central Government which is a condition precedent according to the proviso to Sub-rule (2) of Rule 9 has admittedly not been obtained. In the counter affidavit filed on behalf of the Central Government, it has been maintained that there is no officiation in a senior post as far as he is concerned and hence his seniority has been determined with respect to the date of his promotion to the I.F.S., namely 12-9-1980, and the year of allotment fixed accordingly. In the counter affidavit filed on behalf of the State Government, the circumstances under which the G.O. dated 20-11-1978 happened to be issued are referred to. It is clearly stated that since cadre posts were vacant owing to dearth of I.F.S. officers the State Forest Service Officers had to be appointed to such posts temporarily and that such appointment does not amount to promotion to the I.F.S. As far as the applicant in T.A.88/87 is concerned, it is clearly stated that even before the order he was on deputation on foreign service condition as Silviculturist under the Hindustan Paper Corporation Limited which post is not a cadre post. It is categorically stated by the State Government that by virtue of the order dated 20-11-1978, there was no officiation by him in a cadre post. It is also pointed out that on the date of the order, the State deputation reserve had been over-utilised and on that account, the Government of India did not approve the officiation of the State Forest Officers appointed to the I.F.S. under the said order.

Counsel of the direct recruits brought to our attention the decision of the Supreme Court in Anil Kumar Chowdry vs. State of Assam (A.I.R.1975 S.C. 1061) where it was held on an interpretation of clause (b) of Sub-rule (3) of Rule 3 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954, that even the break in the officiation on account of joining time taken by an official

cannot cover up the legal ingredients of continuous officiation. It was submitted that in the case of the applicant in T.A.88/87, even assuming that by virtue of the order dated 20-11-1978 he validly started to officiate in a cadre post, in view of the several breaks adverted to earlier, there is no continuity and hence the service is of no avail for assessment of seniority in accordance with clause (c) of Sub-rule (3) of Rule 3 of the Seniority Rules. As far as the other promotees are concerned, as they are admittedly junior to Shri John, the applicant in T.A.88/87, they have to necessarily go below him. The applicant in T.A.313 of 1986, was only holding the post of Divisional Forest Officer in the rank of Assistant Conservator of Forests in State Forest Service and in the scale of pay attached to that post till 12-9-1980. On the date of the G.O., on 20-11-1978, he was holding the territorial division of Wyanad. It is clearly pointed out in the counter affidavit filed by the State Government in T.A.262/86, that though there are sixteen posts of Deputy Conservator of Forests in the Kerala cadre of I.F.S. these posts have not been specified for administrative reasons with a view to ensure flexibility in regard to postings of cadre officers and that the posts are intended to be put in charge of sixteen territorial divisions existing in the State. It is further pointed out that junior scale officers will be counted against the junior scale post provided in the cadre irrespective of the postings given to them in the senior time scale. It is also stated that any officer, whether Assistant Conservator or Deputy Conservator, in charge of a Forest Division, is a Divisional Forest Officer. There is no case for the promotees that as a result of the order dated 20-11-1978, the applicant in T.A. 313 of 1986 was transferred from the post of Divisional Forest Officer, Wyanad. Counsel of the direct recruits placed reliance on paragraph 4...3...2 Kerala Forest Code to the effect that when a cadre officer

holds a territorial division, it will be counted against a cadre post and when a State Forest Officer holds it, it will be counted only against a State Forest Service post. It was submitted that till 12-9-1980, the applicant in T.A.310 of 1936 was only holding the post of Divisional Forest Officer as Assistant Conservator of Forest in the State Forest Service and was drawing only the scale of pay in the State Forest Service. Counsel also placed before our attention a decision of the High Court of Himachal Pradesh in R.C.Sharma vs. Union of India (1983 Lab.I.C.1435) wherein it was held that where a Forest Officer belonging to the Forest Service of Himachal Pradesh held the post with the rank and designation of Assistant Conservator of Forest on the date of the constitution of the Indian Forest Service, and the post he held could be held by any member of the State Forest Service, the officer could not be considered to hold a cadre post and that he could not claim senior scale of pay.

On behalf of the promotees, an argument was advanced that Explanation 1 to clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules contemplates continuous officiation in two instalments, the first till the date of inclusion in the select list and the other during the period thereafter. It was submitted that though for reckoning the officiation under the former category, approval by the Central Government is required, such approval is not mandatory for taking into account the officiation after the inclusion in the select list. Apparently, the submission was made drawing inspiration from the decision of the Supreme Court in D.R.Nim Vs. Union of India (A.I.R.1967 S.C. 1301). That case dealt with Rule 3 of the Indian Police Service (Regulation of Seniority) Rules, 1954. It was the scope of the second proviso to Sub-rule (3) of Rule 3 that was considered.

The second proviso to clause (c) of Sub-rule (2) of Rule 3 of the Indian Forest Service (Regulation of Seniority) Rules, has been introduced by an amendment dated 10.10.1968 and its terms are not the same as in the proviso that was under consideration by the Supreme Court.

It was emphatically urged by counsel of the promotees that at any rate since the names of the applicants in T.A.88/87 and T.A.318/86 were included in the list prepared by the Selection Committee that met on 21.12.1979, it is to be held that their continuous officiation has commenced from that date. The fallacy in the submission is two fold. By the mere inclusion of the name of a State Service Officer in the list prepared by the Committee constituted under Regulation 3 of the Indian Forest Service (Appointment by Promotion) Regulations, it cannot be said that his name has been included in the select list. The list prepared by the Committee is subject to change by the U.P.S.C. According to Regulation 7 of the above Regulations, the list as finally approved by the Commission shall form the select list of the members of the State Forest Service. So much so, only when the U.P.S.C. grants its final seal of approval, does the list prepared by the Committee become a select list. The expression "select list" referred to in the Regulation of Seniority Rules means the select list prepared in accordance with the Regulations, as is clear from the definition in clause (1) of Section 2 of the Regulation of Seniority Rules. Admittedly, the approval was given only on 27.2.1980. As such, it cannot be successfully contended that their names were included in the select list prior to that date.

The mere inclusion of the names in the select list will not be of any purpose in the matter of reckoning seniority under clause (c) of Sub-rule (2) of Rule 3 of the Regulation of Seniority Rules. What is essential is continuous officiation in a senior post. According to Explanation 1 to the clause, in some cases the period of continuous officiation for the purpose of determination of seniority shall count from the date of inclusion of the name in the select list, and though there was an officiation in a senior post earlier to the inclusion of the name in the select list, it will be of no avail. But without an officiating appointment to the senior post, mere inclusion of the name in the select list cannot be pressed into service.

From the materials on record, what emerges is that prior to their appointment to the I.F.S. these promotees had no continuous officiation at all, as has been pointed out earlier, and as such they can claim seniority only from 12.9.1900, the date of their regular appointment to the I.F.S.

Among the direct recruits, Shri Rao, the first applicant in T.A. 51 of 1987 is the junior-most. He was appointed to the service with effect from 1.3.1977 on the basis of the competitive examination held in 1976. He has been given 1977 as the year of allotment, and has been confirmed with effect from 1.3.1980. After completion of training he was appointed as Divisional Forest Officer, Trivandrum, by G.O.Rt.No.1969/80/AD dated 10.7.1980. He continued in the post till 29.7.1982 and thereafter he was working as Silvicultural Research Officer at Trivandrum, a cadre post. It was submitted on his behalf that from 16.7.1980, the date on which he took charge as Divisional Forest Officer, Trivandrum, he has been officiating in a senior post. The submission has to be accepted.

It follows that the applicants in T.A.88/87 and in T.A.318/86 cannot claim any year of allotment earlier than 1977 and that their prayer for assigning them the year 1969 as the year of allotment is not sustainable.

By G.O.Rt.No.6729/80/GAD dated 17-10-1980, the 4th respondent in T.A.88/87 was promoted to officiate in the senior scale of I.F.S. By a subsequent G.O.No.831/81/GAD issued on 29-1-1981, the promotion was ante-dated with effect from 1-5-1980. The validity of these orders has been challenged by the applicants in T.A.88/87 as well as T.A.318/86. It is contended that a direct recruit can be promoted to the senior time scale only on completion of five years of service including the period of training, in view of the instructions contained in the letter dated 24-9-1973 issued by the Ministry of Home Affairs. Though by a subsequent letter issued on 23-8-1982, the period of five years has been reduced to four, the plea of the applicants in T.A.88/87 and T.A.318 of 1986 is that the subsequent instructions have no retrospective effect. On the same lines the orders promoting the applicant in O.A.482 of 1936 are also attacked.

Appointment of officers in the junior time scale of pay to posts in the senior time scale is governed by Rule 6-A of the Indian Forest Service (Recruitment) Rules. It is provided in Sub-rules (1) and (2) of the Rule, the appointments of officers recruited to the service by direct recruitment to posts in the senior time scale is to be made by the State Government, if, having regard to his length of service and experience, the State Government is satisfied that he is suitable for such appointment. According to clause (a) of Sub-rule (3) it is open to the State

Government to withhold the appointment of an Officer to the senior time scale of pay till he is confirmed in the service or till he passes the prescribed departmental examination. Clause (b) enables the State Government to appoint an officer at any time to a post in the senior time scale of pay as a purely temporary or local arrangement.

In the counter affidavit filed by the Central Government in T.A.319/1986, it is pointed out that these two direct recruits, Shri R.S. Sharma and Shri T.M. Manoharan were appointed to the I.F.S. on 5-3-1975 and on 1-5-1976 respectively and that there is nothing that prevents the State Government from appointing the direct recruits like them to a post in the senior time scale even without passing the departmental examinations. This is reiterated in the counter affidavit filed by the State Government wherein it is further stated that in June 1980, the State Government as a matter of policy decided that I.F.S. officers can be considered for promotion to the senior scale on completion of four years instead of five years and it was based on this policy decision that these two officers were promoted to the senior scale. It is also pertinent to refer to the letter dated 29-6-1975 from the Government of India to the Secretary, Government of Bihar, Forest Department, that the five year period referred to in the letter dated 24-9-1973 is only in the form of guidelines and that there is no restriction in promoting a direct recruit to the I.F.S. who has been confirmed in the service even before the completion of the said period.

In view of what is stated above, the attack against the orders promoting Shri R.P. Sharma and Shri T.M. Manoharan to the senior scale has to be ruled out and we do so.

The claim for salary in the senior time scale with effect from 1-3-1980 put forward by the applicants in T.A.51/87 and T.A.262/86 and that of the applicant in O.A.482/86 with effect from 5-3-1978 may now be examined.

It is seen that interim directions were issued by the High Court of Kerala in T.A.51/87 and T.A.262/86, while they were pending there, to the effect that the salary of the direct recruits of 1977, should be fixed in the senior scale as all of them were admittedly working in senior post ever since their probation was declared, if not earlier. In implementation of these directions, G.O.Ms.426/83/GAD dated 26-12-1983 was issued. In paragraph 2 of the order, it is stated that these direct recruits have been posted to senior posts. Hence it was argued that the senior scale of pay is to be given from the date of such posting. It is specifically contended by the State Government that the appointment of these persons to the senior scale post was only as a temporary arrangement as contemplated by clause (b) of Sub-rule (3) of Rule 6-A of the Recruitment Rules. It is also pointed out that they have not been promoted to the senior scale and that they were not eligible for such promotion as they have not passed the prescribed departmental test.

It cannot be disputed that the State Government has unfettered powers to appoint a direct recruit to the I.F.S to a post in the senior time scale of pay as a purely temporary or local arrangement and that this can be done at any time. That the State Government has the power to withhold the appointment of such an officer to a post in the senior time scale of pay till he passes the prescribed departmental examination is also clear.

The State Government may choose to appoint a direct recruit even

before the probation period is completed to a post in the senior time scale of pay as a purely temporary or local arrangement. Such a person cannot claim to have been formally promoted to the post in the senior time scale of pay and claim that scale of pay. It may be that the service in the post would count for officiation in a post in the senior time scale of pay. But that will not confer any right for awarding the senior scale of pay till a regular appointment is made to that post. We are fortified in this view by Sub-rule (2) of Rule 6-A of the Recruitment Rules which makes it clear that as a matter of right it is not open to such an officer to be appointed to a post in the senior time scale of pay and that it can be done only if the State Government is satisfied, having regard to his length of service and experience, that he is suitable for appointment to the post.

It follows that the claim for salary in the senior time scale urged by the applicants in T.A.51/87, T.A.262/86 and O.A.402/1986 cannot be allowed. However, it is made clear that there will not be any liability to refund any portion of the salary drawn till this date pursuant to the G.O. dated 26-12-1983 in accordance with the interim directions of the High Court.

We pass on to consider the attack against the G.O. Rt. No. 3336/79/GAD dated 25-5-1979 to the effect that a pass in the departmental examination will be a condition for promotion of an officer in the I.F.S. to the senior scale in the case of I.F.S. officers of the year of allotment 1977 onwards. It was submitted by counsel of the applicants in T.A.51/87 and T.A.262/86 that the All India Service Act, 1951, does not confer power on the State Government to make rule governing the conditions of services of the officers

in an All-India Service. It was pointed out that under Section 3 of the Act, power is conferred only on the Central Government to make rules for the regulation of recruitment and conditions of service of persons appointed to All India Service after consultation with the State Government. Reference was also made to the provision in the Act that though power has been conferred to give retrospective effect to the rules, no retrospectivity shall be given to any rule so as to prejudicially affect the interest of any person. The G.O. was characterised as ultravires. We are not persuaded to accept this submission. In view of Rule 6-A of the Recruitment Rules, the State Government is the appointing authority in respect of direct recruits to the I.F.S. in the matter of their appointment to posts in the senior time scale of pay. The suitability of an officer in this regard is also to be assessed by the State Government. It is specifically provided in Sub-rule (3) of the Rules that it is open to the State Government to withhold the appointment of such an officer to a post in the senior time scale of pay till he passes the prescribed departmental examination. According to the definition contained in clause (c) of Rule 2 of the Pay Rules, departmental examination means such examination as may be prescribed by the State Government from time to time for members of the service allotted to the cadre of that State. In the face of these provisions, the vires of which is not assailed, the G.O. issued by the State Government making a pass in the departmental examination essential for promotion to the senior scale of the I.F.S. cannot be said to be without jurisdiction. In paragraph 13 of the counter affidavit filed on behalf of the State Government in T.A.262/86, the circumstances under which the G.O. had to be issued are

referred to. It is stated there that the Government noticed that there was a tendency on the part of some probationers in not taking sufficient interest in the departmental examinations, which have been proscribed as a detailed study of the relevant rules and procedures and a test of their proficiency in the rules and procedures are essential to the training and development before they can be entrusted with substantial responsibilities. Hence G.O.Ms.No.403/78/GAD dated 26-7-1978 was issued as regards the officers in the Indian Administrative Service of the year of allotment of 1977 onwards. Subsequently, by the impugned G.O. this was extended to the officers of the Indian Police Service as well as the I.F.S.

It was vehemently submitted by Advocate Shri T.R.Govinda Wariar that at any rate in so far as the G.O. gives retrospectivity, it is bad, and that it is also arbitrary as officers of the year of allotment 1977 onwards have been brought within its scope without any rational basis. It was stressed that in view of the settled position of law an order affecting the conditions of service of an employee shall not be made retrospectively so as to operate to his prejudice. We have given careful thought on this contention, but are not in a position to agree.

The impugned G.O. was issued on 25-5-1979. It does not state that it will have operation from a prior date. What is stated there is only that the order will have effect in the case of I.F.S. officers of the year of allotment 1977 onwards. The I.F.S. officer to have the year of allotment 1977 must be one who reports for duty in the State, after training, in the year 1979. As such, there is a reasonable basis for making the order

operative only in respect of I.F.S. officers with the year of allotment 1977 onwards, and not earlier. The classification of the officers with the year of allotment 1977 onwards and those with earlier years of allotment is, in the circumstances, a reasonable classification. It has also a rational nexus with the object sought to be achieved, namely to make the officers equipped with the rules and procedures before entrusting them with substantial responsibilities.

We overrule the attack against the G.O.

What remains is the consideration of the claims of the applicant in O.A.402 of 1986. He is a direct recruit on the basis of examination held in the year 1974 and has been assigned 1975 as the year of allotment. He was confirmed with effect from 5-3-1978. He joined the senior post on 19-10-1978 and hence he claims pay in the senior time scale from that date. Admittedly, he has been awarded senior scale pay, originally with effect from 5-3-1980 which was later modified and was given effect from 5-3-1979. In view of the discussion and the conclusion arrived at earlier that it is not open to a direct recruit, merely because he has been appointed to a post carrying a senior scale of pay, to claim that scale of pay, this relief cannot be allowed.

The other relief that is claimed in the application is to place him above the respondents 3 to 5. Those officers are promotee officers who have been assigned 1969 as the year of allotment, as early as on 17-6-1980. The year of allotment of the applicant is only 1975. The names of the three promotees were included in the select list dated 3-5-1978 and their

continuous officiation in senior post with the approval of the Government of India was from 15-5-1970, 15-7-1970 and 17-7-1970 respectively. As their names have been included in the select list and as they started continuous officiation in a senior post, both of which were prior to 19-10-1970, the date on which the applicant claims to have been posted to a senior post and started officiating therein, the plea of the applicant that they have to be placed below him cannot be accepted. As the junior-most direct recruit officer who started officiation in a senior post prior to the commencement of the continuous officiation by these three promotees was Shri C.T.S.Nair, a direct recruit with the year of allotment 1969, they have been assigned 1969 as the year of allotment. Hence the challenge in that respect is also without any basis.

Advocate Mr.K. Balakrishnan appearing on behalf of the promotees in this application submitted that the application is barred by limitation in view of Section 21 of the Administrative Tribunals Act. We find that this submission is well-founded.

The assignment of the year of allotment to these three promotees was by the order contained in the Government letter dated 17-6-1980. The gradation list of I.F.S. officers (Kerala cadre) as on 1-1-1981 was published in the year 1981 itself wherein the respondents 3 and 4 have been shown at ranks 17 and 18, while the applicant is only at 21. The respective years of allotment are also mentioned therein. Thereafter, every year gradation lists were being published showing these respondents as seniors to the applicant. Merely because on 1-1-1986 a gradation list has been published, the applicant cannot base his cause of action thereon so as to save the bar of limitation. It was

submitted by counsel of the applicant that the applicant had been bringing the matter to the notice of the Government by filing representations. That will not save time under Section 21 of the Administrative Tribunal Act. Hence the application has to fail on the ground of bar of limitation as well.

In T.A.51 of 1987 and T.A.262 of 1986, there is a prayer for directing respondents 1 to 6 to clearly define and publish the junior and senior posts in the Kerala State cadre of the I.F.S. In the counter affidavit filed by the Union of India in T.A.51 of 1987, the cadre strength in respect of Kerala cadre of I.F.S. has been extracted. It refers both to the junior and senior posts.

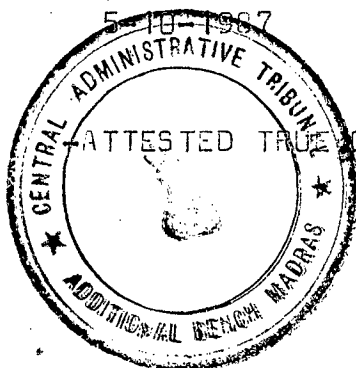
Before parting with these cases, we would like to place on record the valuable assistance rendered by all the counsel who appeared in this case, but for which it would not have been possible for us to dispose of these cases within such a short time.

In the result, in T.A.51 of 1987 we declare that the applicants therein have to be treated as seniors to the respondents 7 to 14. The other reliefs claimed therein are disallowed. The other applications, namely T.A.88/87, T.A.318/86, O.A.402/86 and T.A.262/86 are dismissed.

Sd/-
(C. VENKATARAMAN)
Member (A)

Sd/-
(G. SREEDHARAN NAIR)
Member (J)

Index: Yes



8/10/87
DEPUTY REGISTRAR

Prepared by: RV/CKS/VPA

Compared by: