

REPORTABLE**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 3968 OF 2009**

B.S. MURTHY & ORS.

...APPELLANT(S)

VERSUS

A. RAVINDER SINGH & ORS.

...RESPONDENT(S)

WITH

**CIVIL APPEAL NO. 3967 OF 2009
CIVIL APPEAL NOS. 3969-3982 OF 2009
WRIT PETITION (CIVIL) NO. 1380 OF 2020****ORDER****S. RAVINDRA BHAT, J.**

1. The appellants are aggrieved by a common judgment and order of the erstwhile unified High Court of Andhra Pradesh in several writ petitions.¹ The High Court allowed those writ petitions and set aside the order² of the Central Administrative Tribunal (CAT) in a batch of ten original applications. The CAT's order had allowed those applications and directed proper fixation of *inter se*

¹ W.P.Nos.11620/2004, 10601/2004; 13525/ 2004, 12970/ 2004, 21863/2004, 1834/ 2005, 1836/2005, 1838 of 2005, 1858/ 2005, 1861/ 2005, 2011/2005, 1348/ 2005, 18149/ 2004, W.P. No.6098/2005, 6099/2005; 6100/ 2005, & 6097/ 2005; all were decided on 16.03.2005.

² Dated 29.12.2003

seniority of Inspectors of Central Excise, as between direct recruits and promotees. The promotee inspectors are aggrieved, and are appellants before this court.

2. Recruitment to the posts of Inspectors of Central Excise is from amongst two channels- one, direct recruitment and the other, by promotion from in-service candidates: in accordance with the provisions of the Central Excise and Land Customs Group-C Recruitment Rules, 1979 (hereafter the "1979 Rules" or "the Rules") framed by the President of India under proviso to Article 309 of Constitution of India. The *ratio* between the direct recruits and the promotions - from amongst various in-service cadres on the ministerial line- was fixed under the Rules at 75%:25% (or 3:1). The Rules however, did not provide guidance for determination of *inter se* seniority of direct recruit inspectors (DRIs) and promotee inspectors (PRIs). Seniority lists were prepared on the basis of executive instructions issued by the Government of India from time to time. It is an undisputed fact that *inter se* seniority was governed by an office memo³ dated 22.12.1959 (hereafter "1959 OM") stipulating general guidelines to determine the seniority of various category of employees in the Central Secretariat. The Central Excise Department too followed it. The 1959 OM stipulated that seniority was determinable by the order indicated at the time of initial appointment (and not date of confirmation). Permanent Officers of each grade were to be ranked seniors to those officiating to that grade. The *inter se* seniority of the direct recruits was to be determined by the order of merit in which they are selected for such appointment on the recommendations of the U.P.S.C. or such selecting authority. Paras 2-5 of the 1959 OM provided the principles for determining *inter se* seniority of direct recruits and promotees. In the light of experience, the 1959 OM

³ Office Memo No. 9/11/55 RSP dated: 22.12.1959

was changed, and another OM was issued, on 07.02.1986⁴ (hereafter “1986 OM”).

3. Five Revenue Inspectors, from the promotion cadre (hereafter called generically also- apart from PRIs as “promotees”), promoted in 1983-1984 filed an application⁵, challenging the *inter se* seniority list dated 08.07.1985 (hereafter “the 1985 list”) issued by the department on the ground that the length of their continuous service was not taken into consideration while fixing seniority. This application however did not implead the direct recruit employees; it was allowed on 05.07.1988 (hereafter “CAT 1988 order”). CAT directed the department to recast seniority in accordance with the 1986 OM after giving notice to the affected parties. A revised list was thereafter issued. DRIs, whose seniority was affected by the revised seniority list filed review applications⁶ in the disposed of applications. The CAT reiterated its main order, dated 05.07.1998 (hereafter “CAT review order”). The department then issued a final seniority list (as on 1.1.1992) on 30.4.1993 (hereafter “1993 final list”). Those promoted before 1986 also requested the department to fix their seniority in terms of the CAT’s 1998 order.

4. CAT’s 1998 order was in the context of the 1986 OM, which was in-applicable to pre-1986 PRIs. Thereafter, the matter was referred to the Central Board of Excise and Customs (“CBEC”), which apparently clarified that the procedure of fixation of seniority notified in 1986 OM was to be applied to pre-1986 promotees too. A seniority list was then prepared in respect of the officers appointed prior to 1986 on the lines of 1986 OM. At this point, the DRIs filed Review application in R.A. No. 103/1993 against the 1993 final list.

⁴ OM No. 35014/2/80- Estt. (D), dated: 7.2.1986

⁵ O.A.NO. 156/1986

⁶ R.A. No. 29/1994 etc.

5. The CAT, in an order doubted the basis of its previous decision and referred the batch of matters to a Full Bench- on the issue as to whether 1986 OM was prospective or retrospective. The Full Bench by its order clarified that the 1986 OM only operated prospectively from 1.3.1986. On the basis of the finding of the Full Bench, the tribunal heard the review applications along with O.A. Nos. 1323/ 1993, 285/ 1994 and OA 906/1994. It is noteworthy that the Central Government preferred a Special Leave Petition to this court, against the CAT's order in O.A.NO. 156/1986 which was dismissed as time-barred.

6. The tribunal considered the matter and the cases were disposed of by a common order dated 13.2.1997 recording the following conclusions:

- (i) The O.M dated: 07.02.1986 was prospective;
- (ii) Pre- 07.02.1986 *inter-se seniority* was to be regulated in accordance with 1959 OM;
- (iii) There was no break-down of the quota rule: The 1959 O.M. was to be followed.
- (iv) Cases of those who officiating as Inspectors prior to 01.03.1986 but regularised after that date had to be individually decided after determining the nature of officiation, nature of the post, (to which officiation related) and the provisions of OM of 1959 and could not be generalised.
- (v) Pre 01.03.1986 cases where the selection process -for direct recruitment- but where appointment was made after that date were covered by the OM dated: 7.2.1986.

7. Based on these findings, the 1993 final list was quashed; the department was directed to prepare another list, afresh. To comply with the order, a special cell headed by the Superintendent of Central Excise was formed. A new final seniority list (dated 15.10.1997-hereafter "1997 list") was issued based on recommendations of the special cell; it was declared as final on 1.1.1992. This 1997 final seniority list became the subject of scrutiny in RA 56/ 1998 in

O.A.No.1323/1993 filed by the PRIs. These review applications were dismissed by an order dated 27.8.1999. CAT was however of the opinion that the matter had to attain a quietus to the long pending issue; it suggested the setting up of a committee consisting of senior Commissioner as chairman to arrive at consensus duly associating the representatives of DRIs and promotees. Any difference of opinion, was to be recorded in the note and final decision was to be left to the Chief Commissioner, who is the cadre controlling authority.

8. In due compliance with the order, a committee was formed. The CAT, in the meanwhile, disposed of the pending proceedings on 30.3.2000⁷ taking note of the status report by the department, regarding preparation of the seniority list, based on the submission that the final decision of the Chief Commissioner was awaited.

9. The cadre controlling authority, considering the seniority list prepared by the committee circulated a tentative seniority list as on 01.01.2002 calling for objections. These objections were overruled and the final seniority list was published on 7.8.2002. This list was questioned by the promotees, who filed O.A. No. 938/ 2002 etc. The PRIs' plea was that the seniority list finalised was not in conformity with the directions issued by CAT in O.A.NO. 1323/ 1993 as well as the principles in the 1959 and 1986 OMs. The department as well as the unofficial respondents, that is, DRIs, resisted the proceedings. The department's position was that the procedure adopted was valid, in accord with the rules and that the vacancy position from time to time was taken into consideration. The DRIs contended that in fact PRIs occupied more than 25% quota and that the litigation was needlessly continued.

10. CAT, in its order dated 29.12.2000, considered the submissions and the record, and held that:

⁷ O.A.No. 429/1998, which challenged the final list of 1997

(i) *The direct recruit/promotion Register of Inspectors, maintained in the office and forwarded to the Hyderabad-I Commissionerate was an authentic document which discloses the actual vacancies that arose in each year during the period from 1984-1991 and the exact ratio of 3:1 of DR and PR quota respectively;*

(ii) *There were no excess promotions during the years 1983 to 1991; 25% of actual vacancies arising every year during that period were for the promotees. No direct recruit vacancy for any year was filled by promotees;*

(iii) *The indents placed with, the Staff Selection Commission for the recruitment of DRs were only for a part of vacancies (due to partial, ban etc.) and not for the exact 75% of the actual vacancies available in each year. There were no instances of suppression or under-reporting of vacancies available for direct recruits out of the permanent cadre strength in any year, to help the promotees. There was consequently no justification for invoking para 5 of the O.M. of 1986. The department wrongly inferred that there were excess promotions by wrongly estimating the promotee quota on the basis of the indents placed for direct recruitment;*

(iv)(a) *The date of appointment of direct recruits the date for counting seniority- it is not from the date of receipt of the dossiers from the recruiting authorities or the date of recommendation. Resultantly seniority of direct recruits appointed after 1.3.86 is to be revised only from the date of their respective appointments but not earlier to 1.3.1986 as is wrongly done in the impugned seniority list,*

(b) *Direct recruits of 1992 were to be given seniority only in that year but not in 1991 as was wrongly done in the impugned seniority list;*

(v) *The seniority of five applicants in O.A.NO. 156/86 originally fixed in terms of the order, had to be restored and could not be altered.*

(vi) *Those promoted ad hoc basis in any year in the vacancies available to them were eligible for seniority from the date of their*

continuous officiation, if -they were promoted within their eligible quota of that year under the Recruitment Rules;

(vii) Those promoted in 1983 against 17 posts diverted from Shillong, were entitled to seniority in terms of 1959 O.M;

(viii) Of 137 promotees regularised on 27.10.1988, seniority of those applicants regularised under the earlier order in 1985 is to be fixed prior to 1.3.1986, on the said earlier date of their regularisation in 1985;

(ix) Seniority of promotees functioning in temporary posts not forming part of the cadre, is to be fixed from the date of promotion/ appointment.

11. Accordingly, the CAT allowed the applications and set aside the seniority list prepared as on 01.01.2002. The department was directed to revise and refix the seniority list in the cadre of Inspectors in tune with the findings and the order dated 13.2.1997 in O.A.NO. 1322/1993. Another direction to ascertain number of vacancies, which arose each year for working out DRIs and PRIs in the *ratio* of 3:1 on the basis of the direct recruit/promotion Register maintained during the 1991-1994 as well as the remaining period subsequent to 1999- on the basis of the authentic records maintained in the office was issued.

12. Aggrieved by CAT's order dated 29.12.2003 the DRIs and the Central Government filed writ petitions before the High Court, which resulted in the impugned judgment. The High Court held that the vacancy register had no relevance for the purpose of promotion of in-service candidates and such promotions could be only in proportion to the respective quota, based on indents placed by the department with the Staff Selection Board for direct recruitment. It also held that length of continuous service followed by regularisation cannot be counted for the purpose of seniority since the quota rule had not been infringed. It also held that validity of 1986 OM was not challenged in the applications by the promotee inspectors. It therefore, upheld the impugned seniority list dated 22.07.2002.

Contentions of appellant-PRIs

13. It is urged on behalf of the PRIs by their senior counsel, Mr. R. Basant, that the High Court overlooked the fact that the Chairperson of the Committee which was constituted pursuant to the decision of the Full Bench (of CAT) submitted its first report to the Chief Commissioner by letter dated 28.3.2000⁸ suggesting that direct recruit/promotee register of Inspectors maintained from 1884 to 1996 should be taken as the basis to arrive at number of vacancies year-wise to determine the seniority since in terms of 1986 OM. The method of calculation of vacancies should be based on vacancy register. The extract of the report reads as under:

"I have looked into 'DR/Promotee register of Inspectors' Hyderabad which has been forwarded by the Commissionerate. It has been maintained systematically showing the exact ratio of 3:1 as provided in the O.M. dated 22.12.1959 and O.M. dated 7.2.1986. There is, therefore, little scope to doubt authenticity of this register though no signatures are appended. Moreover, it has been duly certified by the Joint Commissioner (F&V) of Hyderabad Commissionerate as having been maintained in the Establishment of Hyderabad Commissionerate now that this register is available, it would be better to go by it than on any assumption or principle to determine the number of vacancies on the basis of which the seniority list is to be drawn up."

14. It was submitted that the Chairperson of the Committee submitted its second report to the Chief Commissioner on 11.10.2000 clarifying that the Special Cell's formula of taking the actual number of DRIs appointed to arrive at the PRI quota was narrow. Instead, it suggested to take the indents placed to Staff Selection Commission (SSC) together with the appointments made on compassionate grounds, inter Commissionerate transfers, sports quota and surplus cell which were in the nature of direct recruitment as basis for arriving at

⁸ C.No.11/39/92/99-Estt., dated 28.3.2000

number of direct recruit vacancies and to arrive at PRI quota by arriving the ratio of 3:1.

15. It was urged by Mr. Basant, that the January 2002 seniority list, completely ignored the previous directions of CAT, which had attained finality, and proceeded to apply the 1986 OM *retrospectively*, in regard to pre-1986 PRIs, as well as ad-hoc PRIs, without considering that most such PRIs were in fact promoted within the quota available to them, under the rules. It was submitted that the department ignored two salient facts, first, that as many as 110 appointments were made, which were adjustable only against the direct recruit quota (such as sports quota, compassionate appointments and inter Commissionerate transfers). Secondly, the existence of a ban-though partial in nature, preventing direct recruitment, was a completely neutral fact, which could not have operated against the PRIs while determining the *inter se* seniority with DRIs.

16. It was urged by learned senior counsel that the method of calculation of promotee quota vacancies was flawed. The appellants urge that the quota is to be worked out, based on the total vacancies arising each year. This contention is supported by the 1979 Rules as well as 1986 OM. The department's stand that quota is to be worked out, not on the total reported vacancies as per the vacancy register as envisaged in the 1986 OM but on the indents placed with the SSC for DRIs is unjustified. This position is contrary to the express terms of the OM. Indents placed with the SSC is only *one*, (among others) mode of direct recruitment. It is not the only basis for determination of quota either, for quotas are fixed by the Recruitment rules. According to the appellants the restricted interpretation of the 1986 OM by the department would render it bad and violative of Articles 14 and 16 of the Constitution.

17. It is urged that the 1986 OM is an executive instruction and hence subordinate to statutory rules formulated under Article 309 of the Constitution.

Rule 7 of the 1979 Rules empowers the department to relax any of the rules with regard to any class or category of persons. In this case, the Ministry of Finance, Department of Expenditure imposed restrictions on filling up of direct recruit vacancies during the years 1984 to 1990 while exempting vacancies to be filled up purely by promotion in terms of the relevant recruitment rules from the purview of those restrictions. These amounted to relaxation of the Recruitment Rules in exercise of the powers conferred under Rule 7 of those Rules. The appellants also rely on the averments, in Paras 5(1)(c) & (d) of the department's counter affidavit⁹, admitting that filling of vacancies by promotion, was exempt from the instructions relating to ban on recruitment, to the following effect.

“.....Central Board of Excise & Customs has since clarified that there were restrictions on filling up direct recruit vacancies during the years 1984 to 1990 and the restrictions do not apply to vacancies which are to be filled up purely by way of promotion in terms of the relevant Recruitment Rules.”

18. The appellants then rely on the replies given by the department, to the replies to queries (dated 29-08-2007, 30-10-2007, 13-11-2007 and 28-11-2007) made under the Right to Information Act (“RTI”). The reply to the RTI query¹⁰

“the restrictions on filling up of direct recruit vacancies imposed by the Government do not apply to vacancies which are filled up purely by way of promotion in terms of recruitment rules provided the resultant vacancies in the lowest level of the cadre are not filled up during the period of the ban order”.

Likewise, the letter dated 13-11-2007¹¹ refers to two earlier letters, (F.7 (1)-E. Coord/84 dated 20.06.1984, F.7 (1)-E-Coord/86 dated 20.05.1986 and F.7 (1)-E-Coord.186 dated 15.07.1986), issued by the Govt. of India, department of

⁹ Dated 25th August 2008 in CA 3969-3982/2009 arising out of SLP (C) 4784/2007

¹⁰ Given on 28-11-2007 (F.No.A.60/31/RTI/2007-Ad.III.B) by Govt of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs

¹¹ F.No.A.60/3 1/RTI/2007.AD.III.B by the Govt of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs

revenue, alluding to the fact that “*there were restrictions on the filling up of Direct Recruit vacancies during the year 1984 -1990 in terms of instructions issued by Government of India.*” The appellants lastly rely on the reply dated 29.08.2007¹², which stated that

“..The 25% promotee quota vacancies of Inspectors were worked out on the basis of actual vacancies available in each year....The promotee Inspectors promoted well within 25% promotee quota.”

It is submitted therefore, that the department proceeded on a misconception that promotions made *even within the quota* available for the PRIs were to be treated as excess to the extent that indents were not (or could not be) made for direct recruitment to the cadre, through the SSC.

19. It was further argued by the appellants, that the department’s interpretation of the quota rule is untenable, in that for the purpose of reckoning seniority, the quota for PRIs was taken to be *one third of the total vacancies available and filled by direct recruitment*. This is contrary to the rules, which provide, independently a quota of 25% of the total vacancies. It was submitted that this interpretation, together with the fact that existence of a ban on direct recruitment was ignored, led the department to ignore the directions in the previous orders of the CAT, as well as the factual report of the commissioner, which clearly existed that the vacancy register maintained at the relevant time, did not show that there was any under-reporting of direct recruit vacancies.

Contentions of the respondent DRIs and the department

20. It was urged on behalf of the DRIs, who succeeded before the High Court, that the impugned judgment does not call for interference. It is pointed out that the question of *inter se* seniority has been gone into on multiple occasions, and

¹² F. No. I/Admn (22) Misc-42 /R.TIA/CPIO/M-I/2007/49

the department interpreted the previous rulings (which had attained finality) correctly while drawing up the seniority list.

21. It was urged that the previous seniority list (as on 01.1.1992) dated 15.10.1997 was not challenged by the PRIs; it was impugned by the DRIs. Therefore, PRIs cannot seek better seniority than what their position was in the list dated 15.10.1997 as on 1.1.1992. It was urged that the excess PRIs including the applicants were not given any seniority positions in the seniority list dated 15.10.1997 and the appellants as well as other excess PRIs did not challenge the said seniority list in which they were not granted seniority and were shown at the bottom of the list. Having not challenged the seniority list on 15.10. 1997. It was only challenged by the DRIs as they were aggrieved by their respective ranking positions in that list. The PRIs therefore, cannot question the positions assigned to them in the revised seniority list. It was argued that the CAT failed to notice this aspect, and held that it was not open for the PRIs again at a subsequent stage to contend that they ought to have been fixed in the seniority above 1991 and 1992 DRIs. They cannot be allowed to do so as the principle of estoppel would squarely operate against them.

22. It was urged that the impugned judgment correctly appreciated that the vacancy register at the most indicated the vacancy position in cadre and was not meant to confer the benefit of promotion on in-service candidates more especially when the promotions were to be made with reference to vacancies indented for DRIs. Therefore, CAT's observation that only in case of detection of under reporting/ suppression the bunching process had to be adopted and in other cases the vacancies position *vis-a-vis* the promotion was to be identified from the vacancy register, was untenable. It is also relevant that contrary to the premise underlying the contentions of PRIs, there is no conflict between Para 4 and 5 of the 1986 OM. This too was appreciated by the High Court. The pertinent issue, submit the DRIs, was whether PRIs can claim seniority over the DRIs when they occupied the posts beyond the prescribed ratio, subject to bunching process. Quite

possibly some PRIs were promoted on temporary basis and some were promoted on *ad-hoc* basis. Assuming that they were promoted on regular basis, without properly assessing the vacancies, that *ipso facto* could not confer any right to claim seniority from the date of their appointment, in as much as, the seniority can only be assigned when the vacancy crystallizes. It is always subject to the quota rule. That is what was followed in the 1959 OM, however, a slight change was brought in 1986 doing away with the slotting system and replacing the same with the bunching system. The bunching process has the effect of balancing the ratio as far as possible without much deviation and it acts as an effective catalyst and always equalizes the inequalities created by excess promotion or excess.

23. The respondents urge that *there cannot be excess direct recruitment in as much as only clear vacancies would be reported to the selection agencies* whereas promotions would also be given on *ad-hoc*, temporary basis. In the process of fixation of seniority, there could be variation in the dates of promotion either in the promotee cadre or *date of joining* in the DRI cadre, but that should not be allowed to uproot the entire seniority list and efforts must be made to set right the commissions or omissions as far as practicable. The High Court also correctly appreciated that para 5 of the 1986 OM did not cause prejudice to PRIs by the bunching process and any promotions beyond the bunching stage were treated as *ad hoc* promotions. The High Court correctly upheld the 1986 OM and observed that it contained principles for fixation of seniority when the intake is from two sources. In fact, in bunching system the PRIs would benefit in view of the fact that when the indented vacancies are not filled up in *toto* for non-availability of DRIs for various reasons, requisite promotions made to the extent of indented vacancies.

24. It is argued that the OMs are to be read as they are and nothing can be imported nor interpreted contrary to their intention. Quotas have been specifically fixed between DRIs and PRIs at 75% and 25%, the quota of PRIs is co-relatable

to the indent placed for direct recruitment with the SSB. Therefore, the quota has no relation to permanent strength or vacancy position.

25. It is contended that though a vacancy may arise, or exist, it may not necessarily be filled up immediately. Therefore, even if the direct recruit quota has not been filled up, PRIs should be given their share in terms of such vacancy positions. The dispute also arose with regard to "identification" of the vacancies that is, whether it is assessed on the basis of the indents placed by the departments or by the SSC or on the basis of the vacancy position as reflected in the vacancy register. It is pertinent to mention that DR/PR Register is not a vacancy register contrary to the observation that the same was said to be maintained by the department for the said purpose. Therefore, discrepancies in such register were highlighted to CAT in the DRIs' review petition. One discrepancy was that promotion were given to an individual against a death vacancy which arose nearly 16 months after such promotion- this too was held to be a promotion within the promotee quota and seniority was sought to be extended to such promotion from the date of promotion by the CAT's order. The CAT however, dismissed the review petition on the ground that the plea was nothing but an appeal in disguise and DRIs were free to appeal against the verdict.

26. It is argued therefore, that the maintenance of a Register at best, served to identify vacancies. Instead of that register, the Departmental Promotion Committee (DPC) reports (ordering the promotions with specific reference to nature of such vacancies against such promotions were given for the said period) would be more authentic in considering if promotions were made in the regular manner. However, CAT ignored the DRIs' pleas, in its order. It was submitted that the vacancy register is not relevant when promotions are made but their relevance is important at the time of fixation of seniority, as such promotions should conform to the quota prescription under the rules, as between PRIs and DRIs. The CAT, having observed that quota rule had not been broken down, should have held that promotions could have been given only in proportion to the

PRI quota on the basis of indents placed by the department with the SSB and promotions could not be correlated to the vacancy position. The bunching system was introduced so as not to cause injustice to the promotee officers. The Central Government's clarification clearly provided that notwithstanding the vacancies which were indented by the department Staff Selection Board were not filled up, yet, to the extent of the indent, promotions could be given by resorting to bunching system. Consequently, the interests of the PRIs were fully protected.

27. The contesting respondents rely on the judgments of this court, reported as *State Of West Bengal & Ors v Aghore Nath Dey & Ors*¹³; *Devindra Prasad Sharma v State of Mizoram*¹⁴; *Suraj Parkash Gupta v State of J& K*¹⁵ to argue that this court has previously ruled that wherever public servants are promoted in excess of their quota, such promotions would be deemed as irregular to the extent it violates the rules. The PRIs would be eligible only to the extent DRIs are appointed, and that the balance or excess PRIs would have to be bunched at the bottom of the seniority list.

28. The Central Government has supported the conclusions arrived at by the High Court. On its behalf, the Additional Solicitor General (ASG) Ms. Madhvi Divan, urged that the relative seniority of DRIs and PRIs has to be determined according to the rotation of vacancies between DRIs and PRIs which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules. It was urged that the record clearly bears out that while finalizing the seniority of Inspectors for the years 1983 to 2002 as on 01.01.2002, vide seniority list dated 22.7.2002, the promotee quota vacancies were arrived at year wise, in terms of the indents placed to the SSC for direct recruitment and other appointments made under direct recruit quota i.e., on

¹³ 1993 (3) SCC 371

¹⁴ 1997 (4) SCC 422

¹⁵ 2000 (3) SCR 807

compassionate grounds, sports quota, vacancies kept aside for inter-Commissionerate transfers and surplus cell.

29. The Central Government also argued that in tune with the OM of 1986 all the excess PRIs including the appellants were not given any seniority position in the seniority list dated 15.10.1997. The appellants did not challenge that seniority list where they were not given any seniority position and were only shown at the bottom of the list, they cannot challenge their seniority position in the impugned seniority list and cannot question their present seniority positions. The note in the seniority list dated 15.10.1997 with reference to the excess PRIs as regards to their seniority was self-explanatory, Therefore, the grievance of the appellants against the present seniority list was devoid of any merit. They are not entitled to any relief.

30. It is lastly urged that in accordance with the principle adopted that the indents placed to SSC together with actual appointment on compassionate grounds, sports quota and vacancies kept reserved for Inter Commissionerate transfers while placing such indents shall be taken as the vacancies meant for direct recruitment, it was found that 789 vacancies arose during the period 1991-2001 which indicated that the department could order 264 promotions -in that period. Thereafter all the officers who were to be given seniority after 1999 including the officers promoted against the vacancies that arose consequent to increase in the promotee quota from 25 % to 33 1/3 %, since at that point of time all the vacancies under promotee quota were filled up, have been bunched and given seniority in the year 2000.

Analysis and Reasoning

31. The rules in question, that is, 1979 Rules prescribes that recruitment to the post of Inspectors is from two sources: direct recruitment (to the extent of 75% of the cadre) and promotions (to the extent of 25% of the cadre). Promotions are made from seven feeder grade cadre posts: Upper Division Clerks (UDCs)/Steno Grade III; UDCs with a total of 13 years combined experience as UDCs and

Lower Division Clerks (LDCs); Stenographers Grade II; Stenographers Grade II or Grade III with combined experience of 12 years; Woman Searcher with 7 years' experience; Draftsman with seven years' service in the grade. The rules are silent about the principle on which *inter se* seniority of DRIs and PRIs is to be fixed.

32. The 1986 OM which is at the heart of the present controversy is reproduced below:

“OFFICE MEMORANDUM

Subject: General principles for determining the seniority of various categories of persons employed in Central Services.

*As the Ministry of Finance, etc. are aware, the General Principles for determination of seniority in the Central Services are contained in the annexure to Ministry of Home Affairs OM No. 9/11/55-RPS dated 22-12-1959. According to Para 6 of the said annexure, the relative seniority of direct recruits and promotees shall be determined according to rotation of vacancies between the direct recruits and the promotees, which will be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules. In the Explanatory Memorandum to these Principles, it has been stated that a roster is required to be maintained based on the reservation of vacancies for direct recruitment and promotion in the Recruitment Rules. Thus, where appointment to a grade is to be made 50% by direct recruitment and 50% by promotion from a lower grade, the *inter se* seniority of direct recruits and promotees is determined on 1:1 basis.*

2. While the abovementioned principle was working satisfactorily in cases where direct recruitment and promotion kept pace with each other and recruitment could also be made to the full extent of the quotas as prescribed, in cases where there was delay in direct recruitment or promotion, or where enough number of direct recruits or promotees did not become available, there was difficulty in determining seniority. In such cases, the practice followed at present is that the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees became available

through later examinations or selections, such persons occupied the vacant slots, thereby became senior to persons who were already working in the grade on regular basis. In some cases, where there was shortfall in direct recruitment in two or more consecutive years, this resulted in direct recruits of later years taking seniority over some of the promotees with fairly long years of regular service already to their credit. This matter had also come up for consideration in various court cases both before the High Courts and the Supreme Court and in several cases the relevant judgment had brought out the inappropriateness of direct recruits of later years becoming senior to promotees with long years of service.

3. This matter, which was also discussed in the National Council has been engaging the attention of the Government for quite some time and it has been decided that in future, while the principle of rotation of quotas will still be followed for determining the inter se seniority of direct recruits and promotees, the present practice of keeping vacant slots for being filled up by direct recruits of later years, thereby giving them unintended seniority over promotees who are already in position, would be dispensed with. Thus, if adequate number of direct recruits do not become available in any particular year, rotation of quotas for purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list, below the last position up to which it is possible to determine seniority on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter, in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed en bloc below the last promotee (or direct recruit as the case may be) in the seniority list based on the rotation of vacancies for that year. The same principle holds good in determining seniority in the event of

carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent years.

Illustration:

Where the Recruitment Rules provide 50% of the vacancies in a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are 10 vacancies in the grade arising in each of the years 1986 and 1987 and that 2 vacancies intended for direct recruitment remained unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

<i>1986</i>	<i>1987</i>
<i>1. P1</i>	<i>9. P1</i>
<i>2. D1</i>	<i>10.D1</i>
<i>3. P2</i>	<i>11.P2</i>
<i>4. D2</i>	<i>12.D2</i>
<i>5. P3</i>	<i>13.P3</i>
<i>6. D3</i>	<i>14.D3</i>
<i>7. P4</i>	<i>15.P4</i>
<i>8. P5</i>	<i>16.D4</i>
	<i>17.P5</i>
	<i>18.D5</i>
	<i>19.D6</i>

20.D7

4. *In order to help the appointing authorities in determining the number of vacancies to be filled during a year under each of the methods of recruitment prescribed, a vacancy register giving a running account of the vacancies arising and being filled from year to year may be maintained in the pro forma enclosed.*

5. *With a view to curbing any tendency of underreporting/suppressing the vacancies to be notified to the authorities concerned for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant Recruitment Rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad hoc promotees.*

6. *The General Principles of seniority issued on 22-12-1959 referred to above, may be deemed to have been modified to that extent.*

7. *These orders shall take effect from 1-3-1986. Seniority already determined in accordance with the existing principles on the date of issue of these orders will not be reopened. In respect of vacancies for which recruitment action has already been taken, on the date of issue of these orders either by way of direct recruitment or promotion, seniority will continue to be determined in accordance with the principle in force prior to the issue of this OM.*

8. *Ministry of Finance, etc. are requested to bring these instructions to the notice of all the attached/subordinate offices under them to whom the General Principles of seniority contained in the OM dated 22-12-1959 are applicable within 2 weeks as these orders will be effective from the next month.*

sd/- Joint Secretary to the Government of India''

33. The main issue before this Court is regarding application of Clause 4 and 5 of the OM of 1986 in the background of the 1979 Rules, which provide for 75% by direct recruitment and 25% by promotion. In terms of the rules, *ratio* for the two sources is three candidates from the direct recruitment channel and one candidate from the promotional channel has to be resorted to. As mentioned earlier there is no governing rule meant to guide the fixing of inter-se seniority between the DRIs and PRs. That was done in accordance with the executive Office Memorandums.

34. The 1986 OM introduced the principle of rotation of quota along with bunching rule. In its terms when in a particular year, if against the available vacancies, a given number of DRIs or PRIs are not available, after the last available candidate, from a particular channel, candidates from the other channel or quota would be bunched at the end of the list and such seniority *and will be treated as ad-hoc* entrants, for the purposes of seniority. The effect of drawing seniority lists in the manner required of by the OM is that in a particular year, whenever the number of candidates appointed from either source— under the rule can potentially be treated as *ad-hoc* to the extent that vacancies are not reported to the SSC in a given year.

35. The question in this case is whether the *ratio* of the PRIs has to be drawn with respect to the indented vacancies for the DRIs. The counsel for the DRIs has argued in favour and the same has also been done by the government while drawing the seniority list. The fall out of this mode of drawing the list is that if in a particular year there are less number of indented vacancies for DRIs or the vacancies are under reported the PRIs lose their right of seniority as given under 1979 Rules.

36. As is evident from the preceding factual discussion, the genesis of this dispute was the first round of litigation, initiated by the promotee Inspectors – who sought for proper fixation of their seniority. This culminated in CAT's 1988 order. Since direct recruits were not arrayed as parties, they preferred review

applications, which were disposed of in terms of the main 1988 order, dated 05.07.1988.

37. This order required the department to frame the seniority list having regard to the OM of 07.02.1986. The order of CAT attained finality when this Court refused to entertain a special leave petition, directed against it, on 12.03.1990.

38. The second limb of litigation was triggered by the publication of another seniority list of Inspectors (dated 30.04.1993) reflecting *inter-se* seniority between direct recruits and promotees as on 01.01.1992. This list was based on a retrospective application of the OM of 1986; it was challenged by direct recruit Inspectors in a number of applications, and review applications. These applications were heard, and on 12.07.1994, referred to a Full Bench of CAT. On 21.11.1996, the Full Bench rendered its opinion, *inter alia*, holding that the 1986 could not be applied retrospectively. The bench of CAT which then heard the applications pending before it on merits held by its order of 13.02.1997 that the OM of 1986 could be applied only prospectively, and that the 1959 OM had to be followed for the period before the 1986 OM. It also held that the quota rota rule had not broken down, and that the case of PRIs who were regularised after the OM of 1986 had to be individually examined and their seniority, determined. In the light of these observations, the seniority list dated 30.04.1993 was quashed.

39. Review petitions and certain pending applications were disposed of by CAT, on 28.07.1999, when it observed that the fresh seniority list – to be prepared, should be preceded by consultations between the direct recruits and PRIs, whose views should be considered and appropriate recommendations, made by Commissioner level officers. This order was sought to be reviewed, again: however, CAT disposed of those applications, by its clarificatory order dated 30.03.2000.

40. Acting on the basis of these orders, a report was prepared by a five-member committee (which held consultations among the employees, and seven sittings) and submitted on 28.03.2000. The Chief Commissioner asked the Chairperson

(of the Committee) to re-examine the issue. In its report of 11.10.2000, the Chairperson was of the view that to determine seniority and arrive at the correct figures of the relative quotas, it was necessary to take into account, and include appointees made against the sports quota, those appointed on compassionate grounds, as well as those adjusted from the surplus cells to arrive at the vacancies allocable to the share of direct recruits – in addition to vacancies reported to the Staff Selection Board. The Chief Commissioner required the Chairperson of the Committee to submit its final report, which it did, on 27.12.2000.

41. The record in the present discloses that the Central Board of Excise and Customs had issued three directions, with reference to filling up vacancies in the cadre of Inspectors. The first letter dated 9.3.1988¹⁶ directed the department to fill up only 12 vacancies as on 1.2.1988 out of 20 vacancies available for direct recruitment. The second letter dated 4.7.1988¹⁷ directed the respondents to fill up only 18 posts by direct recruitment out of 37 posts available as on 28.2.1989. The last, and third letter¹⁸ dated 29.3.1989 directed the department to fill up only 15 vacancies by direct recruitment against 27 anticipated vacancies up to 28.02.1989. A cumulative reading of these three letters would indicate that for the relative period, though 84 vacancies arose (were available) during the period (1988-89), only 45 were permitted to be filled up.

42. The other important aspect is that at the relevant time, only 10% of the direct recruit vacancies could be filled by compassionate appointment, in terms of the extant policies. However, during the same period 50 compassionate appointments were made. Similarly, 24 vacancies were filled by appointments under the sports quota. 39 vacancies were filled by inter Commissionerate transfers. Thus, in all 123 vacancies earmarked for DRIs were filled through these modes (i.e. compassionate appointment, sports quota and inter Commissionerate transfers).

¹⁶ F.No.12034/19/SCC 87 -Ad.111,B, dated 9.3.1988

¹⁷ F.No. A.12034/ SR/ 18/ SCC 88 Ad.III B dated 4.7.1988

¹⁸ F. No. A. 12034/SR / 181 SCC 88 Ad. III B.

43. From the above facts it is clear that for some of the years, there was a partial ban on filling up of vacancies by DRIs and in addition to those, appointments were also made through different modes but the same were not reported. The department position in adopting such practices is not of an unbiased employer; it is clearly erroneous. On one hand the department contends that the PRIs vacancies were to be in proportion to those reported vacancies of the DRIs- to the SSC and on the other hand, it did not report the correct number of vacancies recruited against the DRI quota, such as those appointed under the compassionate appointment quota and the sports quota. It is nobody's case, nor can it be, that such vacancies were filled from the PRIs quota. The appointments had to be adjusted against the DRI quotas.

44. The department's affidavit, dated 25.08.2008 states that the Board of Central Excise and Customs clarified that

"there were restrictions on filling up direct recruit vacancies during the years 1984 to 1990 and the restrictions do not apply to vacancies which are to be filled up purely by way of promotion in terms of the relevant Recruitment Rules."

45. The replies given by the department, to the replies to queries (dated 29-08-2007, 30-10-2007, 13-11-2007 and 28-11-2007) under the RTI query¹⁹

"the restrictions on filling up of direct recruit vacancies imposed by the Government do not apply to vacancies which are filled up purely by way of promotion in terms of recruitment rules provided the resultant vacancies in the lowest level of the cadre are not filled up during the period of the ban order"

46. In fact the letter dated 13-11-2007 refers to two earlier letters, (F.7 (1)-E-Coord./84 dated 20.06.1984, F.7 (1)-E-Coord/86 dated 20.05.1986 and F.7 (1)-E-Coord.186 dated 15.07.1986 which also support the existence of the ban on direct recruitment, and further state that there were restrictions upon the

¹⁹ Refer to supra, f.n. 10

appointments under the direct recruit quota, for the years 1984-1990; the letter dated 29-08-2007 in reply to an RTI query also admitted that the (promotions to) “25% *promotee quota vacancies of Inspectors were worked out on the basis of actual vacancies available in each year....The promotee Inspectors promoted well within 25% promotee quota.*” Thus, it was established that:

(a) The PRIs, initially appointed on a temporary or *ad-hoc* basis, were regularized in two lots: one by an order in 1985, and 137 PRIs were regularized by an order dated 27.10.1988.

(b) The direct recruits who sought seniority over the PRIs in this case, were appointed in 1992, against existing vacancies, which became available for filling, after the ban (imposed by the central government during 1984-1990) ended. The requisition to the SSC for filling these vacancies, were apparently made in 1991.

(c) Several vacancies (which fell to the share of the DRI quota) *were not reported, to SSC, but were nevertheless filled- against the compassionate appointment quota (to the extent of 50 vacancies and 39 appointments against the sports quota;*

(d) the ban against resorting to direct recruitment, did not apply to resorting to promotion, to the extent, promotional vacancies existed. This is evident from the affidavit of the Central Government, as well as other materials on record.

(e) The reply to a query, under the RTI, pointedly admitted that the promotions made in the PRI 25% quota were *well within* the permissible quota.

47. The contesting respondents and the Central Government justify the impugned judgment, contending that the PRIs had to be treated as *ad-hoc* promotees, in terms of the 1986 OM, because firstly, the *proportion* in which they were appointed against promotional vacancies were in excess of the proportion available to DRIs, given the number of requisitions made to SSC and, secondly, that there cannot be an assumption that the benefit of regularization to PRIs would include seniority over the DRIs who were appointed later, but were entitled to be treated as their seniors. These respondents have relied on the judgments of this

court in *Aghore Nath Dey & Ors; Devindra Prasad Sharma*; and *Suraj Parkash Gupta* (referred to *supra*).

48. The decision in *Aghore Nath Dey* was one where the claim was by persons granted *ad-hoc*, temporary appointments for a fixed period, which was extended from time to time till their regularisation on 26-2-1980, by relaxation of the condition of selection by the Public Service Commission, which was an express condition of their *ad hoc* appointment and a requirement for regular appointment under the 1979 Rules. The court held that assuming the relaxation was valid, they could be treated as regularly appointed only with effect from 26-02-1980 upon relaxation of conditions, and their resultant absorption in the cadre of Assistant Engineers, based on a rule framed at the same time under Article 309 providing for fixation of their seniority from that date. In such circumstances, this court, held that there was no foundation for the claim that they could be treated at par with the direct recruits, regularly appointed prior to 26-2-1980.

49. In *Devindra Prasad Sharma* the rules governed the situation, instructing that *inter se seniority* was to be fixed in accordance with the ratio applicable, under the rules, for the two channels, from the date of appointment. This court held that

“The statutory rule 25(iii), as indicated above, clearly postulates that the inter se seniority of the direct recruits and the promotees has to be determined in accordance with quota and rotation. Accordingly, seniority was rightly determined as per the respective dates of appointment. Therefore, the rotation has to be considered as per the date of appointment and in accordance with the vacancy under the rules. Otherwise, the rule of rota-quota unduly gets disturbed.”

50. *Suraj Prakash Gupta* was a case, where the government relaxed the conditions, and regularized the services of ad-hoc promotees who were given appointment, *against the vacancies that had to be filled by direct recruits*. This court held, in such circumstances that:

“..the Government was merely carried away by sympathy to the promotees. By not making direct recruitment after 1984, by restricting direct recruits to 10% rather than permitting 20% and by deliberately promoting the Junior Engineers to the other 10% quota of the direct recruits, the State Government had definitely acted in a biased manner. There is any amount of justification for the grievance of the direct recruits that the State had passed an omnibus order on 2.1.98 regularising all ad hoc promotees (Electrical Wing) without consulting the Commission, by way of deemed relaxation, in a wholly arbitrary manner, counting the entire ad hoc service of promotion. Their illegal occupation of direct recruitment quota was not even noticed. Their eligibility or suitability was not considered. It is probable that even those who had bad ACRs were regularly promoted. The requirement of following quota for each year was not respected. The regularisations order dated 2.1.98 was therefore bad and was therefore rightly quashed by the High Court. (This declaration is confined to Assistant Engineers and Assistant Executive Engineers (Electrical Wing) - as stated under Point No. 2 of the High Court Court's judgment). We confirm the view of the High Court on this point. The result is that the promotees have to go through the Service Commission for getting into the gazetted category of Assistant Engineers. The Assistant Engineers have to go through DPC for promotion as Assistant Executive Engineers.”

51. Clearly in two judgments (*Aghore Nath Dey* and *Suraj Prakash Gupta*) the promotions were made in disregard of the rules; even in excess of their quota, and against direct recruit quota. In *Aghore Nath Dey*, the promotee's claim was to seniority prior to their regularization – which was achieved through a special rule, inserted by way of amendment. The claim was that seniority should be given to the promotees, over the direct recruits, who had been appointed earlier. In *Suraj Prakash Gupta*, promotions were made in excess of the quota and as against posts that should have fallen due to direct recruits, in their quota. The *ratio* in these decisions is inapplicable, because there is nothing to indicate that the promotees (who were regularized in 1988) *exceeded their quota*. Furthermore, the department's pleading, specifically admits that the promotees were appointed against vacancies available to the PRI quota.

52. This court, in *K.V. Subba Rao & Ors. v. Government of Andhra Pradesh*²⁰ held that, promotion and seniority shall be reckoned from the date of appointment, not retrospectively from the date when the vacancy arose. *M. Nirmala v State of AP*²¹ is a judgment, where the government issued an order, banning recruitment. Stop gap, ad-hoc promotions were given, to many employees, in 1974; they were eligible to be considered for regular promotion only after two years, subject to passing a test. Many of them sought relaxation, which was granted; they were ultimately regularized in 1978 without the test. They sought shifting of the date of promotion, to an earlier date, which this court held, was inadmissible:

“In 1973, the ban on recruitment through Public Service Commission was partially lifted. By G.O. Ms. No. 725 dated December 28, 1973, the Government of Andhra Pradesh directed the Public Service Commission to conduct a special qualifying test for recruitment in. Group IV services with a view to regularising the temporary appointments made during the ban period. One of the conditions of eligibility for appearing at the said qualifying test was, as fixed by the Public Service Commission, two years of service as on 1.1.1973. As the petitioners were appointed after April, 1974, the question of their appearing at the said qualifying test did not arise. It appears that those who appeared at the said test were all absorbed in the regular service. On the representation of the temporary employees who were not absorbed, the Public Service Commission conducted another special qualifying test as directed by the Government by G.O. Ms. No. 787 dated November 9, 1976. The petitioners could not avail themselves of the said test as they had not put in two years of service as on 1.1.1976 as fixed by the Public Service Commission.”

53. This court, in *M. Subba Reddy v A.P. State Road Transport Corporation*²² considered a situation where departmental candidates were given ad-hoc promotions *against direct recruit vacancies* when a ban on direct recruitment was

²⁰ 1988 (2) SCR1118

²¹ 1986 (3) SCR 507

²² 2004 Supp (2) SCR7

in force. Upon later regularization (of such promotions) it was contended that the regularizations *related back* and that the promotees were to be accorded seniority over direct recruits, who entered the service. The court rejected this argument, holding as follows:

“mere inaction on the part of the Government cannot be made a ground to contend that the quota rule has broken down. In the present case, in the absence of direct recruitment, the appellants could not have got seniority over direct recruits. Where there is inaction on the part of the Government or employer or imposed ban on direct recruitment in filling up the posts meant for direct recruits, it cannot be held that the quota has broken down.”

54. *State of Uttaranchal & Ors. v Dinesh Kumar Sharma*²³ was a decision, where this court held that the seniority is to be reckoned not from the date when the vacancy arose, but from the date on which the appointment is made to the post. The judgment in *AFHQ/ISOs SOs (DP) Association & Ors. V. Union of India (UOI) & Ors*²⁴ distinguished *Subba Reddy* (supra) specifically in the context of periods when a ban in recruitment exists

“28. In M. Subba Reddy and Anr., etc. v. A. P. State Road Transport Corporation and Ors. AIR 2004 SC 3517, relied upon by Mr. L. N. Rao, learned senior Advocate appearing on behalf of AFHQ Civil Service (Direct Recruits-Gazetted) Officers' Association, this Court while dealing with inter se seniority between direct recruits and promotees to the posts of Assistant Traffic Manager (for short "ATM") and Assistant Mechanical Engineer (for short "AME") in A.P. State Road Transport Corporation, held that rota rule is inbuilt in the quota prescribed in Item 3, Annexure 'A' (Section B) to A.P. SRTC Employees (Recruitment) Regulations, 1966 and could not be deviated from. In that case, the appellant promotees were promoted to the posts of ATMs/AMEs temporarily under Regulation 30 as there were no direct recruits available. They were promoted subject to being reverted to substantive posts on approved candidates becoming available. Regulation 34(6) states that the revertees shall

²³ 2006 Supp (10) SCR 1

²⁴ 2008 (3) SCC 331

subsequently be considered for repromotion against the quota of vacancies reserved for promotees. Therefore, one has to read Regulation 3 of the A.P. SRTC Employees (Service) Regulations, 1964 with Regulations 30 and 34 of the Recruitment Regulations. It is only when such revertees are repromoted as per Regulation 34, they can be deemed to have been appointed to the posts of ATM or AME. Therefore, when the appellants were tentatively appointed to the post of ATMs/AMEs originally for want of direct recruits and to the posts reserved for direct recruits, it cannot be said that they were first appointed to that category within the meaning of Regulation 3 of the Service Regulations. Therefore, seniority had to be fixed between the direct recruits and the promotees strictly in accordance with the quota provided for in Item 3 of Annexure 'A' (Section B). The said Regulations prescribe a quota of 1:1, which leads to rota for confirmation. The contention of the appellants before this Court was that they had a right to be promoted within their quota during the years 1981 to 1987, when vacancies for promotees' quota became available. M. Subba Reddy, appellant in that case, was regularized from 27.12.1986 vide order dated 9.9.1988, when no direct recruits were available and, therefore, it was improper for the Corporation to place direct recruits above the promotees. The appellant submitted that in such a case the quota in Item 3(1) of Annexure 'A' to the Recruitment Rules would not apply; that the said item prescribed only quota and not rota for seniority and that the direct recruits could not claim appointment from the date of vacancy in their quota before their selection. They added that seniority was dealt with only by Regulation 3 of the Service Regulations, 1964 and not by Regulation 34 of the Recruitment Regulations, 1966. That in view of the 15.9.1995 amendment, Regulation 34 referred to only allocation of vacancy and not for determination of seniority. A total ban for direct recruitment was imposed by the State from the year 1977 to 1988 and, thus, the purported quota-and-rota rule contained in Item 3 of Annexure 'A' could not have been given effect to. The majority view of this Court was that where there is inaction on the part of the Government or employer or imposed ban on direct recruitment in filling up the posts meant for direct recruits, it cannot be held that the quota has broken down. We, with respect, do not support the view of the learned Judges that in the facts and circumstances of the case the quota has not broken down because of inaction on the part of the Government in imposing ban in filling up the posts meant for direct recruits. The appellants in the said case were promoted in a regular manner having been regularized in

service with retrospective effect. Their services were not regularized from the date of their initial ad hoc promotion but with effect from the date when the vacancies became available. Their services after regularization would not be by way of a stop-gap arrangement. The direct recruits who were appointed in the years 1990 and 1991, in terms of Item 3 of Annexure 'A' would be considered to have been appointed only after their successful completion of training. They were borne in the cadre in the years 1990-91 and, thus, prior thereto they cannot claim seniority. The learned third Judge, dissenting with the learned two Judges, has held that the direct recruit can claim seniority from the date of his regular appointment, he cannot claim seniority from a date when he was not borne in the service. Thus, the direct recruits of 1990 and 1991, by reason of the impugned seniority list, could not have been placed over and above the appellants-promotees because the purported quota and rota rule contained in Item 3 of Annexure 'A' could not have been given effect to because the State Government had imposed total ban for direct recruitment from the year 1977 to 1988. In such a situation, the said quota rule became inoperative. We agree with the dissenting view of the learned Judge that in the facts of the case, the quota rule became inoperative because the direct recruits were borne in the cadre when they were appointed against the vacancies meant for them.”

The judgment in *Pawan Pratap Singh v. Reevan Singh*²⁵ considered several previous precedents, on the issue, including the Constitution Bench decision in *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*²⁶. The correct position was summarized by Lodha, J. in the following manner:

“(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

²⁵ 2011 (2) SCR 831- a view followed later, in *State of U.P. v. Ashok Kumar Srivastava*, (2014) 14 SCC 720 and, more recently, endorsed in *K. Meghachandra Singh v. Ningam Siro* (2020) 5 SCC 689 that “seniority should not be reckoned retrospectively unless it is so expressly provided by the relevant Service Rules. The Supreme Court held that seniority cannot be given to an employee who is yet to be borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime”. Also *Dinesh Kumar Gupta & Ots v High Court of Judicature, Rajasthan* 2020 SCC OnLine (SC) 420

²⁶ (1990) 2 SCR 900

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.”

55. In a concurring opinion, Aftab Alam, J. reiterated the position and alluded to additional authorities on the subject and said:

“To the decisions referred to on this point in the main judgment I may add just one more in Suraj Parkash Gupta v. State of J and K (2000) 7 SCC 561]. The decision relates to a dispute of seniority between direct recruits and promotees but in that case the Court considered the question of antedating the date of recruitment on the ground that the vacancy against which the appointment was made had arisen long ago. In para 18 of the decision the Court framed one of the points arising for consideration in the case as follows:

“18. ... (4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter?”

This Court answered the question in the following terms: (Suraj Parkash Gupta case)

“Point 4

Direct recruits cannot claim appointment from the date of vacancy in quota before their selection

80. We have next to refer to one other contention raised by the Respondent direct recruits. They claimed that the direct recruitment appointment can be antedated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under the direct recruitment quota.”

These decisions were reiterated, and followed in a three-judge bench judgment in *P. Sudhakar Rao & Ors. v U. Govinda Rao & Ors*²⁷ which ruled that seniority cannot be given to any appointee from a date anterior to his or her appointment, in the cadre.

56. From the above discussion, it is clear that no appointee from any one channel (direct recruits or promotees) can lay claim to seniority from a date before her or his appointment. That being the position in law, it would be now necessary to consider the reasons which weighed with the High Court to hold that the promotees (in regular and substantive capacity from 1988) had to make way for direct recruits, who were appointed in 1991-92. Simply stated, the High Court was of the opinion that promotees had to be treated as occupying posts in excess of the quota allocated to them, on an application of the 1986 OM. Now, as a matter of fact the materials on record establish that there were promotee vacancies at a time when the ban on direct recruitment was in force (during 1984-1990). To

²⁷ (2013) 8 SCC 693

the query dated 11-06-2007, the Commissionerate concerned, at Hyderabad stated, in its reply dated 30-08-2007, as follows:

“In this Commissionerate whatever vacancies occurred in a year, the same were divided in the ratio 3:1 during the period 1986 to 1990 and the share of vacancy which comes for direct recruit were reported to SSC and the promotee quota vacancies were filled up by holding DPC.

The same letter also stated that:

“..the 25% promotee quota vacancies were washed (sic worked) out on the basis of actual vacancies available in each year.”

The reply further stated that all the promotions were made on regular basis. The rationale for the argument that promotions are to be treated in excess of the promotee quota, is that the requisite number of vacancies falling to the share of direct recruitment were not reported to the SSC. For this logic, Para 4 and Para 5 of the 1986 OM were relied upon.

57. As is apparent, Para 4 is procedural, and talks of a vacancy register, which would contain a *“running account of the vacancies arising and being filled from year to year”*. This was deemed necessary, because of the Para 3 of the same OM which entails the procedure of bunching rule.

58. Hence, it is essential to keep in mind that Para 5, (which has been the basis of the High Court judgment, to hold that the PRIs were in excess of their quota) was meant to cater to a contingency that is *of underreporting direct recruit vacancies to the public service commission* (in this case, the SSC) which resulted in an unfair advantage to promotees who would “steal a march” over such direct recruits, appointed later. It was in such contingencies, that is, of under-reporting vacancies, that the consequence of *deeming promotions to be ad-hoc* could be resorted to. If one keeps this perspective in mind, the correct direction of inquiry,

(which in this court's opinion was undertaken by CAT) was to see what were the number of regular vacancies relative to the quotas, with specific reference to the vacancy register. This approach, however, was discredited by the High Court, which held that the vacancy register

“at the most indicates the vacancy position in DRI/PRI cadre and it is not intended to confer the benefit of promotion on in-service candidates more especially when the promotions are to be effected with reference to the vacancies indented for D.R.l.s. Therefore, the observation of the tribunal that only in case of detection of under, reporting/suppression the bunching process had to be adopted and in other cases the vacancies position vis-a-vis the promotion has to be identified from the vacancy register is untenable.”

59. As discussed, the materials on record indicate that promotional vacancies did exist, at the relevant period. There was a ban on direct recruitment. The reasons for the ban are now obscure; but the fact remains that it was in force for six years (1984-90). During this period, undoubtedly, no requisitions were made to the SSC for filling direct recruit vacancies. However, the linear logic, applied by the High Court, to conclude that by virtue of Para 5 of the OM of 1986, the promotions made during the same period had to be treated as in excess of the quota, *because they were not in proportion to the requisitions for direct recruitment*. This view is plainly fallacious, because it equates executive policy - *of not filling vacancies, due to financial or other compulsions* with deliberate underreporting, meant to result in unfair advantage to the PRIs. In the present case, direct recruitment through the SSC was not resorted to because of a ban, and not due to under-reporting. Thus, the contingency visualized in Para 5 never arose. Not only were promotions made within the quota, and were regular (as they were preceded by proceedings of the Departmental Promotion Committee, and culminated in regularization, in 1988), there were in fact regular vacancies, within the promotee quota.

60. The existence of PRI vacancies is a matter of objective fact – as can be seen from the replies to the RTI queries (see f.n.10-12 supra). Those vacancies fell to the share of PRIs, *in terms of the 25% quota* earmarked for them, under statutory rules. In such circumstances, to say that those promoted, by resort to DPCs and regularized later, should be treated as *ad-hoc* promotees, would be contrary to express rules. In other words, by giving effect to Para 5 of the 1986 OM, (and treating the promotions as *ad-hoc* for purposes of *inter se* seniority), the statutory rules are virtually given a go bye. It is also contrary to the stated objective sought to be achieved by Para 3 of the 1986 OM, which is to “*present practice of keeping vacant slots for being filled up by direct recruits of later years, thereby giving them unintended seniority over promotees who are already in position, would be dispensed with.*” The promotions of the PRIs before this court therefore, have to be treated as regular. This court is of the opinion, that the reasoning of the High Court, in overlooking these aspects, is clearly in error.

61. The other aspect – which the High Court ignored, is that a number of vacancies were filled from amongst the quota for compassionate appointment, and the sports quota. They were not reported to the SSC. In such circumstances, to treat the promotees as exceeding the quota set apart for them (though as a matter of fact, they were accommodated within the quota) is not warranted. Furthermore, the materials on record also show that though there was a ban on direct recruitment, it did not apply to vacancies which were to be filled up by way of promotion in terms of the Recruitment Rules.

62. For the above reasons it is held, that the High Court fell into error in setting aside the order of the CAT, which is hereby restored. Therefore, it is held that:

- (i) No excess promotions took place during the period 1983 and 1991. 25% of the actual vacancies arising every year during that period were for the promotees. No direct recruit vacancy for any year was filled by promotees.

(ii) Indents/requisitions placed with, the SSC for the recruitment of DRIs were for a part of the vacancies and not for the exact 75% of the actual vacancies available in each year.

(iii) The record does not bear out instances of suppression or under-reporting of vacancies available for direct recruits out of the permanent cadre strength in any year, to help the promotees. As a result, there is no justification for invoking para 5 of the O.M. of 1986. The department erroneously proceeded as if there were excess promotions by wrongly estimating the promotee quota on the basis of the indents placed for direct recruitment;

(iv)(a) The date of appointment of direct recruits the date for counting seniority- it is not from the date of receipt of the dossiers from the recruiting authorities or the date of recommendation. Resultantly seniority of direct recruits appointed after 01.03.86 has to be revised only from the date of their respective appointments but not earlier to 01.03.1986 as was done in the impugned seniority list,

(b) Direct recruits of 1992 could be given seniority only in that year but not earlier, or in 1991 as was erroneously done in the impugned seniority list;

(v) The seniority of five applicants in O.A.NO. 156/86 originally fixed in terms of the order, had to be restored and could not be altered.

(vi) Those promoted *ad hoc* basis in any year in the vacancies available to them were eligible for seniority from the date of their continuous officiation, if -they were promoted within their eligible quota of that year under the Recruitment Rules;

(vii) Those promoted in 1983 against 17 posts diverted from Shillong, were entitled to seniority in terms of 1959 O.M;

(viii) Of 137 promotees regularised on 27.10.1988, seniority of those applicants regularised under the earlier order in 1985 has to be fixed prior to 1.3.1986, on the said earlier date of their regularisation in 1985;

(ix) Seniority of promotees functioning in temporary posts not forming part of the cadre, is to be fixed from the date of promotion/ appointment.

63. The impugned judgment and order is accordingly set aside; the appeals by the PRIs are allowed in the terms of the above findings. The consequential action, by way of drawing and publishing a final seniority list, in accordance with the present findings, shall be completed within three months. The writ petition is also disposed of in the above terms. There shall be no order on costs.

.....J
[UDAY UMESH LALIT]

.....J
[HEMANT GUPTA]

.....J
[S. RAVINDRA BHAT]

New Delhi,

March 15, 2022.