



NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2601 OF 2020

(Arising out of Special Leave Petition (Civil)No. 14036 of 2019)

WARAD MURTI MISHRA

...Appellant

Versus

STATE OF MADHYA PRADESH AND ANR.

...Respondents

WITH

CIVIL APPEAL NO.2602 OF 2020

(Arising out of Special Leave Petition (Civil)No. 13973 of 2019)

WITH

CIVIL APPEAL NO.2603 OF 2020

(Arising out of Special Leave Petition (Civil)No. 14134 of 2019)

WITH

CIVIL APPEAL NO.2604 OF 2020

(Arising out of Special Leave Petition (Civil)No. 14083 of 2019)

WITH

CIVIL APPEAL NO.2605 OF 2020
(Arising out of Special Leave Petition (Civil)No. 22167 of 2019)

WITH
CIVIL APPEAL NO.2606 OF 2020
(Arising out of Special Leave Petition (Civil)No. 26080 of 2019)

J U D G M E N T

Uday Umesh Lalit, J.

1. Leave granted.
2. These Appeals arise out of the final judgment and order dated 30.05.2019 passed by the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Writ Petition No. 1712 of 2018 and other connected matters. For facility, the facts in the lead matter viz. Civil Appeal arising out of Special Leave Petition (Civil)No. 14036 of 2019 are set out in detail hereinafter.
3. The Appellant in the lead matter joined the service as Deputy Collector on 01.07.1996 after being selected by the Madhya Pradesh Public Service Commission. The Appellant was initially put on probation for two years and was required to clear a departmental examination within that period. In terms of the concerned Rules, the probation period can be

extended for one year but the departmental examination must be cleared during the extended period. The Appellant could, however, clear the examination on 28.01.2001 that is more than three years after the initial appointment.

Consequently, the status of the Appellant and similarly situated persons, who could not clear the examination even within the extended period of probation, is the matter in issue, raising the question whether the persons selected in subsequent selection processes, who had cleared the departmental examination within the stipulated period, should rank senior to the Appellant and similarly situated persons.

4. The Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 (hereinafter referred to as '1961 Rules') apply to every person holding a post or who is a member of a service in the State, except certain categories in Rule 3. Rule 8 deals with 'Probation', Rule 12 deals with 'Seniority', Rule 12(1) deals with 'Seniority of Direct Recruits and Promotees', Rule 12 (2) deals with 'Seniority of Transferees', Rule 12 (3) deals with 'Seniority in special types of cases' and Rule 12(4) deals with 'Seniority of Ad hoc employees'. Since we are concerned in the present matter with seniority of Direct Recruits and Promotees, Rules 8 and 12(1) are set out hereunder:-

“8. Probation.- (1) A person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed.

(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

(3) A probationer shall undergo such training and pass such departmental examination during the period of his probation as may be prescribed.

(4) The services of a probationer may be terminated during the period of probation if in the opinion of the appointing authority he is not likely to shape into a suitable Government servant.

(5) The services of a probationer who has not passed the departmental examination or who is found unsuitable for the service or post may be terminated at the end of the period of his probation.

(6) On the successful completion of probation and passing of the prescribed departmental examination, if any, the probationer shall, if there is a permanent post available, be confirmed in the service or post to which he has been appointed, either a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and that as soon as a permanent post becomes available he will be confirmed.

(7) A probationer, who has neither been confirmed, nor a certificate issued in his favour under sub-rule (6), nor discharged from service under sub-rule (4), shall be deemed to have been appointed as a temporary Government servant with effect from the date of expiry of probation

and his conditions of service shall be governed by the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960.

... ..

12. Seniority.- The seniority of the members of a service or a distinct branch or group of posts of that service shall be determined in accordance with the following principles, viz.-

(1) Seniority of Direct Recruits and

Promotees.- (a) The seniority of persons directly appointed to a post according to rules shall be determined on the basis of the order of merit in which they are recommended for appointment irrespective of the date of joining. Persons appointed as a result of an earlier selection shall be senior to those appointed as a result of a subsequent selection.

(b) Where promotions are made on the basis of selection by a Departmental Promotion Committee, the seniority of such promotees shall be in the order in which they are recommended for such promotion by the committee.

(c) Where promotions are made on the basis of seniority subject to rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where however a person is considered as unfit for promotion and is superseded by a junior, such person shall not, if subsequently found suitable and promoted, take seniority in the Higher grade over the junior persons who had superseded him.

(d) The seniority of a person whose case was deferred by the Departmental Promotion

Committee for lack of Annual Character Rolls or for any other reasons but subsequently found fit to be promoted from the date on which his junior was promoted, shall be counted from the date of promotion of his immediate junior in the select list or from the date on which he is found fit to be promoted by the Departmental Promotion Committee.

(e) The relative seniority between direct recruits and promotees shall be determined according to the date of issue of appointment/promotion order:

Provided that if a person is appointed/promoted on the basis of roster earlier than his senior, seniority of such person shall be determined according to the merit/select/ fit list prepared by the appropriate authority.

(f) If the period of probation of any direct recruit or the testing period of any promotee is extended, the appointing authority shall determine whether he should be assigned the same seniority as would have been assigned to him if he had completed the normal period of probation testing period successfully, or whether he should be assigned a lower seniority.

(g) If orders of direct recruitment and promotion are issued on the same date, promotee persons enblock shall be treated as senior to the direct recruits.”

The Madhya Pradesh State Administrative Service (Classification, Recruitment and Conditions of Service) Rules, 1975 (hereinafter referred to as ‘1975 Rules’) apply to every member of the service, without prejudice to the generality of the provisions contained in 1961 Rules.

Rule 13 deals with 'Probation', while Rule 23 deals with 'Seniority'. Said

Rules read as under:-

"13. Probation.- (1) Every person directly recruited to the service shall be appointed on probation for a period of two years.

(2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

(3) The probationer shall undergo the prescribed training and pass the prescribed departmental examination by the higher standard during the period of his probation.

(4) The services of the probationer may be terminated during the period of probation, if in the opinion of the appointing authority, he is not likely to shape into a suitable government servant.

(5) The services of a probationer who does not pass the prescribed departmental examinations or who is found unsuitable for the service may also be terminated at the end of the period of probation.

(6) On successful completion of probation and the passing of the prescribed departmental examinations, the probationer shall be confirmed in the service provided permanent vacancies exist for him otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post and as soon as permanent post become available he will be confirmed. The probationer shall not draw any increments until he is confirmed. On confirmation his pay will be fixed with reference to the total length of

service. If the probationary period is extended, government will decide at the time of confirmation whether arrears of increment shall be paid or not. Such arrears shall ordinarily be paid when the extension of the probationary period is due to no fault of the probationer.

(7) A probationer who has neither been confirmed, nor a certificate issued in his favour under sub-rule (6) above nor discharged from service under sub-rules (4) and (5) above, shall be deemed to have been appointed as a temporary government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh (Temporary and Quasi-Permanent Service) Rules, 1960.

23. Seniority.- The seniority of persons appointed to the service shall be regulated in accordance with the provisions of rule 12 of the Madhya Pradesh Civil Service (General Conditions of Service) Rules, 1961.”

Since Rule 8(7) of 1961 Rules and Rule 13 (7) of 1975 Rules expressly refer to Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960 (hereinafter referred to as ‘1960 Rules’), Rules 2 and 3 of 1960 Rules are set out as under:-

“2. In these Rules, unless there is anything repugnant in the subject or context –

(a) “Allocated Government servant” means a person allotted or deemed to be allotted for service in the State of Madhya Pradesh under the provisions of section 115 of the State Re-organisation Act, 1956;

(b) “Quasi-Permanent Service” means temporary service commenced from such date as may be specified in that behalf in the declaration issued under rule 3 or from the date from which the Government servant concerned is deemed to be in quasi-permanent service under rule 3A and consisting of period of duty and leave (other than extraordinary leave) after that date;

(c) “Specified post” means a particular post, or the particular grade or posts within a cadre, in respect of which a Government servant is declared to be in quasi-permanent service under rule 3 or deemed to be in quasi-permanent service under rule 3A.

(d) “Temporary service” means officiating or substantive service in a temporary post, and officiating service in a permanent post, under State Government and also includes the period of leave with allowance taken while on temporary service and complete years of approved war-service, which have been counted for fixation of pay and seniority.

3. A Government servant shall be deemed to be in quasi-permanent service.-

(i) If he has been in temporary service in the same service or post continuously for more than three years; and

(ii) If the appointing authority being satisfied as to his suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect, in accordance with such instructions as the Governor may issue from time to time.

Explanation.- In computing continuous temporary service for the purposes of this rule and period of break in service during a vacation shall be counted as a period of actual service where, upon re-employment immediately after the vacation, the Government servant has been allowed to draw his pay and allowances in respect of such period.”

5. It may be mentioned that while issuing the Seniority List dated 08.08.2001, the Appellant and similarly situated persons were declared as confirmed/permanent on the date when they had cleared the examination, which incidentally was later than the date of confirmation of the officers in the subsequent selection. The relevant order also dealt with cases of certain officials who had not cleared the departmental examination in the initial period of two years, but had cleared the concerned examination within the extended period.

Thus, the order dealt with three kinds of officials (a) those who had cleared the examination in the initial period of probation of two years; (b) those who had cleared the examination within the extended period of one year of probation; and (c) those who had cleared the examination after the expiry of extended period of probation.

(i) The second category of persons was dealt with as under:-

“All the abovenamed officers by not passing all the departmental examinations within the prescribed period of 2 years, have passed the same in the extended period i.e. within 3 years.

Therefore, their seniority in State Administrative Service shall remain as it as per the seniority of the Select List of M.P. Public Service Commission. Abovenamed officers have passed the departmental examination during the extended probation period, therefore, the arrears of increment in pay as per Rule 13 (6) of the M.P. State Administrative Service (Executive) (Classification, Recruitment & Conditions of Service) Rules, 1975, shall not be paid to these officers. The benefit of notional date of permanency of these officers shall be available only for the seniority. The benefit of notional date of regularization shall not be available for revision of pay.”

ii) After setting out the names of candidates who had cleared the departmental examination after the expiry of extended period of probation, the order stated:-

“Abovenamed officers have passed departmental examination after the expiry of probation period of 2 years and extended period of 1 year i.e. after 3 years. Therefore, by not maintaining the seniority of aforementioned officers in permanent cadre of the State Administrative Service as it is as per the Select List of M.P. Public Service Commission, and by lowering their seniority as per Rule 12(1)(f) of the M.P. Civil Service (General Conditions of Service) Rules, 1961, same shall be revised in reference to the date of passing the departmental examination.”

6. In a challenge raised by the concerned candidates, the Division Bench of the High Court considered the matter vide its judgment and order dated 17.12.2009 in Writ Appeal No. 510 of 2009 and all other

connected matters (Suresh Kumar vs. The State of M.P. and others).

The submission advanced in support of the challenge was noted as under:-

“3. as they could not complete the probation period successfully and the same had to be extended, the State Government might have a right under Rule 12(1)(f) of Civil Services (General Condition of Services) Rules, 1961 (hereinafter referred to as “Rules of 1961”) to fix the seniority but the State Government could not place the petitioners below the candidates who were selected in subsequent selections held in 1995, 1996 and/or 1997. It is also contended that as the State Government itself had extended the period of probation, each of the petitioner was certainly entitled to the increments which they had successfully earned while discharging their duties as probationers.”

After going into Rule 12 of 1961 Rules, the Division Bench concluded:-

“8. From perusal of Rule 12 of Rules of 1961, it would clearly appear that seniority of a person will have to be determined in order of merit in which he is recommended for appointment irrespective of date of joining. Persons appointed as a result of an earlier selection shall be senior to those appointed as a result of subsequent selection. A perusal of Rule 12 (1) (a) of Rules of 1961 would make it clear that it refers to inter se seniority of the persons which is based upon the order of merit in which they are recommended by the concerned Selection Board. It would also be clear from Rule 12 (1) (a) that a person appointed in the earlier selection process shall be senior to those appointed as a result of a subsequent selection.

From the language it would clearly appear that if a person is appointed in the earlier year then he would always be senior to a person appointed in the latter year. However, Rule 12 (1) (a) of Rules of 1961 would be subject to certain disciplinary actions, which can be taken and the seniority of such person may be adversely affected. In any case, if there are no adverse reports nor there is any disciplinary action the seniority is to be maintained vertically and horizontally. The horizontally seniority is to be maintained in order of the merits in which they are recommended for their appointment while the vertical seniority is to be maintained in order of selection of the year by holding that the person who was appointed as a result of an earlier selection shall be senior to those appointed as a result of a subsequent selection.

... ..

10. At this stage, it would be necessary to observe that a person who is directly appointed in order of merit in which they are recommended for appointment they have their inter se seniority, their seniority cannot be compared with any person who has been appointed in a subsequent selection process. The authority only has a right to fix the seniority of such probationer who could not complete his probation period successfully within his own cadre or within the person who had been selected in the same selection process. If the arguments of learned Advocate General is accepted, the same is likely to create an administrative anarchy because in a given case a person may complete the probation period successfully within one year and the other may not complete the same within two years and in between if another selection process takes place and the other person of the subsequent selection process completes the probation in less than one year and is confirmed then he is likely to become senior to the person who still had some

valid period of probation. It is also to be seen that there is always a distinction between appointment and confirmation. Once Public Service Commission or the appointing authority undertakes the process for selection then for that class this is the end of matter. After such selection the persons would be appointed on probation or permanently. In case persons are appointed on probation then they would be required to complete the period of probation successfully and on completion of the period they would not be reappointed or reselected but they would be confirmed on the post. If there is a marked and sharp distinction between selection, appointment and confirmation then such distinctions could not be kept in oblivion by the State Government and the petitioners could not be awarded seniority below the persons who had been selected/appointed under the subsequent selection process.”

7. State of Madhya Pradesh, being aggrieved, challenged the correctness of the decision of the Division Bench by filing Special Leave Petition (Civil) No. 13888 of 2010 (State of Madhya Pradesh vs. Sandeep Kumar Mawkin) which was dismissed by this Court on 13.09.2010. Review Petition (Civil) No.1034 of 2011 arising therefrom was also dismissed by this Court on 13.04.2011.

8. Thereafter, in view of the divergence of views expressed by two Division Benches of the High Court, the matter was referred to the Full Bench of the High Court in Writ Appeal No. 607 of 2011 (Dr. Masood Akhtar vs. R.K. Tripathi) and other connected matters, which were

dealt with by the Full Bench vide its order dated 17.02.2012. After considering Rules 8 and 12 of 1961 Rules, it was observed:-

“6.... ...At the end of the extended period of probation, when no further extension of period of probation is permissible, the status of the probationer in the eye of law will be that of a deemed confirmed employee where he has passed the departmental examination is the condition precedent for confirmation either in the rules or in the order of appointment. The view finds support from the decision in *High Court of M.P. through Registrar and others vs. Satya Narayan Jhavar* (2001) 7 SCC 161 *Rajindra Singh Chauhan* (2005) 13 SCC 179. Moreover, taking the other view i.e. an employee does not get status of confirmed employee on successful completion of period of probation and on passing the departmental examination would bring in operation rule 8(7) of the 1961 Rules which would confer the status of a temporary employee on the probationer. We are not inclined to adopt the aforesaid interpretation since the same is contrary to rule 8 (7) of the 1961 Rules which prescribes the maximum period of probation. Besides that, by such an interpretation, the confirming authority can destroy the service career of a probationer merely by indecision in the matter of confirmation of such an employee. However, where the probationer at the end of extend of period of probation has not been able to pass the departmental examination and that passing of the departmental examination is mandatory for confirmation, and confirmation has neither been granted nor refused the probationer will be deemed to have been refused confirmation at the end of maximum permissible period of probation, because even if the confirming authority would have actually considered the cast of probationer for confirmation, it would have no option except to refuse confirmation on

the ground that the probationer has not passed the departmental examination. The case of such a probationer would be covered by Rule 8(7) quoted above and he will be deemed to have been appointed as a temporary government servant with effect from the date of expiry of probation and his condition of service shall be covered by the 1960 Rules.”

The Full Bench went on to observe:-

“8. In our opinion, allowing such probationer to retain original seniority would have to be confined to cases where such extension of probation is not due to any fault or short coming on part of the employee concerned. For example, where the employee could not appear at the departmental examination on account of illness or such other cause beyond the control of the employee or where some departmental inquiry was pending in which the employee is ultimately exonerated. The above contingencies are only illustrative and no exhaustive.

9. However, where the extension of probation is made due to any short coming of the employee, like not being able to pass the departmental examination or not performing well during the initial period of probation, his seniority would have to be pushed down and in that case also the question would arise as to the extent of assignment of lower seniority to such an employee. Again, decision in this regard cannot be left to whim and caprice of appointing authority but the same has to be based on rational and reasonable criterial.

... ..

11. ... Rule 12(1)(a) of the 1961 Rules inter alia provides that persons appointed as a result of earlier selection shall be senior to those appointed as a result of subsequent selection whereas Rule 12(1)(f) confers discretion on the

appointing authority to assign the same seniority or to assign lower seniority to a probationer whose probation or testing period is extended. In the light of aforesaid well settled rule of statutory interpretation the discretion conferred on the appointing authority to assign lower seniority to an employee under Rule 12(1)(f) of the 1961 Rules has to be confined to the extent that despite assigning lower seniority such a probationer shall always rank senior to those who appointed/promoted as a result of subsequent selection/promotion. In other words the power to assign a lower seniority to a probationer has to be interpreted as stated supra so as to give full effect to provision of Rule 12 (1)(a) of the Rules which provides that persons appointed as a result of an earlier selection shall be senior to those who appointed as a result of subsequent selection/promotion. In view of the proceeding analysis, our conclusions are as under:-

- i) A probationer who has passed the departmental examination prescribed either in the rules or in the order of appointment at the end of extended period of probation shall be deemed to be a confirmed employee and shall be assigned seniority accordingly.
- ii) A probationer who has not been able to pass the departmental examination prescribed either in the rules or in the order of appointment at the end of extended period of probation shall be deemed to be temporary employee under Rule 8 (7) of the 1961 Rules.
- iii) Under Rule 12(1)(f) an employee would be allowed to retain original seniority where extension of period of probation is not due to any fault or shortcoming of the employee. However, where extension of period of probation is on

account of fault or shortcoming on the part of the employee, in such a case the probationer has to be assigned seniority from the date if that date can be ascertained i.e. the date on which he clears the departmental examination or where such date cannot be ascertained, the date on which he is considered suitable for confirmation.

iv)The discretion to confer lower seniority to a probationer under Rule 12(1)(f) is confined to the extent that despite assigning lower seniority, such probationer shall always ranks senior to those who are appointed in subsequent selection.”

9. State of Madhya Pradesh challenged the decision of the Full Bench by filing Special Leave Petition (Civil) No. 20288 of 2012 (State of M.P. and ors. vs. Masood Akhtar and ors.) and other connected matters, which were dismissed by this Court on 01.09.2017. Review Petition (Civil) No. 2663 of 2018 arising therefrom was dismissed by this Court on 18.09.2018.

10. Subsequently, Writ Petitions were filed by the Appellant and similarly situated persons seeking direction to grant them seniority from the initial date of appointment in their respective batches in view of the provisions contained in Rule 12 (1)(a) and (f) of 1961 Rules, though they had not passed the departmental examination either within the initial

period of probation of two years or within the extended period of probation of one year.

11. The Division Bench in its judgment, which is presently under appeal, considered the decision of the Full Bench and observed:-

“14. In this regard, on perusal of the provision of the Rules of 1961, Rules of 1960 and Rules of 1975, the aforesaid interpretation do not appear to be as per the provisions of the Rules.”

After referring to the concerned Rules, the Division Bench observed:-

“17. Rule 7 of the Rules of 1961 specifies methods of recruitment and Rule 8 deals with a probation which has been referred by the Full Bench in the judgment of Prakash Chandra Jangre¹ (Supra). As per Sub-Rule (1) of Rule 8, it is clear that a person appointed to a service or post by direct recruitment shall be placed on probation for such a period as prescribed and for the sufficient reasons the said period of probation may be extended further for a period not exceeding one year. Meaning thereby under Rule 8, period of probation of two years has not been specified but in Rule 13 (1) of the Rules of 1975 in specific, the period of two years probation has been specified. As per Sub-Rule (3), the probationer shall undergo such training and pass departmental examination “during the period of his probation” or as may be prescribed. Meaning thereby, passing of departmental examination either in the Rules of 1977 or in the Rules of 1999 and also as per Rule 13 (3) of the Rules of 1975 is necessary for confirmation. Sub-Rules (4) and (5) of Rule 8 of Rules of 1961

1 (2012) 1 MPJR 375

are similar to Sub-Rules (4) and (5) of Rule 13 of Rules of 1975. As per Sub-Rule (6), on successful completion of a probation after passing the departmental examination, the order of confirmation be issued on availability of a permanent post by the appointing authority otherwise a certificate for confirmation on availability of the permanent post shall be issued by such authority acknowledging the said fact. Rule 13 (6) of Rules of 1975, by which the services of the petitioners are governed, confers more power to the authorities to regulate their services. As per Sub-Rule (6) of Rule 8 of the Rules of 1961, there is a distinction with Rule 13 (6) of the Rules of 1975. Sub-Rule (7) of Rule 8 *ibid* indicates that if a probationer has not been confirmed under sub-rule (6) nor discharged under sub-rule (4) then he would be deemed to be a temporary government servant but Rules of 1975 makes it clear that in case either in Sub-Rule (4) or in Sub-Rule (5) if confirmation order has not been issued, in both the cases he would be deemed to be the temporary government servant and his service conditions shall be governed by Rules of 1960.

18. In view of the foregoing facts, it is apparent that the Full Bench has only considered the Rule 8 of the Rules of 1961, although it ought to have considered Rule 13 of the Rules of 1975 and if there is any inconsistency, the departmental rules would govern the field as per Rule 3 of the Rules of 1961 as well of the Rules of 1975.”

Finally, the Division Bench referred certain questions to be considered by a larger bench as under:-

“21. In view of the foregoing discussion and looking to the language of the Rules of 1960, the Rules of 1961, the Rules of 1975 and also

the directions issued by the Full Bench, the direction No.2 relates to Rule 8(7) of the Rules of 1961 but in fact Rule 13 (7) of the Rules of 1975 would govern the issue. It is further seen that after becoming a temporary government servant, how their seniority be decided, it has not been discussed although Rules 3, 3A, 4, 5, 6, 7 of the Rules of 1960 deals the issue. In case the above Rules of 1960 is made applicable, the direction No. 4 do not subsist. Similarly, the Court while interpreting Rule 12 (1)(a) and Rule 12 (1)(f) issued the direction that the probationers shall be assigned the lower seniority but they shall remain rank senior to those who have been subsequently selected. Rule 12 (1)(a) do not apply to the “probationers” but it applies to the “members of the service”. It is to further observe here that Rule 12 (1)(f) deals a situation for grant of seniority on passing the departmental examination within the period of probation or within the extended period of probation. It do not apply to a case where the probationer has not passed the departmental examination even after elapse of the extended period of probation. In such circumstances, the judgment of the Full Bench appears to be contrary to the provisions of the rules framed under proviso to Article 309 of the Constitution of India, which requires reconsideration. In view of the foregoing discussion, the following questions arise for consideration :-

- 1) The judgment of the Full Bench dealing the issue of probation is relying upon the Rule 8 of the Rules of 1961 although in the light of Rule 3 which deals the applicability either in the Rules of 1961 or in the Rules of 1975 on having special provision, the Rules of 1961 would not apply and in the present case, the service of the petitioners or the

intervenors are governed by the Rules of 1975 and Rule 13 deals the issue of probation, however, the judgment of the Full Bench requires reconsideration in the said context.

- 2) Rule 12 and Rule 12 (1)(a) apply to the “members of the service” and it do not deal with the seniority of the probationers, who have not qualified the departmental examination within the period of probation or within the extended period of probation, which shall not be more than one year, however, the interpretation made in Paragraph No.4 of the direction applying those rules is justified.

- 3) As per direction No. 2 of the judgment of the Full Bench in the case of Prakash Chandra Jangre (Supra), it is held that if the probationer has not qualified the departmental examination within the period of probation or within the extended period of probation, he shall be deemed to be a temporary government servant and shall the governed by the Rules of 1960 but without dealing the issue of seniority, how they will achieve, as specified in Rules 3, 3A, 4, 5, 6, 7, the direction issued in Clause 4 of the said judgment, is not contrary to the spirit of the Rules of 1960.

22. In view of the foregoing observation, we deem it appropriate to refer the judgment of the Full Bench to the Larger Bench to answer the aforesaid issues.

23. Registrar (Judicial) is requested to place the matter before Hon'ble Chief Justice to do the needful and to take appropriate steps in this regard in view of the foregoing observations.”

12. In these appeals, the rival submissions were recorded by this Court in the Order dated 11.07.2019, whereafter the matters were posted for hearing. The relevant portion of the Order was:-

“According to Mr. Shrivastava, the controversy in question had reached this Court in 2009 when the special leave petitions and the review petitions were dismissed affirming the view taken by the Division Bench in Writ Appeal No.510 of 2009 and other connected matters. Thereafter, on a reference made by the Division Bench, the Full Bench of the High Court had an occasion to consider the matter. The judgment of the Full Bench rendered in Writ Appeal No.607 of 2011 and connected matters was challenged before this Court in SLP (C) No.20288 of 2012 and other connected matters. The special leave petitions were dismissed by this Court on 1st September, 2017 and review petitions arising therefrom were also dismissed by this Court. The submission of Mr. Shrivastava is that the matters having been settled, the Division Bench ought not to have referred the matter for further consideration by a larger Bench.

Mr. Rahul Kaushik, learned counsel appearing for the State relied upon the decisions of this Court reported in *M.P. Chandoria vs. State of M.P. & Ors.* [(1996) 11 SCC 173]; *State of M.P. vs. Ramkinkar Gupta & Ors.* [(2000) 10 SCC 77]; and *Om Prakash Shrivastava vs. State of M.P. & Anr.* [(2005) 11 SCC 488] to submit that the passing of the departmental examination would be a relevant criteria to determine the seniority and if in the intervening period a

subsequent batch had been appointed, the person from the previous batch would not retain his seniority as against the subsequent batch. In his submission, the Division Bench was, therefore, justified in making the reference to a larger Bench.

Mr. P.S. Patwalia, learned senior counsel appearing for some of the private respondents on caveat, invited our attention to the interplay between Rule 8(7) and Rule 12 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961. According to the learned counsel, by virtue of Rule 8(7), the status of such a Government servant would be “temporary Government servant” and he would cease to be part of the regular service and, therefore, Rule 12 would be completely inapplicable.”

13. We heard Mr. Ravindra Shrivastava, learned Senior Advocate for the Appellants, Mr. Rahul Kaushik, learned Advocate for the State and Mr. P.S. Patwalia, learned Senior Advocate and Mr. Puneet Jain, learned Advocate for the private Respondents. The parties also filed their written submissions.

A. In his written submission, Mr. Shrivastava, learned Senior Advocate for the Appellants submitted:-

“...the question of determination of seniority of those direct recruits who were unable to pass the departmental examination and consequently their confirmation was delayed is no longer res integra, having been decided twice by the High Court. ...

... ..

...it would be travesty of justice to allow the concluded issue to be reopened once again after dismissal of SLP and review in two rounds of litigation in this Hon'ble Court.”

It was further submitted:-

“...in the event, the impugned order is upheld which has directed reference to a larger bench, the High Court would be required to re-consider the legal issues on merits involving interpretation of law and the rules. It is submitted with respect and humility, that this Hon'ble Court is not called upon to examine the interpretation of the law and the rules and the principle of seniority applicable in the instant case as the High Court in seisin of the substantive matter, except perhaps for a limited purpose of ascertaining for itself prima facie that on earlier occasions same very rule and the dispute of seniority based on the same contentions has been considered.”

B. On the other hand, it was submitted by Mr. Kaushik,

learned Advocate:-

“10. Thus to sum up, if the probationers do not clear the departmental examination within the period two years plus extended period of one year as provided under rule 13 (1), 13(2) & 13(3) of Madhya Pradesh State Administrative Services Rules, 1975 and Rule 8(1)(2)(3) of the Madhya Pradesh Civil Service Rules, 1961 and are not terminated as provided under rule 13(5) of Madhya Pradesh State Administrative Services Rules, 1975 and 8(5) of the Madhya Pradesh Civil Service Rules, 1961, they would be deemed to be temporary government servant with effect from date of expiry of probation and their condition of service are governed by Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Services) Rules, 1960 as per Rule 13(7) of the Madhya

Pradesh State Administrative Services Rules, 1975 and Rule 8(7) of Madhya Pradesh Civil Services Rules, 1961.

11. Thus, there would be a situation that a person who clears the departmental examination within normal period of probation and a person who does not clear the departmental examination within a period of two years plus one year and is a temporary government servant after the period of expiry of his probation and does not clear the departmental examination for a period of ten years and would come after ten years to claim seniority with his batch. Such a situation is not provided under the Rules and would lead to total chaos and would be very discouraging the persons who clear the departmental examination within the period of probation as provided under the Rules.

12. It is further submitted that the purpose of departmental examination is to make the officers competent for performing their duties in the quasi-judicial capacity. That is why after the selection of an officer, during the probation period, an officer is supposed to pass examination broadly of the following subjects:-

- i. Criminal Procedure Code
- ii. Civil Procedure Code
- iii. Administrative Revenue Law and Procedure
- iv. Madhya Pradesh Panchayati Raj Adhiniyam
- v. Accounts
- vi. Hindi

If an officer is not able to pass the examination with the higher grade, he/she is not allowed to work as Sub-Divisional Magistrate and Sub-Divisional Officer Revenue, as he cannot pass any judicial/quasi-judicial order. The officer who does not pass the examination, works only as Deputy Collector and is given charge of

SDM/SDO Revenue only after he or she passes the examination. Since the above departmental examination procedure is very significant with regard to the discharge of official duty, officers who do not pass examination within the probation period plus extended period, cannot be equalled with the officers who pass the examination within the abovesaid time limit. That is why the confirmation of an officer depends on the passing of the examination. The moment he passes the examination, he is confirmed by the department and is given the seniority from that date. If, seniority of an officer, is not affected by the delayed passing of the examination, the significance and the very basis of keeping the examination procedure, would be defeated.”

C. It was submitted on behalf of the private Respondents as
under:-

“(vi) The consequences of not clearing the departmental examination “within the probation period” has been prescribed in Rule 13(7). It would entail:-

- (1) The probationer shall be, from the date of expiry of his probation i.e., upon completion of 3 years of probation, deemed to have been appointed as a Temporary Government Servant. The provision is in mandatory language due to the use of the word “shall” and creates a “deeming fiction” by which a such person is “appointed” as a Temporary Government Servant.

Note:- Since Rule 13(7) creates a “Deeming fiction” and therefore one is required to treat an imaginary state of affairs as real. It must also be imagined in real the consequences and incidents which inevitably flow from it.

[See – M. Venugopal v. Divisional Manager, LIC, Machilipatnam & Anr. (1994) 2 SCC 323 (para 11).

(2) The Rule also provide that conditions of such government servant would be “...governed by the Madhya Pradesh (Temporary and Quasi-Permanent Service) Rules, 1960...”. Thus, the probationer, upon unsuccessful completion of the probation period ceases to be part of the 1975 Rules and is now to be governed by a separate set of rules applicable to Temporary Government Servants.

(vii) Due to the “Deeming Fiction” created by 13(7), after expiry of 3 years, the probationer Ceases to be a probationer and becomes a “Temporary Government Servant”. He would then cease to be a member of the State Administrative Service due to the application of Rule 13(7) (or rule 8(7) of the 1961 Rules) which have remained the same and have not undergone any amendment. In *M.P. Chandoria vs. State of Madhya Pradesh* (1996) 11 SCC 173 it was therefore specifically held as under:-

“... ...If however, the period of probation of any direct recruit is extended.... Date of passing of the test.”

14. While considering 1961 Rules vis-à-vis the status and rights of a probationer, in *M.P. Chandoria vs. State of Madhya Pradesh and others*², this Court had stated:-

“4.The probationer has to undergo such training and pass such departmental examination during the period of his probation as may be prescribed. Sub-rules (4) and (5) are not relevant

2 (1996) 11 SCC 173

and are omitted. Sub-rule (6) of Rule 8 is relevant for the purpose of the case which envisages that on successful completion of probation and passing the prescribed departmental examination, if any, the probationer shall, if there is a permanent post available, be confirmed in the service or post to which he has been appointed. Otherwise a certificate shall be issued in his favour by the appointing authority to the effect that the probationer would have been confirmed but for the non-availability of the permanent post. As soon as a permanent post becomes available, he will be confirmed. Under sub-rule (7), a probationer, who has neither been confirmed nor a certificate issued in his favour under sub-rule (6), nor is he discharged from service under sub-rule (4), he shall be deemed to have been appointed as a temporary government servant w.e.f. the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960.

5. Under Rule 12, the seniority of the members of the service of a district branch or group of posts of that service, shall be determined in accordance with the principles laid down therein. Sub-clause (i) of clause (a) envisages that the seniority of a directly recruited government servant appointed on probation shall count during his probation from the date of his appointment; the proviso is not relevant. Sub-clause (ii) envisages that the same order of inter se seniority of direct recruits is maintained by confirmation of the normal period of probation. If, however, the period of probation of any direct recruit is extended, the appointing authority should determine the date from which the candidate should be assigned seniority. Until the probation period is completed and he is confirmed in the post, he does not become a member of the service on successful completion

of the probation and passing of the prescribed tests or conditions precedent to declaration of completion of the probation period. So, mere passage of time of one year does not entitle a probationer to be a member of the service. He remains to be on temporary service. On completion of probation period, the appointing authority should confirm him in a pending post available or grant him a quasi-permanent status. As soon as the post is available, he should be confirmed. In view of the admitted position that he did not pass the test, the appointing authority considered that his seniority would be counted w.e.f. the date of his passing the test. Rule 12(a) (ii) clearly empowers the appointing authority to assign, in these circumstances, the seniority in lower level than the one assigned by the Public Service Commission. We do not find any illegality committed by the authorities in giving seniority from the date of his passing the test.”

15. To similar effect are the observations of this Court in *State of M.P. vs. Ramkinkar Gupta and others*³:-

“7. It is quite evident that Respondent 1, who had neither been confirmed, nor had certificate been issued in his favour under sub-rule (6), nor was he discharged from service under sub-rule (4) would fall within the category of those officers referred to in sub-rule (7) of Rule 8. In other words, he was to be deemed to be a temporary government servant with effect from the date of expiry of probation.

... ..

9. According to sub-clause (ii) of clause (a) of Rule 12 in a case like the present where a person had been allowed to continue in service after the period of probation had been completed and he is confirmed subsequently, it is for the

appointing authority to decide as to from what date he should be assigned seniority. In the present case the decision of the State Government was that he should be assigned seniority w.e.f. 19-1-1984. The aforesaid rules have been considered by this Court in the case of *M.P. Chandoria v. State of M.P.*³ The principle laid down by this Court in *Chandoria case*³ was that if a person does not pass the test then the appointing authority is empowered to assign seniority in a lower level than the one which was assigned by the Public Service Commission. That being so the decision to assign seniority to Respondent 1 w.e.f. 19-1-1984 is in accordance with rules.”

16. The principles were reiterated by this Court in *Om Prakash Shrivastava vs. State of M.P. and another*⁴ as under:-

“10. A bare reading of sub-clause (ii) of clause (a) of Rule 12 makes the position clear that the appointing authority has to decide as to from what date the direct recruit is to be assigned. It has to be decided whether seniority as assigned to him if he had been confirmed on the expiry of the normal period of probation or whether he should be assigned a lower seniority. The original probation period is two years. Therefore, a combined reading of Rules 8, 12 and Rule 13 of the Executive Rules makes the position clear that seniority can be assigned by taking the relevant date to be the date of expiry of normal period of probation. In the case of Ram Rao Bhosley, it was 8-5-1992. So far as the appellant is concerned, the appointing authority has been given power to determine the date from which the candidate should be assigned seniority if the period of probation of any direct recruit is extended depending on the date of his passing the departmental examination. As was noted in *M.P. Chandoria case*³ until the probation period

4 (2005) 11 SCC 488

is completed, and he is confirmed in the post, the employee does not become a member of the service on successful completion of the probation and passing of the prescribed tests or conditions precedent to declaration of completion of the probation period. Mere completion of one year period does not entitle the person to be a member of the service. He continues to be in temporary service on the completion of probation period. The appointing authority is to confirm him in a pending post available or grant him a quasi-permanent status. Unless he passes departmental examination, there is no question of completion of probation and for all practical purposes the employee continues to be in temporary service.

11. Reiterating the principles in *M.P. Chandoria case*³ it was held in *Ramkinkar Gupta case*⁴ that if a person does not pass the test then the appointing authority is empowered to assign seniority in a lower level than one which has been assigned by the Public Service Commission. A person who has neither been confirmed, nor had a certificate in his favour in terms of sub-rule (6), nor discharged from service under sub-rule (4) would fall within the category of those officers referred to in sub-rule (7) of Rule 8 of the Rules. In other words, he is to be deemed to be a temporary government servant with effect from the date of expiry of probation. The position is different in case of an officer, who passes the departmental examination within an extended period of probation.”

17. It is submitted by the learned counsel for the Appellants that the issue stands concluded in their favour by the decisions of the Division Bench and the Full Bench of the High Court, as stated hereinabove, while it is submitted by the State and the private Respondents that the seniority

issue ought to be determined in the light of the aforementioned decisions of this Court.

It is true that the decisions of the Division Bench and the Full Bench were challenged and not only the Special Leave Petitions but the Review Petitions were also dismissed. But as observed by the Division Bench in the instant case, the effect of Rule 13 of 1975 Rules was not considered on the earlier occasions. Since the Division Bench has now made a reference to a larger bench, we do not propose to enter into the matter and decide the controversy but leave it to the High Court to consider and decide all the issues.

18. It was, however, submitted by the learned counsel for the Appellants that going by the settled parameters of “re-consideration” laid down in *Pradip Chandra Parija and others vs. Pramod Chandra Patnaik and others*⁵ and in *Sakshi vs. Union of India and others*⁶, no reference could and ought to have been made unless the earlier decisions were so “palpably wrong” or so “very incorrect” that reference was called for and in any case, the reference ought to have been to a bench of equal strength (three Judges) in keeping with the law laid down by this Court in

5 (2002) 1 SCC 1

6 (2004) 5 SCC 518

Central Board of Dawoodi Bohra Community and another vs. State of Maharashtra and another⁷.

19. Whether the reference was justified or not will certainly be considered by the bench answering the reference. We, however, accept the latter submission and direct that the matters shall first be placed before a bench of three Judges, which may consider whether the decision of the Full Bench on the earlier occasion requires reconsideration. The bench may consider the effect of non-consideration of Rule 13 of 1975 Rules on the earlier occasion as well as the impact of the decisions of this Court quoted hereinabove on the controversy in question. The matters shall be considered purely on merits and without being influenced by the dismissal of Special Leave Petitions by this Court on the earlier occasions or dismissal of the Review Petitions. We have not and shall not be taken to have expressed any view touching the merits of the matters.

20. The Appeals stand disposed of in aforesaid terms. No costs.

.....J.
[Uday Umesh Lalit]

.....J.
[Indu Malhotra]

New Delhi;
June 15, 2020.

⁷ (2005) 2 SCC 673 – paras 5 and 12