

SHANAKR DEB ACHARYA AND ORS.
v.
BISWANATH CHAKRABORTY AND ORS.

OCTOBER 19, 2006

[H.K. SEMA AND P.K. BALASUBRAMANYAN, JJ.]

Service Law:

West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979: Rule 5.

Promotion—Merit-cum-seniority—Inter se seniority—Determination of—Appointment on probation and appointment on permanent basis—Distinction between—Some candidates were appointed through the State Public Service Commission on temporary basis—Some candidates joined duty earlier than others—Those who joined later passed the departmental examination prior to those who joined earlier—These employees also completed the period of probation and were confirmed at an earlier point of time than the other employees—Rules provided that consideration was on the basis of merit-cum-seniority—However, High Court directed that higher scales of pay be given to those employees who passed the departmental examination later—Correctness of—Held: Requirement of passing of the departmental examination is essential before confirmation by a declaration by the appointing authority in that behalf—The sole basis of judging merit, therefore, is the passing of departmental examination—In the policy of merit-cum-seniority great emphasis is on merit and the ability and seniority plays a less significant role—Seniority has to be given weightage only when merit and ability are approximately equal—High Court judgment set aside—West Bengal Services (Training and Examination) Rules, 1953 (as amended)—The West Bengal Services (Revision of Pay and Allowances) Rules, 1970.

The appellants and the respondents were recruited through the State Public Service Commission on temporary basis. The respondents were appointed earlier to the appointment of the appellants and joined duty earlier than the appellants' date of joining. The appellants passed the departmental examination prior to the private respondents. The appellants also completed the period of probation and were confirmed at an earlier point of time than

A the respondents. The scheme of the West Bengal Services (Training and Examination) Rules, 1953 (as amended), the West Bengal Services (Revision of Pay and Allowances) Rules, 1970 and the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979 provided for probation, passing of departmental examination and confirmation after the departmental examination and completion of probation. The Rules also provided
 B that the consideration is merit-cum-seniority.

The State Government vide its memo imposed an additional condition prescribing a minimum period of six years' service in scale 17 for promotion to scale 18 and a minimum combined period of 13 years' service in scales 17 and 18 before promotion to scale 19. This additional condition was challenged
 C by some of the private respondents before the High Court. The High Court quashed the said memo imposing additional condition and further directed that the respondents be given the higher scales 18 and 19 on the basis of their respective merit-cum-seniority w.e.f. the date when the promotion policy came into effect. Hence the appeal.

D The following question arose before the Court:

Whether the private respondents could be made seniors to the appellants solely on the ground that they joined the service earlier to the appellants' date of joining?

E Allowing the appeal, the Court

HELD: 1. The mandate of the West Bengal Services (Training and Examination) Rules, 1953 (as amended), the West Bengal Services (Revision of Pay and Allowances) Rules, 1970 and the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979 is that the
 F Government employees shall be deemed to be on probation on completion of continuous temporary service for two years. The Rule further mandates that an employee shall be confirmed and made permanent on satisfactory completion of period of probation and where passing of any departmental examination is essential before confirmation, the provisions of the Services
 G (Training and Examination) Rules shall be complied with. Rule 5(4) further mandates that on completion of the period of probation the appointing authority shall issue a *formal declaration* making the probationer permanent.

[663-E, F, G]

H 2. The respondents were appointed on temporary basis and not on permanent basis and, therefore, the services of the respondents would fall

within the mischief of Rule 5 of the 1979 Rules where the requirement of passing of the departmental examination is essential before confirmation by a declaration by the appointing authority in that behalf. [664-C, D]

3. The promotion policy announced by the Government would clearly disclose that the consideration is merit-cum-seniority. The streams of Rules also contemplates passing of departmental examination as a condition precedent for completion of probation and confirmation. In the scheme of Rules and policy of promotion, the consideration being merit-cum-seniority, the sole basis of judging merit is the passing of departmental examination.

[664-G; 665-A]

Commissioner of Police v. R.S. More, [2003] 2 SCC 408 and *High Court of M.P. v. Satya Narayan Jhavar*, [2001] 7 SCC 161, relied on.

4. When the principle of merit-cum-seniority is applied, it is now a well settled principle that great emphasis is on merit and the ability and seniority plays a less significant role. Seniority has to be given weightage only when merit and ability are approximately equal. [665-G, H; 666-A]

B.V. Sivaiah v. K. Addanki Babu, [1998] 6 SCC 720 and *Central Council for Research in Ayurveda & Siddha v. Dr. K. Santhankumari*, [2001] 5 SCC 60, relied on.

Jagdish Kumar v. State of H.P., [2005] 13 SCC 606 and *M.H. Patil v. State of Maharashtra*, [1999] 1 SCC 249, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6383 of 2003.

From the Final Judgment and Order dated 11.12.2002 of the High Court of Calcutta in W.P.S.T. No. 1044/2002.

With Civil Appeal No. 6384 of 2004.

Anindita Gupta, H.K. Puri and Ujjawal Banerjee for the Appellants.

Ranjit Kumar, Rana Mukherjee, J. Kar, Siddharth Gautam and Goodwill Indeevar for the State of West Bengal in C.A. No. 6384/2003.

Altaf Ahmed, Tapas Ray, Avijit Bhattacharjee and Saumya Kundu for the Respondents.

The Judgment of the Court was delivered by

A **H.K. SEMA, J.** The challenge in these two appeals is to the judgment and order dated 11.12.2002 passed in W.P.S.T. No. 1044 of 2002 by the Division Bench of the Calcutta High Court.

B Civil Appeal No. 6383 of 2003 has been filed by Sankar Deb Acharya & Ors. and Civil Appeal No.6384 of 2003 has been filed by the State of West Bengal & Ors. both against Biswanath Chakraborty & Ors. Both the appeals raise a common question of law and as such they are being disposed of by this common judgment.

We have heard the parties at length.

C Mr. Raju Ramchandran, learned senior counsel appeared for the appellants in Civil Appeal No. 6383 of 2003 and Mr. Altaf Ahmed, learned senior counsel, appeared for the respondents. We have also heard Mr. Ranjit Kumar, learned senior counsel for the appellants in Civil Appeal No. 6384 of 2003 and Mr. Tapas Ray, learned senior counsel, for the respondents.

D These two appeals have a chequered history. Avoiding prolixity, we may state few facts strictly for the purpose of disposal of these two appeals. As the question of facts and law raised are common, we are taking facts from Civil Appeal No. 6383 of 2003.

E The dispute raised in these two appeals is with regard to *inter se* seniority and promotions of the appellants and the private respondents, under the applicable rules, namely the West Bengal Services (Training & Examination) Rules, 1953, as amended, the West Bengal Services (Revision of Pay and Allowances) Rules, 1970 and the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979, where according to the scheme of service rules the criteria for promotion is merit cum seniority and whether the private respondents can be made seniors to the appellants solely on the ground that they joined the service earlier to the appellants' date of joining.

The facts, which are not disputed, are thus:

- G (a) The appellants and private respondents are direct recruits at entry scale 17. The next promotion is to scale 18 and then to scale 19.
- (b) Private respondents joined the duty earlier than the appellants' date of joining.

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- (c) The appellants passed the departmental examination and were confirmed in service in terms of rules prior to the private respondents.

The two charts showing the detail of respective dates of joining the duty and passing of the departmental examination and confirmation by the appellants and private respondents are as under:

A. POSITION OF APPELLANTS

Sl. No.	Name of Appellants	Date of Joining	Date of passing Departmental	Date of Confirmation Examination
1.	Sankar Dev Acharaya	07.03.79	26.06.83	26.06.83
2.	Gaur Hari Khanra	17.06.80	01.12.85	01.12.85
3.	Pradip Kr.Ghosh	12.05.80	29.12.82	29.12.82
4.	Niranjan Das	12.06.80	13.01.85	13.01.85
5.	Sandip Kr.Bisnu	18.08.81	29.12.82	18.08.83
6.	Asit Ranjan Maity	04.09.81	01.12.85	01.12.85

B. POSITION OF PRIVATE RESPONDENTS

Sl. No.	Name of Appellants	Date of Joining	Date of passing Departmental	Date of Confirmation Examination
1.	Biswanath Chakraborty	10.1.78	16.12.88	16.12.88
2.	Goutam Mitra	24.5.77	21.11.91	21.11.91
3.	Anath Bandhu Biswas	5.5.78	5.6.92	5.6.92
4.	Shyamapada Sarkar	20.5.77	26.11.92	26.11.92
5.	Samir Kumar Ganguly	27.3.76	16.12.88	16.12.88
6.	Haider Ali	3.2.78	16.12.88	16.12.88
7.	Chunilal Ray	1.12.76	16.12.88	16.12.88
8.	Subhijit Sarkar	9.9.77	16.12.88	16.12.88

A	9.	Ashis Kr.Ghosh(1)	20.6.77	29.12.82	29.12.82
	10.	Debabrata Das	20.5.77	26.11.92	26.11.92
	11.	Dilip Kr.Dutta	19.7.79	16.12.88	16.12.88
B	12.	Dinendra Kr. Chandra	1.6.77	1.6.84	1.6.84
	13.	Amarendra Nath Bhowmik	13.1.78	16.4.94	16.4.94
	14.	Ramesh Ch. Sarkar	16.7.77	26.11.92	26.11.92
C	15.	Subhendra Bikash Mallik	28.7.78	1.6.84	1.6.84
	16.	Bejoy Kumar Banerjee	2.7.78	16.12.88	16.12.88
	17.	Bidhan Ch.Saha	28.12.76	21.11.91	21.11.91
D	18.	Bimal Kr. Bhttacharjee	1.6.77	31.5.85	31.5.85
	19.	Prem Das Roy	12.7.77	5.6.92	5.6.92
	20.	Anindya Kumar Mitra	1.6.77	16.5.95	16.5.95
	21.	Prabir Kr.Dutta	2.5.78 1996	confirmed	
E	22.	Asit Baran Mudi	28.8.76	5.6.92	5.6.92
	23.	Mrinal Kanti Sarkar	31.12.76	25.11.83	25.11.83
	24.	Amitava Saha	3.6.77	27.11.97	27.11.97
F	25.	Nil Kamal Saha	16.4.80	5.6.92	5.6.92
	26.	Md.Haider	16.9.76	21.11.91	21.11.91
	27.	Shamal Kanti Bal	1.8.79	16.12.88	16.12.88
	28.	Paresh Nath Das	8.12.76	1.6.84	1.6.84
G	29.	Abdus Suni Nasir	19.7.76	16.12.88	16.12.88
	30.	Kamal Sengupta	22.1.75	1.6.84	1.6.84
H	31.	Ratan Kumar Sandhukhan	18.8.76	21.7.91	21.7.91

32.	Sekharieswar Kundu	6.8.77	16.12.88	16.12.88	A
33.	Janardan Mondal	26.4.78	18.5.88	1.5.88	
34.	Jaydeb Biswas	23.8.78	17.11.86	17.11.86	
35.	Anil Kumar Kesh	9.6.78	5.6.92	5.6.92	B
36.	Golam Sarwar	1.6.77	16.12.88	16.12.88	
37.	Habibul Ahsan	1.7.77	5.6.92	5.6.92	
38.	Rathindra N. Bhattacharjee	30.6.76	5.6.92	5.6.92	C
39.	Subhas Ch.Das	10.6.77	16.6.94	16.6.94	
40.	Supriya Ranjan Ghosh	17.12.77	Not yet passed	Not yet confirmed	
41.	Narayan Ch.Ghosh	17.12.74	28.5.81	28.5.81	D
42.	Subodh Kr.Sarkar	3.5.78	26.11.92	26.11.92	
43.	Ashim Kumar Mitra	23.7.79	17.5.87	17.5.87	
44.	Ananda Mohan Chakraborty	6.3.79	1.6.86	1.6.86	E
45.	Asish Kumar Ghosh(II)	20.6.77	17.11.94	17.11.94	
46.	Jaydev Jana	27.5.77	26.6.83	26.6.83	

To answer the aforesaid questions, it will be relevant to have a quick survey of the scheme of the rules framed from time to time. The Government of West Bengal framed the rules called Training and Examination Rules, 1953 (hereinafter the 1953 rules) as amended. The rules *inter alia* provided that a government servant appointed on probation, remains a probationer until confirmation. A probationer would have to pass before confirmation any test or examination, prescribed as a condition precedent for confirmation in the service. It also provided that no officer shall be eligible for promotion unless he has completely passed the departmental examination. Then came the West Bengal Services (Revision of Pay and Allowances) Rules, 1970 (hereinafter the ROPA Rules). It also provided that all appointment to a permanent post under the Government would be on probation, which shall include West Bengal Food & Supplies Service.

A The Government of West Bengal framed rules called West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979 (hereinafter the 1979 rules). The rules *inter alia* provided that where the rules for confirmation required passing of any academic, departmental or other examination before confirmation, the 1979 Rules would not be construed to relax to such requirement.

B The Government of West Bengal framed rules called West Bengal Services (Revision of Pay and Allowances) Rules, 1981 (hereinafter the ROPA Rules, 1981). On 5.8.1981 the Government of West Bengal announced a Promotional Policy for the state government employees *inter alia* provided that the posts in the scales 18 and 19 under ROPA Rules, 1981 would be filled through promotion, on the basis of *merit cum seniority* from within the respective service and departmental cadres. In West Bengal Food and Supplies Services cadre, 220 posts were redistributed as follows, 150 posts in scale 17, 61 posts in scale 18 and 9 posts in scale 19.

C Thereafter, vide memo dated 12.10.1983, the Government imposed an additional condition prescribing a minimum period of six years' service in scale 17 for promotion to scale 18 and a minimum combined period of 13 years' in scales 17 and 18 before promotion to scale 19.

D The additional condition imposed vide memo 12.10.1983 and the order passed thereunder were challenged by filing Writ Petition being C.O.No.590(W) of 1988 by some of the private respondents herein along with some other persons before the High Court. The only contention raised in the application was that the additional condition sought to be imposed was discriminatory, as the same had not been imposed in the cases of other state government Services. The learned Single Judge by an order dated 13.2.1990 allowed the Writ Petition and quashed the Government Memo dated 12.10.1983 imposing additional condition. The learned single Judge further directed that the respondents be given the higher scales 18 and 19 on the basis of their respective merit-cum-seniority w.e.f. the date when the promotion policy came into effect. Consequent to the order aforesaid the Government issued a fresh promotion order dated 11.9.1991. This, however, dispensed with the compliance of the rules about determination of merit-cum-seniority, which mistake was later acknowledged by the State Government. The mistake was corrected by an order dated 19.9.1991. By the said order the Government directed the compliance with the relevant service rules before giving effect to the promotion order dated 11.9.1991 and directed that no payment of arrear

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dues be made to officers promoted before confirmation.

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The appellants being aggrieved by the order dated 11.9.1991 moved Writ Petition being C.O.2031 (W) of 1993 before the High Court of Calcutta wherein the officers covered by the promotion order dated 11.9.1991 were also impleaded. In the Writ Petition the appellants raised a contention amongst others that unequals had been treated equally. An injunction sought for was rejected. An appeal being F.M.A.T.589 of 1993 was preferred before the Division Bench of the Calcutta High Court which was disposed of by the Division Bench on 27.11.1995 directing the State to consider the case of all eligible candidates including the appellants and others strictly in accordance with law and the relevant rules as applicable. The aforesaid direction of the Division Bench was sought to be complied with by a memo dated 16.2.1996. However, promotion order dated 11.9.1991 was left undisturbed. The same was challenged by some of the appellants before the Administrative Tribunal in O.A.No.759 of 1996 seeking proper implementation of the Division Bench order and also seeking refixation of seniority of officers. The Tribunal disposed of O.A.No.759 of 1996 by an order dated 17.11.1997. Being not satisfied with the order of the Tribunal the appellants challenged the order of the Tribunal by filing a Writ Petition, WPST No. 8 of 1998 before the Division Bench of the High Court in which 15 respondents illegally promoted by an order dated 11.9.1991 were also impleaded amongst others. It was contended before the Division Bench that non-observance of the promotion rules regarding eligibility was illegal but the Tribunal had failed to address the said issue.

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After referring to Rule 5(b) of the 1979 Rules, the Division Bench came to the following conclusion:

“Having heard the learned Counsel, we are of the opinion that keeping in view the fact that in the instant case confirmation is not to be granted automatically or being not a fortuitous circumstances, as a result whereof the seniority of the respective employee would be normally determined, from the date of their initial appointment, this aspect of the matter may also be considered by the authorities concerned afresh. Such consideration may be made at an early date, and preferably within a period of 8 weeks from the date of communication of this order. The order of the learned Tribunal is modified to the aforementioned extent and the writ petition is disposed of”.

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A It appears that pursuant to a writ of mandamus issued by the Division Bench on 5.5.2000 the Government of West Bengal issued a fresh promotion order under the memo dated 28.3.2001. In the said memo the Government has acknowledged the mistake committed in the order dated 11.9.1991 in ignoring the Rules for the determination of merit-cum-seniority. In the said order the Government has considered the entire rules relevant for determination of merit-cum-seniority and grant of higher scale to the eligible officers and the same order was passed in accordance with the Rules.

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C We are surprised to notice that aggrieved party (respondents herein) again approached the Tribunal in O.A.No.636 of 2001 and the Tribunal by its order dated 10.4.2002 set aside the Government order dated 28.3.2001 which was passed, as already noticed, pursuant to the writ of mandamus issued by the Division Bench of the High Court. The Tribunal was of the view that effected persons have not been heard and the matter be remanded back to the Government for fresh consideration. We are unable to subscribe to the view expressed by the Tribunal. Firstly, since the order of 28.3.2001 was issued pursuant to a mandamus issued by the Division Bench of the High Court, the Tribunal should not have interfered. Secondly, before the High Court the interest of the present respondents were adequately represented and there was no question of passing an order without hearing the parties who had been adversely affected.

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E Aggrieved by the order of the Tribunal of remand the private respondents herein filed WPST No.1044 of 2002 before the Division Bench of the Calcutta High Court. The Division Bench of the High Court after hearing the parties by the impugned judgment and order set aside the directions of the Tribunal of remand of the matter for re-consideration. The High Court was of the view that the controversy has been finally settled in terms of the judgment and order passed in CO.No.590(W) of 1988 by learned single Judge, affirmed in appeal. The High Court further directed the authorities to act in terms of the promotion order dated 11.9.1991 by setting aside the order dated 28.3.2001 which was issued pursuant to a writ of mandamus issued by the Division Bench of the High Court.

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G The High Court order is assailed mainly on two grounds (a) that the directions in the impugned judgment run counter to the Rules and (b) that the impugned judgment is contrary to earlier orders passed by the co-ordinate Bench of the High Court. In short, the impugned judgment of the High Court has set-aside two orders of the co-ordinate benches, passed earlier.

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The impugned judgment of the High Court has relied on the judgment in C.O.No.590(W) of 1988. As already noticed, the judgment in the aforesaid matter was confined to the imposition of additional condition, which has no relevancy in the facts of the present controversy. The High Court also erred in directing to restore the promotion order dated 11.9.1991, which was set aside earlier by co-ordinate bench by its judgment dated 27.11.1995 in FMAT No.589 of 1993. The High Court was also clearly in error in setting aside the order dated 28.3.2001 which was passed pursuant to a writ of mandamus issued by the co-ordinate bench earlier in WPST No.8 of 1998 on 5.5.2000. In any event, in our view, the impugned order of the High Court is unsustainable in law.

We now proceed to make a quick survey of the set of rules, which are relevant for the purpose of disposal of these appeals. At the risk of repetition the appellants and respondents were recruited through the West Bengal Public Service Commission on temporary basis. It is also not disputed that the respondents were appointed earlier to the appointment of the appellants and joined duty earlier than the appellants' date of joining. It is also not disputed that the appellants passed departmental examination prior to the private respondents. The appellants also completed the period of probation and were confirmed at an earlier point of time than the respondents. The scheme of the rules, which we shall be dealing with presently, provides probation, passing of departmental examination and confirmation after the departmental examination and completion of probation. The Rules also provide that the consideration is merit-cum-seniority.

The 1953 Rules deal with General Rules regulating the Probation and Training of Officers appointed on probation to IAS, IPS, and West Bengal State Services.

Rule 1(ii) defines "Probationer" as a Government servant appointed on probation and remains a probationer until he is confirmed.

Rule 3 deals with assigning special reasons, if the appointing authority so decides to extend a probationer's prescribed period of probation not exceeding half the prescribed period.

Rule 4 deals with the completion of period of probation or the extended period of probation, as the case may be, and provides that the appointing authority shall record an order either confirming the probationer from such

A date as it may deem fit, subject to the restrictions prescribed in rule 8, or discharging him.

Rule 8 deals with the confirmation. It reads:-

B “A probationer may not be confirmed until he has served on probation, for the period prescribed under rule 2, passed any test or examination the passing of which may by rule be prescribed as a condition of confirmation in the service or post in which it is proposed to confirm him, and been declared by the appointing authority to be fit for confirmation”.

C Note: The departmental examinations prescribed in Chapter II-VI or parts thereof as are applicable to particular service or posts should be considered to be examinations, the passing of which is a pre-condition of confirmation under this rule.

D Rule 13 in Chapter II provides that no probationer will be confirmed until he has passed completely the departmental examination prescribed for him. Failure to pass the examination within the probationary period will make him liable to discharge.

E Part 20 of the Rules deal with the Officers of the Departments of Food and of Supplies. Clause 1 deals with the requirement to pass a departmental examination as prescribed under the Rules of the Officers of Department of Food and of Supplies and above the rank of Chief Inspectors. There is no dispute that both the appellants and respondents are above the rank of Chief Inspectors and they are required to pass the departmental examination prescribed under the Rules in Part 20.

F Rule 10 of Part 20 provides that no officer will ordinarily be eligible for promotion unless he has passed the examination completely.

G Then comes West Bengal Services (Appointment, Probations and Confirmation) Rules, 1979. Rule 5 of the Rules deals with the appointment on probation and appointment on permanent basis. It reads:-

“R.5 *Appointment on probation and appointment on permanent basis*—(1) A Government employee-

H (a) shall be deemed to be on probation on completion of continuous temporary service for two years after his initial appointment in a post of service or cadre;

- (b) shall be confirmed and made permanent on satisfactory completion of the period of probation. Where passing of any departmental examination is essential before confirmation, the provisions of Chapter I of the Services (Training and Examination) Rules, West Bengal, shall have to be complied with. A
- (2) Except as otherwise provided elsewhere in these rules, the period of probation shall be one year. B
- (3) No formal declaration shall be necessary in respect of appointment on probation.
- (4) On completion of the period of probation the appointing authority shall either issue formal declaration making the probationer permanent or take such action as may be considered necessary in terms of the provisions of Part A of Chapter 1 of the Services (Training and Examination) Rules, West Bengal, within six months from the date of completion of the period of probation, or of the extended period of probation, if any, and the appointing authority shall ensure that confirmation on satisfactory completion of the period of probation is not delayed in any case. C
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Rule 6(2) provides *inter alia* that where the Rules for confirmation required the passing of any academic, departmental or other examination before confirmation, the 1979 Rules would not be construed to relax such requirement. E

The mandate of the Rules, as noticed above, is that the Government employees shall be deemed to be on probation on completion of continuous temporary service for two years. The Rule further mandates that an employee shall be confirmed and made permanent on satisfactory completion of period of probation and where passing of any departmental examination is essential before confirmation, the provisions of the Services (Training and Examination) Rules shall be complied with. Sub-Rule (4) of Rule 5 further mandates that on completion of the period of probation the appointing authority shall issue a *formal declaration* making the probationer permanent. F
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Rule 7 deals with repeal and savings.

We may, at this stage, deal with one of the arguments of Mr. Altaf Ahmad, appearing for the respondents. Referring to the appointments of the respondents, it is contended by Mr. Altaf Ahmad that the appointments of H

A the respondents were made through the examination conducted by the West Bengal Public Service Commission and on the recommendation of the Commission. According to him, therefore, the appointments of the respondents were not on probation and, therefore, 1979 Rules would have no application. We are unable to countenance this contention. No doubt, the respondents were appointed to the service after the examination conducted by the Public Service Commission and recommended by the Commission, however, the appointments were purely temporary and terminable at the discretion of the Government with one month's notice on either side or on payment of one month's pay in lieu thereof. Rule 5(1)(a) as quoted above contemplates two conditions. Firstly, that an employee appointed on temporary service after serving for two years after his initial appointment in post of service or cadre, shall be deemed to be on probation and secondly, the words "employee shall be deemed to be on probation" visualizes the pre 1979 situation, if one were working on temporary basis. We have noticed that the respondents were appointed on temporary basis and not on permanent basis and therefore the services of the respondents would fall within the mischief of Rule 5 of the 1979 Rules where the requirement of passing of the departmental examination is essential before confirmation by a declaration by the appointing authority in that behalf.

E The next question to be considered is the criteria of merit-cum-seniority in the promotion to scale 18 and scale 19. By a circular dated 5.8.1981 the Government has brought out statement of promotion policy. Paragraph 4 of the said circular reads:-

F "4. In the case of the State Services, including the State Civil Service, State Health Service and the State Engineering Service, the number of posts currently available in Scales 18 and 19 are being increased with effect from April 1, 1981, those posts will be filled through promotion, on the basis of *merit cum seniority*, from within the respective Service and Departmental Cadres. The rearrangement of posts within each cadre is listed in the Annexure".

G (emphasis supplied)

H The promotion policy announced by the Government would clearly disclose that the consideration is merit-cum-seniority. The streams of Rules as referred to above and considered, also contemplates passing of departmental examination as a condition precedent for completion of probation and

confirmation. In the scheme of Rules and policy of promotion, the consideration being merit cum seniority, the sole basis of judging merit is the passing of the departmental examination. A

In *Commissioner of Police v. R.S. More*, [2003] 2 SCC 408, this Court held that confirmation of service on a particular post is preceded by satisfactory performance of the incumbent unless service rules otherwise prescribe. B

In *High Court of M.P. v. Satya Narayan Jhavar*, [2001] 7 SCC 161, this Court held in paragraph 11 at scc p.169 as under:-

“11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired”. C
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When the principle of merit-cum-seniority is applied, it is now well settled principle that great emphasis is on merit and ability and seniority plays a less significant role. Seniority has to be given weightage only when merit H

A and ability are approximately equal. [See: *B.V. Sivaiah v. K. Addanki Babu*, [1998] 6 SCC 720, *Central Council for Research in Ayurveda & Siddha v. Dr. K. Santhakumari*, [2001] 5 SCC 60].

B It is, however, contended by Mr. Altaf Ahmad that seniority be linked with date of initial appointment and not from the date of passing the departmental examination. According to him, if one passes departmental examination later in point of time, his seniority must relate back to the date of original appointment. According to him, under merit cum seniority the test is merit and once an incumbent passes the examination he qualifies the test of merit and, therefore, his seniority relates back to the date of entry in the service. To accept such contention would negate the mandate of the Rules.

C Mr. Altaf Ahmad has also drawn our attention to the rules called the West Bengal Service (Determination of Seniority) Rule, 1981. He particularly referred to Rule 4 of the Rules. Rule 4 reads:-

D “4. *Determination of seniority of direct recruits*:- The relative seniority of all persons appointed directly through competitive examination or interview or after training or otherwise shall be determined by the order of merit in which they are selected for such appointment on the recommendation of the Commission or other selecting authority, persons appointed on the result of an earlier selection being senior to those appointment on the result of a subsequent selection;

E Provided that where appointment of persons initially made otherwise than in accordance with the relevant rules is subsequently regularized in consultation with the Commission, where necessary, seniority of such persons shall be determined from the date of regularization and not from the date of appointment. The *inter-se* seniority amongst such persons shall, however, depend on the date of appointment of each such person in the department or office concerned;

F Provided further that if any person selected for appointment to any post does not join within two months of the offer of appointment, his seniority shall count from the date on which he joins the post unless the appointing authority for reasons to be recorded in writing condones the delay.

G Note-(1) A list of candidates for the purpose of selection for appointment shall be prepared in all cases by the selecting authority,

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when there will be recruitment in a single process of selection of more than one person. A

(2) Where the inter-se seniority amongst several persons has not been determined prior to the coming into force of these rules, such seniority shall, on the coming into force of these rules, be determined on the basis of actual date of their joining. When the date of joining of all such persons is the same, seniority shall be determined on the basis of date of birth, persons retiring earlier being adjudged as senior. When the date of birth is the same, seniority shall be determined on the basis of total marks obtained by each in the examination, passing of which is the qualification prescribed for recruitment to the particular post, cadre or grade. B C

(3) In so far as the determination of relative seniority of persons selected either by the Commission or by other selecting authority for appointment to different posts in the same grade with different qualifications such as posts of Assistant Professor in History, Economics, Physics, Chemistry etc. is concerned, seniority shall be determined from the date of joining. D

On a fascicule reading of the Rule, it appears to us that the said Rule has no application in the facts of the present case. Rule 4, in our opinion, deals with the appointment directly through the competitive examination on permanent basis. There is no quarrel with the provision of the Rule that if the Commission recommends and appoints the incumbents on permanent basis, such seniority has to be determined in the order of merit in which they are selected for such appointment on the recommendation of the Commission. As already noticed, the respondents were not appointed on permanent basis though appointed through the examination conducted by the Commission. They were appointed purely on temporary basis terminable with one month's notice on either side or on payment of one month's pay in lieu thereof. In our view, therefore, Rule 4 is of no assistance to the respondents' case. E F

Mr. Altaf Ahmad has also referred to Rule 10 of 1953 Rules. Rule 10 of 1953 Rules reads:- G

"10. When a probationer is confirmed otherwise than with effect from the date of expiry of the period of probation prescribed under rule 2, he will unless it be otherwise provided by rule draw as from the date of effect of his confirmation the pay he would have drawn had he H

A been confirmed on the expiry of the prescribed period of probation, and unless it be otherwise provided by rule, the whole of his services from the date of his appointment on probation shall count for increments”.

In our view, Rule 10 will be of no assistance to the respondents’ case.

B Rule 10 simply provides that if an incumbent is confirmed on the expiry of the prescribed period of probation and unless the rules provided otherwise, the whole of his service from the date of his appointment on probation shall count for increments.

C Mr. Altaf Ahmad also referred to Notification dated 21.12.1966 framing the Rules under proviso to Article 309 of the Constitution regulating the recruitment to the West Bengal Food and Supplies service. According to him, they were appointed under 1966 Rules and there is no provision in the said rules, which required the passing of the departmental examination. According to him, requirement of passing the departmental examination was introduced for the first time by a Notification dated 10.1.1995. This contention is factually incorrect. In fact on earlier occasion a Notification dated 21.4.1977 was issued, which required that candidates appointed by direct recruitment against posts of West Bengal Food and Supplies Services and subordinate Food and Supplies services Grade-I would be required to pass the departmental examination to qualify for being declared quasi permanent in status and for the purpose of confirmation and the subject of the departmental examination was also prescribed. The Notification dated 10.1.1995 only brought an amendment and it is not correct to say that it was for the first time that requirement of departmental examination was introduced on 10.1.1995.

F By Notification dated 29.6.1985, the Government of West Bengal, Department of Food and Supplies, brought out 18 Officers of the Food and Supplies, who have completely passed the departmental examination. In serial No.5 one Ratan Kumar Mukhopadhyay is shown to have passed the departmental examination on 26.7.77. Therefore, it is not correct to say that the requirement of departmental examination was for the first time introduced by Notification dated 10.1.1995.

Mr. Altaf Ahmad referred to the decision of this Court in *Jagidsh Kumar v. State of H.P.*, [2005] 13 SCC 606, particularly paragraph 16. The aforesaid decision is not relatable to appointment on probation and will be of no help to the respondents’ case.

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On the question of departmental examination *vis-a-vis* reckoning of seniority, he has referred to the decision rendered by this Court in *M.H. Patil v. State of Maharashtra*, [1999] 1 SCC 249. This Court referred to Rule 3, which was relied upon by the appellant in the case; the same is reproduced as under:

“3. Seniority among the Non-Gazetted Prohibition and Excise Officers and Clerks for the purpose of confirmation shall be decided according to the dates of their passing the departmental examination held after completion of one year’s continuous service in the Prohibition and Excise Department”.

This Court accepted the view of the department that the seniority lists were prepared on the basis of continuous officiation right from 1977 onwards. The seniority lists so prepared were not disturbed, notwithstanding Rule 3 prescribing the fixation of seniority otherwise. Therefore, no law has been laid down which can be followed as a precedent.

There is yet another difficulty to sustain the order of the High Court. The High Court has also relied on the communication dated 31.7.1978 wherein an Assistant Secretary in a departmental communication has stated that none of the direct recruits were working in the department as Probationary Officers. Such departmental communication has no role to play in the face of statutory rules.

For the reasons aforesaid, we are unable to sustain the impugned order of the High Court. The judgment and order dated 11.12.2002 passed in WPST No.1044 of 2002 is set aside. The Notification dated 28.3.2001 issued pursuant to a writ of mandamus by the earlier Division Bench of the High Court is restored. The appeals are allowed. No costs.

V.S.S.

Appeal allowed.