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MD. RAISUL ISLAM AND ORS.

v.

GOKUL MOHAN HAZARIKA AND ORS.

(Special Leave Petition (C) No. 19188 of 2007)

JULY 06, 2010

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[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

C *Assam Civil Services (Class-I) Rules, 1960: rr.4, 19 – Selection/Seniority – Selection process started on the basis of the existing Service Rules – Held: Existing rules would continue to govern the selection process, notwithstanding any amendment to the said Rules in the meantime – Seniority would thus be governed by the existing rule – Assam Civil Services (Class-I) Amendment Rules, 1986 – Service law –*
D *Seniority.*

E **An advertisement was published on 22.5.1984 for filling up 30 posts in each category of ACS Class-I and ACS Class-II Officers in terms of unamended rule 4 of the Assam Civil Services (Class-I) Rules, 1960. Written test was conducted and the result was declared on 22.2.1986. Interview was conducted by APSC in respect of candidates successful in written examination. A list of recommended candidates was submitted by the APSC to the Government on 22.6.1986. The amendment to rule 4**
F **came subsequently on 21.7.1986 by the Assam Civil Services (Class-I) Amendment Rules, 1986 whereby the number of persons to be promoted from ACS Class-II to ACS Class-I was left to be decided by the Governor and the earlier quota of 50% for promotion was discontinued.**

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129 ACS Class-II Officers, including the petitioners, were regularly promoted as ACS Class-I officers on 11.9.1986. Thereafter on 22.10.1986, ACS Class-I Officers, including the respondents, were appointed by way of

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direct recruitment on the basis of the recommendations made by the APSC. On 1.1.1993, a draft seniority list was prepared wherein all 129 Officers promoted on 11.9.1986 were shown as senior to 45 ACS Class-I Officers who were appointed by direct recruitment on various dates in the month of October 1986.

Respondents 1 to 8 challenged the draft seniority list. High Court held that the seniority of the direct recruits and promotees would be governed by the unamended rules as the selection process was initiated prior to the 1986 amendment. Hence the Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1. Once a process of selection is started on the basis of the existing Rules of recruitment, the said Rules would continue to govern the selection process, notwithstanding any amendment which may have been effected to the said Rules in the meantime. Accordingly, the seniority of members of the service would, no doubt, be governed under Rule 19 of Assam Civil Services (Class-I) Rules, 1960 but the selection process has to be completed under Rule 4 in order to attract the provisions of Rule 19. The High Court was right in directing that the vacancies for which the advertisement was published in 1984 be filled up on the basis of the unamended Rule 4 which provided for quota between promotees and direct recruits and in placing 45 of the direct recruits immediately below the first 45 promotees out of the list of 129 promotees in keeping with the said quota system for the year 1986. [Paras 27, 28] [747-B-C; 746-G-H; 747-A]

Dr. K. Ramulu & Anr. v. Dr. S. Suryaprakash Rao & Ors. (1997) 3 SCC 59, Distinguished.

Suraj Parkash Gupta & Ors. v. State of J & K and Ors. (2000) 7 SCC 561; *State of Uttaranchal & Anr. v. Dinesh*

A *Kumar Sharma (2007) 1 SCC 683; Uttaranchal Forest Rangers' Assn. (Direct Recruit) v. State of U.P. (2006) 10 SCC 346; N.T. Devin Katti v. Karnataka Public Service Commission (1990) 3 SCC 157, referred to.*

Case Law Reference:

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(2000) 7 SCC 561 referred to Para 18

(2007) 1 SCC 683 referred to Para 18

(2006) 10 SCC 346 referred to Para 21

C

(1990) 3 SCC 157 referred to Para 22

(1997) 3 SCC 59 Distinguished Paras 24, 25, 26

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CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 19188 of 2007.

From the Judgment & Order dated 23.5.2007 of the High Court of Gauhati in Writ Appeal No. 5 of 2004.

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Vijay Hansaria, Sneha Kalita, Shankar Divate for the Petitioner.

Parthiv Goswami, A. Henry, Rajiv Mehta, J.R. Luwang, Riku Sharma (for Corporate Law Group) for the Respondent.

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The Judgment of the Court was delivered by

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ALTAMAS KABIR, J. 1. On the request of the Government of Assam to select candidates by way of direct recruitment for filling up 30 posts in each category of ACS Class-I and ACS Class-II, the Assam Public Service Commission, hereinafter referred to as 'the ASPC', published an advertisement on 22nd May, 1984, for the aforesaid purpose in terms of Rule 4 of the Assam Civil Services (Class-I) Rules, 1960. Subsequently, the Government of Assam informed the APSC on 24th November, 1984, that a decision had been taken to relax the upper age limit by two years. Accordingly, a revised advertisement was

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published by APSC on 28th November, 1984, incorporating the decision to relax the upper age limit by two years. Pursuant to the said advertisement, a written test was conducted by the APSC, as required under the aforesaid Rules, hereinafter referred to as 'the 1960 Rules', between 5th June, 1984, to 1st August, 1985, and the results of the said written examination were declared on 22nd February, 1986. Vive voce test was thereafter conducted by the APSC from 25th April, 1986, to 30th May, 1986, in respect of those candidates who had qualified in the written examination. Thereafter, the APSC sent its list of recommended candidates to the Government on 27th June, 1986, for appointment to ACS Class-I and ACS Class-II category officers.

2. On 21st July, 1986, vide Notification of even date, the Government of Assam amended the proviso to Rule 4(1) and Rule 4(1)(b) of the 1960 Rules whereby the number of persons to be promoted from ACS Class-II to ACS Class I was left to be determined by the Governor and the earlier quota of 50 per cent for promotion was discontinued.

3. At this stage, reference may be made to Rule 4 of the 1960 Rules, as it stood prior to the amendment of 21st July, 1986, namely,

"Rule 4(1). Recruitment to the service after the commencement of these Rules, shall be by the following methods, namely:

- (a) by competitive examination conducted by Commission;
- (b) by promotion of confirmed members of the ACS (Class-II) who have passed the prescribed departmental examination and successfully completed the prescribed training under Sub-Rule(3) of Rule 14 of ACS (Class-II) Rules, 1962; and

A (c) by selection, in special cases from among persons, other than members of the Assam Civil Service (Class-II) service in connection with the affairs of the Government;

B Provided that the number of persons recruited under Clause (b) shall be 50 per cent of the total number of vacancies to be filled in a year and the persons recruited under Clause (c) shall not in any year exceed two; provided further that the persons recruited under Clause (c) shall not at any time exceed 5 per cent of the total strength of the cadre".

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4. As will be apparent from the above, under the unamended Rules, the number of persons to be recruited by way of promotion would be 50 per cent of the total number of vacancies to be filled in a year and the number of persons to be selected under clause (c) in said cases was not to exceed 5 per cent of the total strength of the cadre at any time.

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5. While the aforesaid process of filling up the vacancies was being undertaken, the State Government as indicated hereinabove, amended some of the provisions of the 1960 Rules by the Assam Civil Service (Class-I) (Amendment) Rules, 1986, hereinafter referred to as 'the 1986 Amendment Rules', which were directed to come into force at once and were, therefore, given prospective operation. The amendment with which we are directly concerned in this case is Rule 2 of the Amendment Rules, which reads as follows :-

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"2. In the Principal Rules, in Rule 4 –

G (a) for clause (b) of sub-rule (1), the following shall be substituted, namely:-

"(b) by promotion from amongst the ACS (Class-II) officers who have completed 5 years of continuous service in ACS (Class-II) on the first day of January of the year in which recruitment is made"

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(b) for the proviso to sub-rule (1), the following shall be substituted, namely:- A

“provided that the number of persons recruited under Clause (b) in any calendar year shall be such as may be determined by the Governor. Provided further that the persons recruited under Clause (c) shall not in any year exceed two and shall not, at any time exceed 5 per cent of the total strength of the cadre.” B

6. The amended provisions of Rule 4, do away with the quota of 50 per cent reservation for promotees and the number of persons to be recruited in such manner in any calendar year would after the amendment be such as might be determined by the Governor. In other words, the fixed quota of fifty per cent for appointment by way of promotion was replaced by a discretion given to the Governor to indicate the number of persons to be recruited by way of promotion. C D

7. Pursuant to the aforesaid selection process, 129 ACS Class-II Officers, including the petitioners, were regularly promoted as ACS Class-I Officers on 11th September, 1986. Thereafter, on 22nd October, 1986, 45 ACS Class-I Officers, including the Respondents, were appointed by way of direct recruitment on the basis of the recommendation made by the APSC. On 16th December, 1989, as a matter of policy, the State Government merged the ACS Class-II Officers with ACS Class-I Officers in order to eliminate the ACS Class-II category. Pursuant thereto, on 1st January, 1993, a draft gradation list of ACS Class-I Officers was published by the State Government inviting objections thereto. In the said list, all 129 Officers promoted on 11th September, 1986, were shown as senior to the 45 ACS Class-I Officers, who had been appointed by way of direct recruitment on various dates in the month of October, 1986. E F G

8. Aggrieved by the above, the Respondent Nos.1 to 8 herein filed a Writ Petition challenging the draft seniority list H

A dated 1st January, 1993, and the amendments effected to Rule
4 of the 1960 Rules on 21st July, 1986. It may not be out of
place to take note at this stage of the fact that the appointments
of the petitioners and other similarly situated promotees made
vide notification dated 11th September, 1986, were not
B challenged in the Writ Petition, nor was the notice of the Writ
Petition served on them, although, they were made parties to
the proceedings. During the pendency of the Writ Petition, the
State Government published the final seniority list of ACS
Class-I Officers in which all the 129 promotees were shown to
C be senior to the 45 direct recruits. It is the petitioners' case that
the said seniority list was never challenged and had attained
finality long ago.

9. On 26th June, 2003, the learned Single Judge of the
High Court dismissed the Writ Petition holding that although the
D process of selection had been initiated long before the
amendment of 1986, the Government had decided not to make
any appointments till the Rules were amended. The Respondent
Nos.1 to 8 thereupon filed a Writ Appeal before the Division
Bench of the High Court which was allowed on 26th August,
E 2006, upon the finding that the seniority of direct recruits and
promotees would be governed by the unamended Rules as the
selection process was initiated prior to the 1986 amendments.
The State Government was, accordingly, directed to fix the
seniority of the promotees and direct recruits by applying the
F quota rule and to fix the seniority of all 45 direct recruits of 1986
just below the 45 promotees, who had been promoted to ACS
Class-I service. It is the petitioners' case that they had no
knowledge about the Writ Appeal as they were not served with
notice thereof. Review Petitions Nos.92 and 93 of 2006 were
G filed on 9th November, 2006, by 12 of the promotees/
petitioners herein on the ground that they had not been served
with notice of the Writ Appeal. Thereupon, the Division Bench
on 13th September, 2006, issued notice on the Review
Petitions and stayed the operation of the judgment and order
H passed on 26th August, 2006. Subsequently, on 25th

September, 2006, the Division Bench modified its earlier order dated 13th September, 2006 and directed that posting of officers, if any, pursuant to the interim order, would be only with the leave of the Court.

10. On 13th November, 2006, the State Government filed its counter affidavit in the matter and on being satisfied that notice of the Writ Appeal had not been served on the Review Petitioners, the Division Bench permitted them to file their affidavit in the Writ Appeal and the same was re-heard along with the Review Petitions on merit. It is on a re-hearing of the Writ Appeal and the Review Petitions that the order impugned in Special Leave Petition (Civil) No.19188 of 2007 came to be passed on 23rd May, 2007.

11. In its counter affidavit filed in the Writ Appeal, the State Government opposed the Writ Appeal contending that seniority, upon merger of the ACS Class-I and ACS Class-II Officers, had been rightly fixed by the State. After considering the submissions made on behalf of the parties, the Division Bench, while allowing the Writ Appeal, directed the authorities to ascertain the vacancies available in the year 1986 for recruitment from each source in terms of the quota fixed by Rule 4 of the 1960 Rules and to recast their seniority by rotating the vacancies following the quota and rota rules. The said order of the Division Bench being impugned in this Petition, this Court issued notice to the parties on 12th November, 2007, and directed status-quo to be maintained.

12. Appearing in support of the Special Leave Petition, Mr. Vijay Hansaria, learned Senior counsel, firstly referred to Rule 19 of the 1960 Rules dealing with seniority, which reads as follows :

“Seniority: (1) The seniority of members of the service shall be determined according to the order of merit in the lists prepared under sub-rule (5) of Rule 5 or approved under

A Rule 8. if the members join their appointments within 15 days of the receipt of the order of appointment.

B Provided that in case a member is prevented from joining within the said period of 15 days by circumstances of a public nature or for reasons beyond his control, the Governor may extend it for a further period of 15 days. If the period is not so extended and the member of the service joins within the period extended under sub-rule (2) of Rule 15, his seniority shall be determined in accordance with the date of joining.

C Provided further that the members of the service recruited in a year under clause (b) and (c) of Rule 4 shall be senior to members recruited in the same year and in the same batch under clause (a) of Rule 4.”

D 13. What is important for our purpose is the second proviso which indicates that the number of promotees in a year under Clauses (b) and (c) of Rule 4 would be senior to members recruited by direct recruitment in the same year and in the same batch under Clause (a) of Rule 4. The language of the second
E proviso to Rule 19 is clear and unambiguous that in a year candidates promoted to the higher post under Rule 4 would be senior to candidates recruited in the same year and in the same batch under Clause (a) of Rule 4 of the 1960 Rules.

F 14. Mr. Hansaria then drew our attention to Rule 26, which provides that “the seniority of members of the service promoted to the senior grade time scale, shall be in the order in which their names are arranged by the Selection Board under Sub-Rule (2) of Rule 25 for the purpose of promotion to that grade.”

G Learned counsel also referred to Rule 27, wherein the Governor of the State was also empowered to dispense with or relax any Rule on being satisfied that the operation of any of the Rules caused undue hardship in any particular case. Mr. Hansaria submitted that after the Amendment Act was enacted on 21st
H July, 1986, whereby Rule 4 was also amended, the Governor

was given the power to determine the number of ACS Class-II officers to be promoted as a result whereof, the quota system in relation to recruitment of ACS Class-I Officers was discontinued. According to Mr. Hansaria, the quota system had broken down, necessitating the amendment.

15. Mr. Hansaria contended that the direct recruits had been appointed long after the appointment by promotion of the Petitioners under the Rules and could not, therefore, be given seniority over the promotees. Mr. Hansaria submitted that in this petition what was of utmost importance was not the question of recruitment, but how seniority was to be determined *inter se* with those who had been promoted earlier. The question posed is: Would the rules relating to seniority which were applicable at the time of recruitment also determine seniority even if the Rules were subsequently altered?

16. Mr. Hansaria submitted that since the quota and rota rule had not been followed over the years, the same was discontinued by virtue of the amendments to the 1960 Rules which became effective from 21st July, 1986. Although, the said amendments were challenged by the respondents, such challenge was later given up. Despite the above, the High Court quite erroneously relied on the unamended Rules in arriving at a final decision in the appeal. Mr. Hansaria urged that when the Rules relating to quota had been discontinued by the 1986 Amendment, the High Court erred in not following the Amended Rules which came into effect on 21st July, 1986, after the recruitment of both the petitioners as well as the respondents herein. Mr. Hansaria contended that even if the quota Rule is held to be applicable, the same had broken down on account of not having been followed for a long period of time, seniority had to be fixed by applying the amended Rules.

17. Mr. Hansaria then urged that it was a well-settled principle that direct recruits cannot claim appointment from the date on which the vacancy in the quota for direct recruitment occurred before their selection, which principle had been

A incorporated in the proviso to Rule 4(b) of the 1960 Rules, as amended.

B 18. In this regard, Mr. Hansaria referred to the decision of this Court in *Suraj Parkash Gupta & Ors. vs. State of J & K and Ors.* [(2000) 7 SCC 561], wherein the very same question fell for consideration and this Court observed that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment and not from the date when he was not even born in the service. Reference was also made to the decision of this Court in *State of Uttaranchal & Anr. vs. Dinesh Kumar Sharma* [(2007) 1 SCC 683], where the earlier decision in *Suraj Parkash Gupta's* case (supra) was reiterated and it was re-emphasized that a person appointed on promotion cannot get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Several decisions were also cited by Mr. Hansaria on the same lines, to which reference will be made, if necessary.

E 19. Mr. Hansaria contended that the High Court had committed an error in relying upon the unamended provisions of Rule 4 of the 1960 Rules, instead of relying upon the amended Rules which were relevant to the case of the respondents since the quota Rules had broken down when the process of recording seniority had been commenced.

F 20. Mr. Parthiv Goswami, learned Advocate, representing the Respondent Nos. 1 to 8 pointed out that Rule 4(1) provided the method of recruitment to the service and the proviso to the said Rule provided that 50% of the total vacancies in a given year was to be filled up by promotion of confirmed members of the Assam Civil Service (Class-II). Furthermore, Rule 19(1) provided that the promotees would be senior to direct recruits in case of appointment in the same year and in the same batch. Mr. Goswami contended that the State Government on 21st July, 1986, amended Rule 4 and the Governor was authorized thereunder to determine the number of promotees to be H accommodated, but as rightly pointed out by the Division

Bench, the amended Rules would not apply to the direct recruits whose selection process had commenced under the unamended Rules. A

21. Mr. Goswami submitted that promotees appointed in excess of the quota reserved for them could only be described as ad hoc and seniority could not be given to such promotees on the basis of such ad hoc promotions. In support of his submissions Mr. Goswami referred to the decision of this Court in *Uttaranchal Forest Rangers' Assn. (Direct Recruit) vs. State of U.P.* [(2006) 10 SCC 346], wherein the said proposition was approved and it was further held that promotees who were appointed in 1991 could not claim seniority over direct recruits who were substantively appointed at a prior point of time in 1990. B C

22. Reference was also made to the decision of this Court in *N.T. Devin Katti vs. Karnataka Public Service Commission* [(1990) 3 SCC 157], wherein it was held that appointment made in terms of an advertisement published prior to amendments effected to the Rule or Order would normally not be affected by the amendment. In other words, where the selection process is initiated by issuing an advertisement inviting applications, selection normally should be regulated by the Rule or Order then prevailing. Several other decisions were also referred to where the same principles have been explained. Mr. Goswami submitted that the process of selection in the instant case had commenced before the amendments came into force and since it was held that only prospective operation could be given to the amended Rules, the process of selection started under the unamended Rules would have to be continued and completed thereunder. Mr. Goswami submitted that the submissions made on behalf of the petitioners that the selection would be in accordance with the amended Rules was contrary to the law as established and was, therefore, liable to be rejected. D E F G

23. We have carefully considered the submissions made H

A on behalf of the respective parties and the decisions cited by
them. The point at issue in this SLP is confined to the question
as to whether the 1960 Rules as amended would govern the
seniority of the persons recruited in the process of selection
commenced earlier to the amendment. It is not disputed that
B an advertisement was published on 22nd May, 1984, for filling
up 30 posts in each category of ACS Class-I and ACS Class-
II Officers in terms of unamended Rule 4 of the 1960 Rules and
that a written test was conducted by the APSC under the said
Rules between 5th June, 1984 and 1st August, 1985 and the
C result of the said written examination was declared on 22nd
February, 1986. Viva-voce test was conducted by the APSC
from 25th April, 1986, to 30th May, 1986, in respect of those
candidates who had qualified in the written examination. A list
of recommended candidates was thereafter submitted by the
APSC to the Government on 22nd June, 1986. It is also not
D disputed that soon thereafter on 21st July, 1986, the proviso
to Rule 4(1) and Rule 4(1)(b) of the 1960 Rules were amended
whereby the quota system was sought to be discarded and
discretion was given to the Governor to determine the number
of appointments to be made by way of promotion in a given
E case.

24. It is evident from the chronological list of events that
the process of selection for filling up the 30 posts in each
category of ACS Class-I and ACS Class-II Officers commenced
F with the publication of the advertisement inviting applications
which was published on 22nd May, 1984. Pursuant thereto,
written examinations were also held and the result of the written
examinations was declared on 22nd February, 1986, and after
completion of the viva-voce test, a list of recommended
G candidates was submitted by the APSC to the Government on
22nd June, 1986. The amendment to Rule 4 came subsequently
on 21st July, 1986. The submission advanced on behalf of the
Respondent Nos.1 to 8 herein is that once the process had
commenced under the unamended Rules, appointments would
H have also to be completed under the said Rules, even though

the Rules were amended in the meantime. The Division Bench of the High Court, while re-hearing the Writ Appeal and the Review Petitions, reiterated the views expressed earlier on 26th August, 2006, holding that the seniority of direct recruits and promotees would be governed by the unamended Rules as the selection process was initiated prior to the 1986 amendments. Consequently, the Division Bench also held that the seniority between the promotees and direct recruits was to be determined on the basis of the quota fixed for recruitment from each source under Rule 4 of the 1960 Rules on the basis of the vacancies available in the calendar year, by applying quota and rota selectees to the extent of the vacancies in their quota as envisaged in the proviso to Rule 4(1) of the Rules as they stood prior to the 1986 amendments. The Division Bench, accordingly, amended its earlier judgment dated 24th August, 2006 and set aside the provisional seniority list of ACS Class-I Officers with the aforesaid modification and directed the authorities to recast the seniority in accordance with the said directions. While arriving at the aforesaid decision, the Division Bench had occasion to refer to the decision of this Court in *Dr. K. Ramulu & Anr. vs. Dr. S. Suryaprakash Rao & Ors.* [(1997) 3 SCC 59], wherein the question which fell for consideration was whether the Government was entitled to take a decision not to fill up existing vacancies on the relevant date unless the process of amendment was completed. This Court, after taking into consideration Rule 4 of the A.P. Subordinate Service Rules, held that the object of the said Rule was that all eligible candidates should be considered in accordance with the Rules. This Court held that the Government was entitled to take a conscious decision not to fill up any of the vacancies before the proposed amendment to the Rules was effected.

25. While at first glance the decision in *K. Ramulu's* case (supra) may appear to be at par with the facts of the instant case, there is yet a distinction which cannot be ignored. While in the present case a process of selection had been set in motion under the existing Rules and a list of selected

- A candidates had also been recommended by the APSC, in *K. Ramulu's* case (supra) the Government had merely taken a decision not to fill up the vacancies until the amended Rules came into force. In *K. Ramulu's* case (supra) no process had been initiated for the purpose of filling up any of the vacancies.
- B In such circumstances, where no candidate had either been invited or interviewed or selected for appointment, as has been done in the instant case, this Court rightly held that the Government was competent to take a decision not to fill up the vacancies.

- C 26. There can be no dispute that as a matter of policy the Government may take a conscious decision not to fill up vacancies for justifiable reasons, but at the same time, having started a process of selection under the unamended Rules, it cannot take the stand that it still was entitled not to make
- D appointments of persons from amongst the candidates selected in terms of the process initiated under the old Rules. In fact, in the instant case, the recommendation made by the APSC was submitted to the Government on 22nd June, 1986, before the amended Rules came into operation on 21st July, 1986
- E whereby the quota system was discarded. In such a situation, in our view, the decision in *K. Ramulu's* case (supra) cannot be applied to the facts of this case.

- F 27. We are unable to agree with Mr. Hansaria that the High Court had committed an error in relying on the unamended Rules since the law has been well settled that the process of selection commenced on the basis of the Rules then in existence would continue under the said Rules, even though the Rules may have been amended in the meantime. Accordingly,
- G the seniority of members of the service would, no doubt, be governed under Rule 19, but the selection process has to be completed under Rule 4 in order to attract the provisions of Rule 19. The vacancies for which the advertisement had been published in 1984 were directed to be filled up by the High
- H Court on the basis of the unamended Rule 4 which provided

for quota between promotees and direct recruits and, accordingly, placed 45 of the direct recruits immediately below the first 45 promotees out of the list of 129 promotees in keeping with the said quota system for the year 1986. A

28. We agree with the view taken by the High Court which has been reiterated by Mr. Goswami in keeping with the well-established principle that once a process of selection is started on the basis of the existing Rules of recruitment, the said Rules will continue to govern the selection process, notwithstanding any amendment which may have been effected to the said Rules in the meantime. B C

29. The decision of the High Court does not, therefore, warrant any interference and the Special Leave Petition is, accordingly, dismissed, but, without any order as to costs.

D.G. Special Leave Petition dismissed.