

U.O.I. THROUGH GOVT. OF PONDICHERRY AND ANR.

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v.

V. RAMAKRISHNAN AND ORS.

OCTOBER 7, 2005

[S.B. SINHA AND R.V. RAVEENDRAN, JJ.]

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Service law:

Recruitment Rules, 1996—Post of Chief Engineer—Appointment of claimant, on deputation pending selection of regular incumbent by Competent Authority, thereafter Repatriation Order passed, and posted at other place—Meanwhile, Draft Rules framed, eligibility criteria altered and five years experience for the post reduced to three years—Promotion of Superintending Engineer having three years of experience, on ad hoc basis—Appointment challenged by claimant—Both the tribunal and the High Court upheld the claim—Plea of Superintending Engineer that Draft Rules were approved and notice was issued—On appeal held: Valid Rules made even though it becomes unworkable continues to be in force unless repealed or replaced by another rule or amended—Draft Rules cannot form the basis for grant of promotion, when Rules to the contrary holds the field—Thus, till New Rules framed were given effect to, promotion to the post of Chief Engineer could not be effected in derogation to the criteria prescribed under the existing rules—Hence, order of tribunal and High Court upheld—Constitution of India, 1950—Article 309 proviso.

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Government Services—Deputation—Deputationist, right of—Held: Has no legal right to continue or to be absorbed in the deputed post, but there is no bar—Further, specified term of deputationist should not be curtailed except on unsuitability or unsatisfactory performance—Also in case of non-specified term, reversion can be questioned when it is malafide.

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Constitution of India, 1950—Article 16—Equal opportunity in matters of public employment—Candidates with same qualification—Government in stead of asking the Authority to constitute Departmental Promotion Committee, requesting it to regularize the services of an adhoc promotee from the date of his promotion—Held: Is a malafide action on the part of the Government.

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A The First Respondent was appointed to the post of Chief Engineer of the Public Works Department of the Government of Pondicherry, on short term deputation/ temporary basis till a regular appointment was made by UPSC. The appointment was made under the Recruitment Rules, 1996 governed by the Notification issued by the Government under the proviso to Article 309 of the Constitution of India. Within 8 months the

B respondent was relieved from his duties and was repatriated to his parent department. The first respondent filed application challenging the repatriation order before the tribunal. The appellant in the connecting appeal, who was Superintending Engineer with three years experience and holding the current charge of the duties of the post of Chief Engineer at

C that time challenged the deputation of the first respondent. The application was dismissed since the appellant was not eligible to hold the said post and regular appointment in terms of the Recruitment Rules was yet to take place. Meanwhile, Draft Rules were framed and the eligibility criteria of five years experience for the post of Chief Engineer was reduced to three years and the appellant was promoted on *ad hoc* basis. The First

D Respondent was posted as Director of Works (SR) at other place. Even then he challenged the appointment and filed amendment application before the tribunal and the same was allowed. Aggrieved, appellant filed appeals. The High Court dismissed the appeals holding that the First Respondent who was sent on deputation pending selection of the regular

E incumbent by the UPSC had a right to hold the said post till such time; and the appellant was ineligible to be appointed as Chief Engineer till the Draft Rules were approved. Hence the present appeals.

Appellants contended that the Draft Rules having been approved wherefor an appropriate Notification had been issued and as the DPC is

F likely to hold its meeting at an early date, the application filed by the first respondent became infructuous; that the High Court erred in not considering the effect of the draft rules as in terms thereof the appellant could have been considered; and that the appellant was not given opportunity of filing a reply to the amendment application.

G Dismissing the appeals, the Court

H HELD: 1.1. Valid Rules made under proviso appended to Article 309 of the Constitution of India even if it has become unworkable continues to be in force unless repealed or replaced by another rule or amended. The rules did not become inoperative only because the two scales of pay

of the Superintending Engineer and the Chief Engineer became same in terms of revised pay scales. A rule does not become inoperative only because the UPSC says so. As regard scale of pay, the matter should have been referred to the anomaly removal committee. In terms of the new rules, the criteria prescribed under the old rules were modified. Thus, till the new rules were given effect to, no promotion to the post of Chief Engineer could be effected in derogation to the criteria prescribed under the existing rules. Therefore, the draft rules could not form the basis for grant of promotion, when Rule to the contrary is holding the field.

[301-C; 300-D-E]

Parshotam Lal Dhingra v. Union of India, [1958] SCR 828; *Abraham Jacob and Ors. v. Union of India*, [1998] 4 SCC 65; *Vimal Kumari v. State of Haryana and Ors.*, [1998] 4 SCC 114; *High Court of Gujarat and Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors.*, [2003] 4 SCC 712 and *Dr. Rajinder Singh v. State of Punjab and Ors.*, [2001] 5 SCC 482, referred to.

1.2. The appellant was granted promotion on the basis of the draft rules which was given finality only during the pendency of the matter before this court. Furthermore, the new rules framed in terms of proviso appended to Article 309 of the Constitution of India as per notification dated 28.9.2005 has not been given a retrospective effect. By reason of the said rules, the Superintending Engineer having a scale of pay of Rs. 12,000-16,500 with five years regular service in the grade could be promoted as Chief Engineer. [301-E, F]

1.3. In terms of Article 16 of the Constitution, the employees similarly situated cannot be discriminated. Employees having the same qualification must be considered by a duly constituted DPC consisting of the Chairman/Member, UPSC, Chief Secretary and Secretary (Works). It is unfortunate that the Government of Pondicherry instead and in place of asking the UPSC to constitute a DPC for consideration of the cases of all eligible candidates, passed the order dated 28.9.2005 on which the new Rules came into effect, requesting UPSC to regularize the services of the appellant as Chief Engineer from the date of his *ad hoc* promotion. Such an act betrays lack of *bona fides* on the part of a State which is required to be performed in a fair and reasonable manner. It smacks of favouritism. Having regard to the unauthorized purpose for which the action has been taken, the same would attract the principle of malice in law. [301-H; 302-A, B, C]

Punjab State Electricity Board Ltd. v. Zora Singh Ors., [2005] 6 SCC 776, relied on.

A 1.4. The appellant was not given an opportunity of hearing in terms of Rule 12 of the Central Administrative Tribunal (Procedure) Rules, 1987 framed under the Administrative Tribunals Act, 1985. But, it does not appear from the judgment of the High Court that the appellant had taken any such point before it. It was open to him to raise a specific question as regard violation of Rule 12 and denial of an opportunity of hearing.

B [303-D]

C 2. Ordinarily, a deputationist has no legal right to continue in the post. He has no right to be absorbed in the post to which he is deputed. However, there is no bar thereto as well. It may be true that when deputation does not result in absorption in the service to which an officer is deputed, no recruitment in its true import and significance takes place as he is continued to be a member of the parent service. When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on the just grounds of unsuitability or unsatisfactory performance. But, even where the tenure is not specified, an order of reversion can be questioned when the same is mala fide. An action taken in a post haste manner also indicates malice. [302-D, E]

E *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia and Ors.*, [2004] 2 SCC 65, relied on.

Parshotam Lal Dhingra v. Union of India, [1958] SCR 828, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6332 of 2005.

F From the Judgment and Order dated 11.8.2005 of the Madras High Court in W.P. No. 24008 of 2005.

WITH

C.A. Nos. 6333-34 of 2005.

G G.E. Vahanvati, Solicitor General and V.G. Pragasam for the Appellant.

V.A. Bobde, K.V. Viswanathan, Atul Kumar Sinha and B. Ragunath for the Appellants in C.A. Nos. 6333-34/2005.

H P.P. Rao, Ms. Nalini Chidambaram, Ms.Indu Malhotra, Ms. Rafi and Vikas Mehta for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

The First Respondent herein was appointed on deputation as Chief Engineer of the Public Works Department, Government of Pondicherry on short term deputation/temporary basis pending selection of the regular incumbent by the Union Public Service Commission (UPSC) with effect from 1.7.2004. He was repatriated to his parent department on 14.2.2005 and relieved off from his duties on the same day. Questioning the same, an original application was filed before the Central Administrative Tribunal on 25.2.2005 praying interalia therein:

“it is humbly prayed that this Hon’ble Tribunal may be pleased to quash the order passed by the 2nd Respondent in No. A.22012/I/PW-1/A1/2002 (Part) dated 14-2-05 as illegal and unconstitutional and thus render justice.”

R. Sundar Raju (Appellant in the connected appeal), Superintending Engineer, having three years experience, who was holding the current charge of the duties of the post of Chief Engineer at that time, in the meanwhile had filed an application questioning the deputation of the First Respondent herein. In the said original application, Government of Pondicherry *inter alia* raised a contention that he was not eligible to hold the post of Chief Engineer as he did not fulfill the eligibility criteria therefor. The said original application was dismissed on the ground of ineligibility to hold the said post and, a furthermore regular appointment in terms of the Rules was yet to take place. It was directed:

“We have already given a limited direction to the Respondents when the O.A. was entertained, to follow the Recruitment Rules as and when the post of Chief Engineer, PWD is filled up on regular basis. The Respondents have also assured that the Recruitment Rules will be revised and adhered to strictly when the question of filling up of the post of Chief Engineer on regular basis is taken up. In these circumstances, we are of the view that nothing survives in the relief sought for by the Appellant in this O.A. The interim orders are made absolute. The O.A. is disposed of accordingly. No order as to costs.”

In the meanwhile, draft rules were framed altering the eligibility criteria as regard experience for the post in terms whereof the eligibility clause of

A five years experience was reduced to three years. R. Sundar Raju was promoted on 27.04.2004 purely on *ad hoc* basis.

The First Respondent, herein questioned the said appointment by filing an application for amendment in the pending original application on 23.6.2005 before the Central Administrative Tribunal which was registered as M.A. No. 258 of 2005 wherein he prayed for:

“It is prayed that this Hon’ble Tribunal may be pleased to amend the relief sought column in the main O.A. and it may be read as that this Hon’ble Court “may be pleased to set aside the promotion order of the Fourth Respondent passed by the Government of Pondicherry in No. 473/PW1/A1/2005 dated 27-4-2005 and direct the restoration of the applicant as Chief Engineer, Public Works Department, Pondicherry and thus render Justice.”

On or about 08.04.2005, R. Sundar Raju was recommended for promotion by the Departmental Promotion Committee to be promoted to the post of Chief Engineer and by order dated 27.04.2005, he was promoted to the said post purely on *ad hoc* basis. On or about 21.4.2005, the First Respondent was posted by the CPWD, New Delhi as Director of Works (SR) Chennai.

The original application filed by the First Respondent was allowed by the Central Administrative Tribunal by an order dated 14.7.2005. Both the Appellants preferred appeals therefrom before the High Court of Judicature at Madras and by reason of impugned judgment the said appeals have been dismissed holding that as the First Respondent was sent on deputation pending selection of the regular incumbent by the UPSC; till such regular selection is made, he had a right to hold the said post. So long, the draft rules were not approved by the Competent Authority, viz., UPSC, it was opined, R. Sundar Raju was ineligible to be appointed as Chief Engineer, Pondicherry.

The Appellants, aggrieved by the said judgment, are in appeal before us.

The learned Solicitor General and Mr. V.A. Bobde, learned senior counsel appearing on behalf of the Appellants, at the outset would draw our attention to the fact that the said draft rules had since been approved wherefor an appropriate notification has been issued on 28.9.2005.

Our attention has further been drawn to the fact that Government of

Pondicherry by a letter dated 28.9.2005 addressed to the Secretary, UPSC A requested it to regularize the services of the Chief Engineer from the date of his adhoc promotion. It was contended that the Departmental Promotion Committee (DPC) constituted in terms of the said Rules would hold its meeting at an early date. A

The learned Solicitor General would submit that the First Respondent B herein had no legal right to hold the said post of the Chief Engineer of PWD in the Government of Pondicherry and that having regard to the fact that the Rules have now been approved and as the DPC is likely to hold its meeting at an early date, the prayers made in the original application for all practical purposes have become infructuous. B C

It was submitted that the High Court committed a manifest error in not considering the effect of the draft rules as in terms thereof the candidature of R. Sundar Raju could have been considered. It was also contended that on repatriation, the First Respondent opted for posting at Chennai and having been so posted, he was no longer entitled to pursue his claim to continue as Chief Engineer. D

Mr. Bobde would further submit that if the prayer for amendment of the original application was permitted without giving his client an opportunity of filing a reply to which he was entitled to in terms of Rule 12 of the Central Administrative Tribunal (Procedure) Rules, 1987 in terms whereof it was incumbent upon the Tribunal to give at least one month's time. It was submitted that a prayer was made on behalf of the Appellant for an adjournment on the ground that the senior counsel Mr. Vijayaraghvan was not well but the same was rejected and the Tribunal proceeded to pass the impugned judgment on 11.7.2005. E F

Mr. P.P. Rao and Ms. Nalini Chidambaram, learned senior counsel appearing on behalf of the First Respondent, on the other hand, would contend that in terms of the Recruitment Rules, 'deputation' is a mode of recruitment. Having regard to the fact that such appointment has not been made until now, the First Respondent had a legal right to continue as Chief Engineer, in view of the decision of this Court in *Parshotam Lal Dhingra v. Union of India*, [1958] SCR 828. G

It was further submitted that as the original application filed by R. Sundar Raju was dismissed on the ground that he was wholly ineligible, the effect of the judgment could not be nullified by reason of the draft rules. Our H

A attention was drawn to the fact that the Appellant Government repatriated and relieved the First Respondent on 14.2.2005 and the First Respondent approached the Tribunal on 25.2.2005 and in that view of the matter, he having been posted at Chennai, the order passed by the Tribunal cannot be said to have been made on a representation made by the First Respondent herein as was sought to be contended. The said order was passed during the pendency of the original application.

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C It was argued that it is not a case where the First Respondent wanted to be permanently absorbed but his right to hold the said post for the term he was appointed could not have been defeated. Deputation, it was submitted, being a tripartite arrangement, the same must meet the requirements of law. In so far as the order of promotion of R. Sundar Raju dated 27.4.2005, Mr. Rao, would contend that it was only a consequential order and in that view of the matter it was not necessary to set out the grounds therefore separately.

D It was argued that although the UPSC asked the Government of Pondicherry to amend the rules in view of the fact that the Post of Superintending Engineer and the Chief Engineer carry the same scale of pay upon revision thereof, the remedy therefor was to send the matter to anomaly removal committee and not to amend the rules. The UPSC, the learned counsel would contend, did not say that the eligibility criteria should be changed. The action of the Government of Pondicherry must be held to be illegal as by its letter dated 28.9.2005 a request was made to regularize the services of the Chief Engineer from the date of his *ad hoc* promotion.

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F Furthermore, new Rules cannot be given a retrospective operation.

The fact of the matter, as noticed hereinbefore, depicts as to how sometimes the public functionaries of the Government function. R. Sundar Raju, according to the Appellant, is said to have been appointed as Superintending Engineer on *ad hoc* basis. The Central Administrative Tribunal in its order dated 31.8.2004 passed in Original Application No. 581 of 2004 noticed:

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H “The Respondents refuted the claim of the applicant that he is eligible to be considered for the post. They have averred that the Applicant was appointed only on *ad-hoc* basis as Superintending Engineer with effect from 26.11.2001. Further, the departmental candidates in the feeder category who are in the direct line of promotion shall not be eligible for consideration for appointment on deputation. Therefore,

it is asserted that the Applicant does not have any cause of action to approach this Tribunal. Further, he cannot be a person aggrieved or concerned with the appointment in question. Therefore, there is no merit in the O.A. and is liable to be dismissed *in limine*.” A

It was further held:

“...This is particularly relevant in the context of this case. If the above eligibility criteria are applied in the case of the Applicant in this O.A. it is obvious that he is not eligible to be considered for the post of one of the following grounds, either by promotion or by transfer on deputation.” B

Taking note of the eligibility criteria as laid down in the Rules, it was observed: C

“The Applicant was only holding the current charge of the duties of the post of Chief Engineer which does not confer on him any right to be considered for the post. Therefore, the averments made by the Applicant that he is eligible and qualified for the post and that the Respondents have not given wide publicity for filling up the vacancy and statutory rules have not been followed have no basis.” D

The Tribunal, as noticed hereinbefore, directed the Respondents to follow the Recruitment Rules as and when the post of Chief Engineer, PWD is filled up on regular basis. As would be noticed hereinafter, the Appellant has failed even to keep it assurance before the Central Administrative Tribunal that the revised recruitment rules would be adhered to strictly when the question of filling up of the post of Chief Engineer on regular basis is taken up. E

However, things began to take a different shape in a quick succession from February, 2005. The First Respondent was relieved by the Government of Pondicherry. No reason was assigned therefor. There is nothing to show that the lending department was consulted. The draft rules were made. A so-called DPC, composition whereof has not been disclosed, was constituted and R. Sundar Raju was sought to be promoted on *ad hoc* basis by an order dated 27.4.2005 although he merely completed three years of service at that point of time. F

As has been noticed by this Court in *Abraham Jacob and Ors., v. Union of India*, [1998] 4 SCC 65 and *Vimal Kumari v. State of Haryana and Ors.*, [1998] 4 SCC 114, such draft rules can be acted upon to meet urgent H

A situations when no rule is operating.

In *High Court of Gujarat and Anr v. Gujarat Kishan Mazdoor Panchayat and Ors.*, [2003] 4 SCC 712], it was observed:

B “27. It is now trite that draft rules which are made to lie in a nascent state for a long time cannot be the basis for making appointment or recommendation. Rules even in their draft stage can be acted upon provided there is a clear intention on the part of the Government to enforce those rules in the near future. (See *Vimal Kumari v. State of Haryana*)”

C But, therein the question as to whether a draft rules can constitute a valid rules or not, did not arise for consideration either in *Gujarat Kisan Mazdoor Panchayat* (supra) or in *Abraham Jacob* (supra) and *Vimal Kumari* (supra).

D The rules did not become inoperative only because the two scales of pay of the Superintending Engineer and the Chief Engineer became same in terms of revised pay scales. A rule does not become inoperative only because the UPSC says so. A rule validly made even if it has become unworkable unless repealed or replaced by another rule or amended, continue to be in force. As regard, scale of pay, the matter should have been referred to the anomaly removal committee. In terms of the new rules, the criteria prescribed under the old rules were modified. Thus, till the new rules were given effect to, no promotion to the post of Chief Engineer could be effected in derogation to the criteria prescribed under the existing rules.

F In *Dr. Rajinder Singh v. State of Punjab and Ors.*, [2001] 5 SCC 482, this Court held:

G “5. It has not been disputed before us that on the relevant date when Respondent 3 was recommended for promotion, he had not completed 10 years of service within the meaning of Rule 9-A read with Rule 2(2) of the PCMS Class I Rules. As Respondent 3 was not possessing the requisite qualifications on the relevant date, he could not be considered for promotion to the post of Deputy Director, Health Services.”

It was further held :

H “7. The settled position of law is that no government order, notification

or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a government order and ignoring the mandate of Article 309 of the Constitution.”

Valid rules made under proviso appended to Article 309 of the Constitution of India operates so long the said rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion, when Rules to the contrary is holding the field. It can safely be assumed that the principle in *Abraham Jacob* (supra), *Vimal Kumari* (supra) and *Gujarat Kisan Mazdoor Panchayat* (supra) that draft Rules can be acted upon, will apply where there are no rules governing the matter and where recruitment is governed by departmental instructions or executive orders under Article 162 of the Constitution of India.

Indisputably R. Sundar Raju was granted promotion on the basis of the draft rules which was given finality only during the pendency of the matter before this court.

Furthermore, the new rules framed in terms of proviso appended to Article 309 of the Constitution of India as per notification dated 28.9.2005 has not been given a retrospective effect. By reason of the said rules, the Superintending Engineer having a scale of pay of Rs. 12,000-16,500 can be promoted as Chief Engineer. The eligibility criteria for promotion is laid down in clause 12 of the Schedule to the Rules in the following terms:

“Promotion: Superintending Engineer (Rs. 12,000-16,500) with five years regular service in the grade, failing which Superintending Engineer with ten years of combined regular service in the grade of Superintending Engineer and Executive Engineer out of which at least one year regular service should be in the grade of Superintending Engineer.”

In terms of Article 16 of the Constitution, the employees similarly

A situated cannot be discriminated. Employees having the same qualification, thus, must be considered by a duly constituted DPC consisting of the Chairman/ Member, UPSC, Chief Secretary and Secretary (Works). It is unfortunate that the Government of Pondicherry in stead and place of asking the UPSC to constitute a DPC for consideration of the cases of all eligible candidates, passed the order (vide letter dated 28.9.2005) on the same day on which the new Rules came into effect, requesting UPSC to regularize the services of R. Sundar Raju as Chief Engineer from the date of his *ad hoc* promotion. Such an act betrays a lack of *bona fides* on the part of a State which is required to be performed in a fair and reasonable manner. It smacks of favouritism. Having regard to the unauthorized purpose for which the action has been taken, the same would attract the principle of malice in law. [See *Punjab State Electricity Board Ltd. v. Zora Singh and Ors.*, [2005] 6 SCC 776].

Ordinarily, a deputationist has no legal right to continue in the post. A deputationist indisputably has no right to be absorbed in the post to which he is deputed. However, there is no bar thereto as well. It may be true that when deputation does not result in absorption in the service to which an officer is deputed, no recruitment in its true import and significance takes place as he is continued to be a member of the parent service. When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on such just grounds as, for example, unsuitability or unsatisfactory performance. But, even where the tenure is not specified, an order of reversion can be questioned when the same is *mala fide*. An action taken in a post haste manner also indicates malice. [See *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia and Ors.*, [2004] 2 SCC 65, para 25]

Kunal Nanda v. Union of India and Anr., [2000] 5 SCC 362, relied upon by the learned Solicitor General, was a case where the petitioner therein had asserted a claim for permanent absorption in the department.

The matter relating to appointment through the Government of Pondicherry Public Works Department Group "A" Post of Chief Engineer Recruitment Rules, 1996 was governed in terms of a notification dated 11th December, 1996. The said notification was issued by the Government of Pondicherry in exercise of its power under the proviso to Article 309 of the Constitution of India. Rule 3 thereof prescribes that the method of recruitment thereto shall be as specified in columns 5 to 14 of the Schedule appended

thereto. In terms of the Schedule, the post of Chief Engineer was a selection post and one of the methods for recruitment as envisaged in Column 11 thereof is that the same post may be filled up by direct recruitment or by promotion or by deputation/transfer. The said post could be filled up by transfer on deputation in terms of Column 12 of the Scheduled appended thereto. The appointment of the First Respondent in the said post was on short term deputation/temporary basis till a regular appointment is made.

In *Parshotam Lal Dhingra* (supra), it is categorically stated that when an appointment is made for a specific period, unless any disciplinary proceeding is initiated, a person will be entitled to hold the said post.

The Tribunal and the High Court, therefore, cannot be said to have committed any error in passing the impugned judgments.

It is true that R. Sundar Raju was not given an opportunity of hearing in terms of Rule 12 of the Central Administrative Tribunal (Procedure) Rules, 1987 framed under the Administrative Tribunals Act, 1985. But, it does not appear from the judgment of the High Court that any such point had been taken before it. It was open to him to raise a specific question as regard violation of Rule 12 and denial of an opportunity of hearing but he chose not to do so.

Furthermore, the questions which were raised before the Central Administrative Tribunal and the High Court are pure questions of law. They have been gone into both by the Tribunal and the High Court.

For the reasons aforementioned, we do not find any infirmity in the judgment of the High Court. However, all the authorities concerned must see to it that the selection process in accordance with law may be completed as expeditiously as possible. These appeals are dismissed with the aforementioned observations. No costs.

N.J.

Appeal dismissed.