

17

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1405/2002 With

OA No.1259/2002

~~OA~~ No.1507/2002

New Delhi this the 22nd day of September, 2003.

HON'BLE MR. V.K.MAJOTRA, MEMBER (ADMNV)

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

OA No.1405/2002

1. Shri Shiv Bahadur Joshi
2. Shri Pramod Kumar Sharma
3. Shri Avinash Kumar
4. Shri Darsuothang
5. Shri Biplab Biswas
6. Shri N.T.Bhutia
7. Shri T.C.Kom,
8. Ms.Pushpa N.Lakra
9. Shri Rahul Sharma
10. Shri Arvind Anand
11. Shri Ajoy Kumar
12. Shri Bidhan Chandra Patra
13. Shri Jaydeb Lahiri
14. Shri Melton Correya
15. Shri Rakesh Kumar
16. Shri Suman Kumar Das
17. Md. Umar
18. Shri Anoop Kumar
19. Shri Malay Mallick
20. Shri Kumar Rajeev
21. Shri Anand Kumar Pathak

... Applicants

(By Advocate: Shri M.C.Dhingra)

Vs.

1. Election Commissioner of India,
Through its Secretary,
Nirvachan Sadan,
Ashok Road,
New Delhi.

2. Chief Election Commissioner of India,
Election Commission of India,
Nirvachan Sadan,
Ashok Road,
New Delhi.
3. Deputy Election Commissioner of India,
Election Commission of India,
Nirvachan Sadan,
Ashok Road,
New Delhi.
4. Ministry of Law & Justice,
(Legislative Deptt.),
through its Secretary,
Admn-I, Legislative Deptt.,
Shastri Bhawan,
New Delhi.
5. The Deptt. of Personnel & Training,
Through the Secretary,
North Block,
New Delhi.
6. Ho Ram
7. Ms. Meenakshi Das Gupta
8. Ashim Narayan Das
9. J. Kameshwar Rao
10. Shyamendu Dutta
11. Brij Mohan Sharma
12. Ms. Baljit Kaur
13. K.D.R. Sharma
14. Sarama Bannerjee
15. Ms. Gurmeet Kaur
16. A.K. Bhatnagar
17. T.K. Dutta
18. S.K. Mitra
19. R.R. Chaudhary (Retd.)
20. H.J.K. Ghai
21. Gokul Chand
22. Lekh Raj
23. I.C. Goel
24. Ms. Krishna Kumari
25. R.P. Mehendiya

26. M.M.Raghvan
27. Ms.Saroj Kalonia
28. Rajan Jain
29. Vasdev Arora

... Respondents.

(Respondents 6 to 29 was working as Assistants to be served through Secretary, Election Commission of India, Nirvachan Sadan, Ashok Road, New Delhi.)

(Shri S.Muridhar, Advocate for respondents No.1 to 3)

(Shri N.S.Mehta, Advocate for respondent No.4)

(Shri S.M.Arif, Advocate for respondents No.5 and 6)

OA No.1259/2002

1. Sh. Tapan Kumar Dutta
2. Lekh Raj
3. Sh. H.G.K.Ghai
4. Saroj Kalenia
5. Sh. Vasdev Arora
6. Sh. Sate Singh Negi
7. Ms. Tanuj
8. Shashi Bala Bhardwaj
9. Sh. R.P.Mehandiya
10. Ms. Gurmeet Kaur
11. Sh. Rajan Jain
12. Harjeet Kaur
13. Smt.Krishna Kumari
14. Sarawa Banerjee
15. Sh. Gokul Chand
16. M.M.Raghvan
17. S.K.Mitra
18. I.C.Goel
19. Sh. A.K.Bhatnagar

...Applicants

(All Applicants No.1 to 19 are C/o Election Commission of India, Nirvachan Sadan, Ashok Road, New Dehhi-110001.)

(By Advocate: Shri Naresh Kaushik)
Vs.

1. Election Commissioner of India,
Through its Secretary,
Nirvachan Sadan,
Ashok Road,
New Delhi-110001.
2. Chief Election Commissioner of India,
Election Commission of India,
Nirvachan Sadan,
Ashok Road,
New Delhi-110001.
3. Deputy Election Commissioner of India,
Election Commission of India,
Nirvachan Sadan,
Ashok Road,
New Delhi-110001.
4. Ministry of Law & Justice,
(Legislative Deptt.),
through its Secretary,
Admn-I, Legislative Deptt.,
Shastri Bhawan,
New Delhi.
5. The Deptt. of Personnel & Training,
Through the Secretary,
North Block,
New Delhi.

(Shri S.Muraidhar, Advocate for respondents No.1 to 3)

(Shri N.S.Mehta, Advocate for respondent No.4)

(Shri S.M.Arif, Advocate for respondents No.5 and 6)

... Respondents.

OA No.1507/2002

1. Sh. Tapan Kumar Dutta
2. Lekh Raj
3. Sh. H.G.K.Ghai
4. Saroj Kalenia
5. Sh. Vasdev Arora
6. Sh. Sate Singh Negi
7. Ms. Tanuj
8. Shashi Bala Bhardwaj
9. Sh. R.P.Mehandiya
10. Ms. Gurmeet Kaur
11. Sh. Rajan Jain

12. Harjeet Kaur
13. Smt. Krishna Kumari
14. Sarawa Banerjee
15. Sh. Gokul Chand
16. M.M. Raghvan
17. S.K. Mitra
18. I.C. Goel
19. Sh. A.K. Bhatnagar

...Applicants.

(By Advocate: Shri Naresh Kaushik)

(All Applicants No. 1 to 19 are C/o Election Commission of India, Nirvachan Sadan, Ashok Road, New Delhi-110001.)

Vs.

1. Election Commissioner of India,
Through its Secretary,
Nirvachan Sadan,
Ashok Road,
New Delhi-110001.
2. Chief Election Commissioner of India,
Election Commission of India,
Nirvachan Sadan,
Ashok Road,
New Delhi-110001.
3. Deputy Election Commissioner of India,
Election Commission of India,
Nirvachan Sadan,
Ashok Road,
New Delhi-110001.
4. Ministry of Law & Justice,
(Legislative Deptt.),
through its Secretary,
Admn-I, Legislative Deptt.,
Shastri Bhawan,
New Delhi.
5. The Deptt. of Personnel & Training,
Through the Secretary,
North Block,
New Delhi.
6. Regional Director (NR),
Staff Section Commission,
Block No. 12, C G O Complex,
Lodhi Road, New Delhi.

...Respondents

(Shri S. Murdhar, Advocate for respondents No. 1 to 3)

(Shri N.S. Mehta, Advocate for respondent No. 4)

(6)

(Shri S.M.Arif, Advocate for respondents No.5 and 6)

O R D E R

By Mr. Shanker Raju, Member (J):

As the issues involved relate to identical facts and law and are inter-related, these OAs are being disposed of by this common order.

2. The issue relates to inter-se-seniority of direct recruits and promotees Assistants in Election Commission of India (ECI, for short). As per the Election Commission (Group 'A' and Group 'B' Posts) Recruitment Rules, 1988, recruitment to the posts of Assistant is 50% by promotion, failing which by transfer on deputation and 50% by direct recruitment through Assistant Grade Examination (AGE, for short), conducted by the Staff Selection Commission (SSC). The essential qualification for the post is Upper Division Clerk with five years' regular service. The vacancies are to be worked out on yearly basis. The general instructions and criteria for fixing seniority of direct recruits was laid down by the DOPT in OM dated 30.7.1986. Earlier to 1990 for making direct recruitment the Commission had been requisitioning/reporting vacancies to SSC and on its recommendations appointing candidates against 50% of the vacancies meant for direct recruitment. However, the aforesaid practice has been stopped by the Commission from 1991 onwards and no vacancy of direct recruitment was reported to SSC and in case of recommendation by the SSC no appointments have been given till 1995. Seven applicants who appeared in the AGE 1995 on recommendations by the Commission as direct recruit Assistants in AGE, in 1996 seven applicants and in 1997 AGE seven more applicants were recommended by the SSC. A seniority list was circulated in

1994 of the Assistant by the Commission. The seniority in the quota of 50:50 and promotees was shown as per the OM of the DOPT.

3. As the Commission did not report vacancies to SSC it had faced shortage of Assistants. The incumbents in the feeder cadres, i.e., UDC who had no eligibility in so far as requisite year of regular service were promoted on ad hoc basis from 1990 onwards and they are respondents No.6-29. Besides making ad hoc promotions vacancies earmarked for direct recruit could not be filled, as such the ad hoc promotions were made by the Commission without disturbing these vacancies. By an order dated 13.5.1995, one Gautam and Horam, respondent No.6 who were promoted on ad hoc basis in 1990 and 1992 respectively were given regular promotion. Accordingly, by an order dated 26.5.1995, respondents No.7-26 who had been given ad hoc promotion during the years 1990-1993 were regularly promoted w.e.f. 19.9.1995 and again by an order dated 2.1.1996 respondents 20-29 were also regularly promoted. This has been done by giving relaxation to the eligibility criteria of five years' regular service in the feeder cadre as per the recruitment rules.

4. Seven applicants of AGE 1995 were given appointment in 1997. On representation by the direct recruits as to illegality committed in the grant of relaxation to the promotees, on review by the respondents that these private respondents did not qualify the eligibility criteria of five years' regular service in the feeder cadre a review DPC de-regularised them and on

completion of respective five years of regular service accorded promotion on regular basis by the impugned order dated 10.12.2001.

5. A draft seniority list was issued on 10.12.2001 showing the promotees senior to applicants. This has been represented against by the direct recruits.

6. Vide memorandum dated 1.5.2002 their request was turned down.

7. By an order dated 1.5.2002 a final seniority list was issued wherein respondents No.6-29 were shown at higher places than applicants. Being aggrieved, applicants have filed this OA.

8. In OA-1401/2002 quashment of promotion of respondents No.6-29 vide order dated 10.12.2001 as well as seniority list dated 1.5.2002 has been sought, with a direction to ECI to frame seniority list of direct recruits and promotees Assistants as per the Rules.

9. Shri M.C. Dhingra, learned counsel for applicant contends that seniority assigned to promotees is in violation of OM of 1986 and is violative of Articles 14 and 16 of the Constitution of India. According to him, the Commission could not make promotion in excess of the posts ear-marked for promotees in any particular year. The promotions given on 1.5.2002 are illegal violative of recruitment rules as have been made in excess of the quota.

10. According to Sh. Dhingra, the Commission committed serious error in promoting respondents No.6-29 from the date of their completion of five years' regular service irrespective of the number of vacancies available as per quota. The seniority of promotees could be reckoned from the date of appointment or availability of vacancies whichever is later. As the vacancies were not available the promotees could not be treated as appointed in subsequent vacancies and their promotion has certainly stolen a march over applicants. By referring to the decision of the Constitutional Bench of the Apex Court in **The direct recruits Class-II Engineering Officers' Association v. State of Maharashtra, 1990 (2) SCC 715** it is contended that for reckoning seniority appointment should be made in accordance with rules whether in case of a promotion or direct recruit. As the promotions have been made beyond the quota of 50% it is violative of the rules and in excess of the vacancies seniority cannot be assigned to them. According to applicants though no requisition has been sent to SSC to fill up 50% quota for direct recruits, promotees given promotion till 1995, 20 vacancies got accumulated promotees had been given ad hoc promotion whereas these regular promotions given to the promotees in 1995 is without any reference to the quota or post. Vacancies meant for them cannot be filled encroaching upon direct recruit quota. However, on realisation promotees have been rightly de-regularised. However, promotees have been placed in subsequent list enbloc-senior against quota and 20 vacancies in direct recruit quota have been converted by the Commission into promotee quota. In so far as relaxation in recruitment rules is concerned, this has to be done in consultation with UPSC and is to be by the

Central Government. As there is nothing indicative of aforesaid procedure being carried out the relaxation given to the promotees is de hors the rules.

10. By referring to DOPT OM dated 3.7.1986 it is stated that the relative seniority of direct recruits and promotees shall be determined according to the rotation of the vacancies between them and shall be based on the basis of the quota reserved for them in the recruitment rules. As rota quota has not been broken, seniority is to be strictly assigned as per the OM placing enbloc the promotees who are the direct recruits, cannot be countenanced. To substantiate the aforesaid plea learned counsel for applicant has relied upon the decisions of the Apex Court in *Suraj Parkash Gupta v. State of J&K*, 2000 (7) SCC 561 and *B.B. Badani v. State of Mysore*, 1976 (2) SCC 901.

11. In so far as direct recruitment is concerned, it is stated that though the Commission recommended, the ECI refused. In case of non-availability of direct recruits, reasons are to be recorded. As no requisition has been sent to SSC and for the first time it was done only in 1995 appointment in excess of quota of promotees does not bestow seniority.

12. Shri Dhingra contends that as applicants have cleared AGE right from 1995 the delay in their appointment cannot be attributed to them and accordingly their appointment is to be antedated with correct

assignment of seniority. As the UPSC had not granted exemption as per the vacancy position the claim of applicants is to be allowed.

13. Learned counsel appearing for the Election Commission Sh. Murlidhar in his reply contends that till 1991 rota quota in the grade of Assistant was operated strictly in accordance with the recruitment rules. In May, 1993 an issue had arisen whether to fill up the posts of Assistant in ECI by candidates sponsored by SSC. The plea was rejected by the Commission on the ground that the experience with SSC was disappointing and the entire proceedings involved inordinate delay. However, between 1993-1996 ECI did not fill vacancies meant for direct recruits but these vacancies were filled by promotion from the feeder grade of UDC from time to time on ad hoc basis. According to the learned counsel between 1991-1995 20 vacancies meant for direct recruit quota accumulated. However, in May, 1995 it has been decided by the ECI to fill these vacancies through the feeder cadre by promoting the incumbents instead of following the direct recruitment. As it was found that the candidates in the feeder cadre have not completed the requisite qualifying service of five years, Commission's approval was obtained to relax the required qualifying service. However, approval of the Government of India was not taken. A DPC held on 19.5.1995 drew year-wise panels from 1991-1995 and recommended all 20 persons from the feeder cadre of UDC in the grade of Assistant against vacancies meant for direct recruitment. This was one time relaxation but no such order was passed by the Commission. This has been done in public interest. Accordingly, 20 UDCs were appointed as Assistants on

(12)

regular basis w.e.f. 19.5.1995. This has necessitated circulation of draft seniority list where objections have been invited. Applicants who were aggrieved made representation but the same were rejected.

14. By a full Commission meeting held on 20.8.1996 matter was reviewed and as the quota for promotion had already been acceded to a balancing act was proposed. This has, as a follow up action, initiated the proceedings of filling up the vacant posts of Assistant by direct recruitment through SSC. The first appointment on the basis of nomination by SSC of AGE 1995 was appointed in 1997 upto to AGE 1997. In all 22 persons had been appointed.

15. On representation, it was decided to validate the transfer of quota from direct recruit to promotee and took a decision to break all ties with SSC and accordingly vacancies which are to be filled up to be necessarily from amongst promotees. However, after 1996 quotas have been filled through direct recruitment whose vacancies were carried forward for the years 1990-1995. On shifting of vacancies to promotion quota vacancies have been released to be filled up from promotion quota w.e.f. 15.9.1995. Balance has been drawn from 1995 till 1999 in respect of promotion quota but from 1996 direct recruits who were appointed through SSC and their inter-se-seniority position has been fixed as per rota quota rule. Ad hoc appointments have been de-regularised and it has been decided to regularise the promotees from the date they fulfil the eligibility criteria in the recruitment rules and the seniority is to be reckoned from that date.

29

Accordingly, the entire matter was reviewed. Keeping in view the vacancy position with reference to reservation the review DPC which met on 10.12.2002 in accordance with instructions office order dated 10.12.2001 was issued in supersession of Commission's order issued in 1995, 1996 and 1998. The seniority was finally settled in accordance with general principles of seniority laid down in DOPT OM dated 4.11.1992. The seniority of promotees has been determined on the principle enumerated in para 2.4.2 of the OM of 1992. Although the Commission requested to nominate candidates on the basis of the result of AGE, SSC nominated the candidates on the basis of 1995 AGE. The nomination for subsequent years were made against vacancies of 1997 and the candidates were nominated from 1996 AGE etc. A draft seniority list was issued on 10.12.2001. The promotees took certain objections and demanded seniority from their initial appointment on ad hoc basis. As there is no provision to give show cause notice to the persons affected by the review DPC, this has been rejected. The review DPC in such a case is to be held if there have been grave errors in the procedure followed by the DPC. As the DPC on 19.5.1995, 2.9.1996 and 2.11.1998 committed unintentional errors resulting in appointment of ineligible persons. The final decision taken by the ECI provides that appointment made in the grade of Assistant in 1995 should not be touched as by that time there had been a severance from SSC and vacancies are to be filled up by appointment from feeder cadre. Accordingly, Assistants appointed prior to 1997 should be rendered enbloc senior to direct recruits, as appointments were made as per the Rules and approved by the ECI. However, 20 ad hoc Assistants who

were regularised on 19.5.1995 in violation of rota quota system as per Recruitment Rules and accordingly revised the orders for regularisation.

16. In so far as recruitment rules are concerned, as Commission had discontinued from recruiting persons from SSC, however, SSC inducted candidates on the basis of 1995 examination and as vacancies became available only in 1996 direct recruit recruited on the basis of 1995 AGE cannot be included in the select list of 1995. Nominations for subsequent years were made in the same year, as such there was no carried forward of unfilled vacancies earmarked for direct recruitment year 1992-1997. As 20 vacancies earmarked for direct recruitment have been diverted to the promotion quota aforesaid was not possible. As quota of direct recruitment was not operated according to the recruitment rules relative seniority was assigned as per rules.

17. Respondent No.4, i.e., Ministry of Law and Justice represented through Sh. N.S. Mehta in his reply contends that the legislative department is the administrative department in respect of ECI. In the year 1992 ECI requested the respondents to obtain the approval of Government to fill up certain posts in ECI without consultation with UPSC and DOPT, as the exemption was not accorded. According to Sh. Mehta the relaxation in the rules cannot be made by the ECI itself and as DOPT and UPSC did not agree to the proposal of ECI for exempting the posts from their purview as such ECI had no power of relaxation.

18. Shri Naresh Kaushik, learned counsel representing the promotees has relied upon the decisions of the Apex Court in the Direct Recruit Class-II Engineering Officers' Association (supra) and Rudra Kumar Sain v. Union of India, JT 2000 (9) SC 299.

19. According to Sh. Kaushik applicants have no locus standi to challenge the promotion of private respondents, as they were not even borne in the Department on the dates respondents were appointed. It is further stated that the OA is barred by limitation as appointment of non-applicants was made in 1995 and 1996 respectively the present OA filed in 2002 is beyond the stipulated period of limitation envisaged under Section 21 of the Administrative Tribunals Act, 1985. According to the respondents the impugned order dated 10.12.2001 even if it is quashed is based on Commission's order dated 26.5.1995, 2.1.1996, 21.11.1998 and 21.12.1998. As these orders are not assailed herein in absence of any challenge to the appointments of answering respondents on promotion OA is liable to be dismissed. According to the respondents their appointments were validly made on promotion after relaxing the rules in a decision taken by the Commission in its meeting on 19.5.1995. This conscious decision of departing from making appointment through SSC was in accordance with rules. According to him, as appointment was in accordance with rules the seniority flows is to be reckoned from the date of initial appointment in the light of the decision of the Apex Court in Direct Recruits' case (supra).

20. Sh. Kaushik by referring to para 2.4.2 clause of OM dated 3.7.1988 it is stated that in case of carry foreword of quota of direct recruit inter-se-seniority between the direct recruit and promotee would be fixed by placing enbloc below the last promotee the direct recruit vacancies carried forward.

21. According to Sh. Kaushik, quota rules breaks when appointments are not made as per rules and this admission of breach of quota is apparent from the fact that one of the mode of recruitment, i.e., SSC has been by-passed. According to him seniority is to be determined on the basis of continuous length of service and the relaxation given is in public interest, there should be a presumption of deemed relaxation in case appointment is made in accordance with rules.

22. OA-1259/2002 has been filed by the promotee Assistants impugning the memo dated 10.12.2001, 1.5.2002 as well as the seniority assigned to them. The main contention put-forth by applicants is that the impugned order relegating their seniority on regularisation which has vested them with a right is bad in law for want of an opportunity in consonance with the principles of natural justice and fair play. By referring to 30th meeting of the ECO held on 20.8.1996 it is stated that one time relaxation has been accorded and there was no mistake on their part or any attribution in their regularisation. The relaxation was a conscious decision on the part of the Commission and as there is no break in service the seniority as per the decision in Suraj Parkash Gupta's case (supra) is either from officiation or from eligibility. According to Sh.

33
D

(17)

Naresh Kaushik, orders have been issued by the incompetent authority as the regularisation of promotees was made by the Election Commissioner whereas the impugned orders have been passed by an authority subordinate. As the settled regularisation has been unsettled after a lapse of considerable period the orders are contrary to the doctrine of legitimate expectation.

23. The official respondents in their reply contended that as the relaxation was not approved by the competent authority, i.e., the Central Government the review DPC on reconsideration de-regularised the applicant and accorded them regularisation from the date of their acquirement of eligibility, i.e., five years regular service. The inter-se-seniority has been maintained in accordance with rules. The order dated 10.12.2001 has been issued on the basis of recommendations of the review DPC. It is stated that the relative seniority has been assigned keeping in view the extraordinary circumstances and least disturbance.

24. In OA-1507/2002 promotees have assailed seniority list dated 10.5.2002 and seeks seniority from the date of initial appointment. According to Sh. Naresh Kaushik objections against seniority had been illegally rejected as the quota rota rule has already been broken seniority assigned is contrary to OM dated 4.11.1992.

25. The learned counsel for direct recruits Sh. M.C. Dhingra opposes the OA and stated that due to non-requisitioning from the SSC quota rota rule cannot be said to be protected. It is only when the recruiting

34

agency fails to sent or recommend candidates after selection to the employer and not otherwise. According to him, three candidates were recommended by SSC on 11.1.1993 and further two candidates on 8.3.1993 but none of them have been selected by the SSC and were appointed. On the contrary Commission returned back the dossier of 11 candidates on 21.7.1993. The eligibility and qualification as per the recruitment rules of the Assistant recommended have not been disputed. Although the candidates were available for direct recruitment yet ECI had not appointed them and in the subsequent years also till 1995 no request was sent to the SSC. Relying upon the decision of the Apex Court in Suraj Parkash Gupta's case (supra) it is stated that there is no break down of quota rota rules. As the recruitment rules provide vacancies to be filled up in the ratio of 50:50 from direct recruits and promotees, resort of the Commission to fill up the vacancies meant for direct recruitment by making promotion is not legally permissible.

26. As the Commission has violated the recruitment rules for filling the vacancies meant for direct recruitment and their non-requisitioning of candidates from SSC the recruitment rules were violated. The relaxation provision has not been validly complied with, i.e., consultation with UPSC. Instead incompetent authorities have given post facto rectification for the wrong committed by the Commission.

27. As the promotees did not meet the parameters framed in the recruitment rules they have no right to appointment. Relaxation of essential qualification is beyond the law. Assuming relaxation is available it is for

relaxing the qualification and not for varying the quota of 50:50 meant for direct recruits and promotees. As such the act of relaxation, the qualification and varying the quota is not legally sustainable. By placing reliance on **Direct Recruits'** case (supra) it is stated that appointees in violation of quota rules cannot be accorded seniority from the date of officiation.

28. It is stated by Sh. Dhingra that seniority list is violative of DOPT OM of 1992 but also of 1986. Placement of applicants enbloc above the private respondents is de hors the rules.

29. In the counter-reply filed by the official respondents they have re-iterated their pleas taken in the other two OAs and in so far as seniority assigned is concerned, it is stated that as per OM dated 10.4.1989 of the DOPT in case of reasons beyond the control of DPC if yearwise vacancies have not been considered by DPC the actual number of regular vacancies in yester years are to be prepared and those who are within the eligibility field are to be considered yearwise and a select list is to be prepared. The direct recruits nominated by SSC from examination of 1995, 1996 and 1997 have been treated as if they were taken for the vacancies of 1996, 1997 and 1998 respectively. Accordingly, as per the rota quota system the seniority has been rightly assigned which does not suffer from any legal infirmity.

30. In the reply filed by respondents No.5 and 6, i.e., SSC, it is contended that at no point of time their advice has been sought by the ECI, as such they are proforma parties.

31. We have carefully considered the rival contentions of the parties and perused the material on record. 32. In the conspectus of the above factual matrix the relevant issues for our consideration are:

- i) whether in the circumstances quota rule has been broken;
- ii) whether the promotions given to the promotees were in accordance with law;
- iii) whether direct recruits are entitled to reckon their seniority from the date of Assistant Grade Examination;
- iv) whether inter-se-seniority assigned to direct recruits as well as promotees is in accordance with law;

33. Before dealing with the above issues the undisputed admitted facts are as under.

34. Recruitment rules for the Assistants provide recruitment for the post of Assistant 50% by promotion, failing which by transfer on deputation and 50% by direct recruitment. Earlier through AGE conducted by UPSC but now by SSC for promotion the feeder cadre is UDC with five years' regular service in the grade. Para-5 of the Rules provide power to relax with the following stipulation "Where the Central Government is of the opinion that it is necessary or expedient to do so, it may, by order, or reasons to be recorded in writing, relax any of the

provisions of these rules with respect to any class or category of persons, provided that when the recruitment is made by UPSC consultation is mandatory.

35. Legislative Department in their reply have clearly stated that on grant of administrative autonomy to Election Commission and to exempt the posts from the purview of UPSC/SSC the proposal has not been acceded to which has been informed to them on 20.1.1993. In so far as relaxation is concerned, any relaxation made by the Election Commission cannot be made by the Election Commission itself, as such no power of relaxation lies with the Election Commission and the approval of the Government and UPSC is to be taken. The UPSC has not been exempted from the purview of the DOPT as well.

36. Till 1991 rota quota in the grade of Assistant was being operated in accordance with the recruitment rules. The proposal of SSC for nomination was rejected by the Commission for recruitment of direct recruits. However, no direct recruitment had taken place from 1993-1996.

37. Due to non-availability of the quota for direct recruits 20 long term vacancies meant for direct recruit quota occurred from 1991 to 1995. The Commission passed an order in May, 1995 in extraordinary circumstances as one time measure to hold a DPC by diverting the quota of direct recruits towards promotion. Accordingly, these vacancies were released and filled up by the feeder cadre

of UDC on 15.5.1995 drawing panel from 1991 onwards. The relaxation provided under the rules was accorded and it is admitted that no approval of the Government was sought.

38. On a Full Commission meeting held on 20.8.1996 vacancies meant for direct recruits have been started to be filled up on nominated candidates from the SSC on the basis of AGE 1995 onwards. Accordingly, the direct recruit Assistants were appointed from 1997 till 1999. By orders dated 26.5.1995, 1.1.1996, 2.1.1996, 21.11.1998 and 21.12.1998 promotees were regularised. However, the same was reviewed by a DPC and by an order dated 10.12.2001 these orders have been superseded and the seniority and regularisation of promotees have been done from the date of their eligibility as per the recruitment rules and simultaneously inter-se-seniority list was issued of promotees and direct recruits determined as per para 2.4.2 of DOPT OM dated 4.11.1992.

39. The aforesaid review of the regularisation to the promotees and accord of seniority has been objected to and simultaneously enbloc seniority accorded to the promotees over and above direct recruits was also challenged in representations filed by them. These representations have been considered and regarding opportunity to show cause before review of the appointments of promotees were held to be valid as the earlier DPC had acted against the rules. As earlier DPCs had committed unintentional mistakes promoting ineligible persons with procedural irregularities the same have been rectified. In so far as seniority is concerned, it is decided that while regularising 20 ad hoc Assistants rota quota system has not

39
been followed and accordingly revised orders for regularisation of Assistants have been issued. As regards rotation of vacancies filled before 1.1.1997 the Commission has appointed direct recruit Assistants through SSC during that period.

40. In so far as direct recruits are concerned, seniority has been prepared on year-wise select list as direct recruitment through SSC was discontinued and requisition was sent on the basis of the results of AGE, 1996. As SSC nominated candidates on the basis of 1995 examination against the available vacancies in 1996 they have been adjusted against the vacancies of 1996 and similarly for 1997 nominations against 1998 vacancies have been made. In so far as carried forward vacancies earmarked for direct recruits upto 1997 as it has been decided to divert 20 vacancies from direct recruits to the promotee quota there was no carried forward vacancies. It is further stated that the seniority has been assigned rotating the quota and as the direct recruits were not available the excess promotees have been 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 quota with reference to the actual number of direct recruits who become available and vice versa. As quota between direct recruits and promotees was not operated according to the recruitment rules the relative seniority was examined in the light of DOPT guide-lines and the course adopted was least disturbing in extraordinary circumstances.

41. Now, in view of the above admitted factual position we take up the relevant issues as described above.

42. Regarding breaking up rota quota is concerned, though it is contended on behalf of promotees that as the quota meant for direct recruits has not been maintained and no direct recruitment has been made through SSC the quota has been broken down and as a result the seniority shall be assigned on the basis of continuous officiation in the light of the decision of the Apex Court in Direct Recruits' case (supra).

43. In a Constitutional Bench decision of the Apex Court in Direct Recruits' case (supra) the corollary laid down is that when the quota rule breaks and appointments are made from one source in excess of the quota after following the prescribed procedure envisaged under the Rules for appointment, appointees should not be pushed down below the appointees from other sources inducted in service at a later date.

44. The Apex Court in Suraj Parkash Gupta's case (supra) while dealing with Rule 5 (4) of the Recruitment rules, 1978 pertaining to Junior Engineers of Jammu and Kashmir cadre, observed as under:

"36. On the question of breakdown of quota rule, except the lethargy of the State Government and its inaction and its not asking the Service Commission to make direct recruitment, no other cause is visible. The Cabinet note only stated that because the reference to PSC would take a long time, the ad hoc services of the promotees were to be regularised. The delay on the part of the Government appears to us to be motivated for the purpose of blocking the quota of the direct recruits and giving a part of it to the

promotees. We have noticed that when a very belated decision was taken to make direct recruitment, the same was restricted to 10% rather than to the statutory quota of 20%. This attitude on the part of the State was not reasonable.

37. Further under Rule 5 (4) of the Recruitment Rules, 1978 it is provided that in case suitable candidates are not available for promotion, the posts shall be filled up by direct recruitment and vice versa. Thus, there must be evidence that suitable candidates were 'not available' for direct recruitment. Such non-availability cannot be inferred when, as a fact, not even a reference is made to the Commission to find out if upon advertisement, anybody will respond. Thus there is no breaking down of the quota rule.

38. That in such situations there can be no breakdown of the quota rule is clear from the decided cases. In N.K. Chauhan v. State of Gujarat the rule said that 'as far as practicable', the quota must be followed. Krishna Iyer, J. said that there must be evidence to show that effort was made to fill up the direct recruitment quota. It must be positively proved that it was not feasible, nor practicable to get direct recruits. The reason should not be 'procrastinatory'. In Syed Khalid Rizvi v. Union of India it was held that mere non-preparation of select list does not amount to collapse of the quota rule. In M.S.L. Patil v. State of Maharashtra it was held that mere omission to prepare lists did not amount to breakdown of quota rule.

39. One other significant fact is that the cabinet note dated 19-12-1997 only states that cases of the ad hoc promotees if referred to PSC, will take a long time for getting the necessary recommendation. But nowhere is it said that direct recruitment was not possible or that direct recruits were not available or such recruitment had become impracticable. For the aforesaid reasons we hold that the quota rule has not broken down."

45. Having regard to the above, in the instant case from 1991 onwards though recruitment rules provide for direct recruit through UPSC/SSC, no nomination has been called from SSC on the basis of AGE. Though direct recruits were available, respondents, i.e., Election Commission, without any relaxation duly accorded by the Central Government, under the relevant rules suo moto, without any authorization, exempted the Commission from the

purview of UPSC/SSC. Despite the fact that such a proposal has been turned down by the Legislative Department in absence of any exemption from SSC and DOP&T. Merely because no direct recruitment has been made from SSC/UPSC would not amount to breaking of the quota rules. The aforesaid contention cannot be sustained in law. An artificial breakage of quota would not be construed as breaking of the quota. In our considered view, no nominated candidates, i.e., direct recruits from SSC and non-availability of quota of direct recruit is self generated and would not amount to breaking up of the quota rule. Accordingly, we have no hesitation to hold that the quota rule has not been broken.

46. As the Commission, right from 1991 to 1995 had not nominated candidates against the direct recruitment quota from SSC, 20 vacancies had accumulated of direct recruitment. Instead of filling the vacancies through direct recruitment without relaxing the rules, for which approval of the Government is mandated and condition precedent, the Commission without any authority de hors the rules as one time relaxation passed orders holding DPC to promote from the feeder cadre of UDC on ad hoc basis towards promotee quota and were regularised. These promotees were not even eligible in so far as their regular service of five years in the feeder cadre.

47. In so far as relaxation is concerned, in Direct Recruits' case (supra) the Constitutional Bench of the Apex Court held that if the quota rule has been broken and rules permit authorities to relax the provisions relating to quota, ordinarily a presumption should be

(43)

raised that there was such relaxation when there was a deviation from the quota rule. However, we find that in the light of the decision of the Apex Court in **Suraj Parkash Gupta's** case (supra) in so far as relaxation is concerned, the Apex court has made the following observations:

"28. The decisions of this Court have recently been requiring strict conformity with the Recruitment Rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment. In **Keshav Chandra Joshi Vs. Union of India** (1993 SCC (L&S) 694) the Rule permitted relaxation of the conditions of service it was held by the three-Judge Bench that the Rule did not permit relaxation of Recruitment Rules. The words "may consult PSC" were, it was observed, to be read as "shall consult PSC" and the Rule was treated as mandatory. In **Syed Khalid Rizvi v. Union of India** (1994 SCC (L&S) 84) (SCC at p.603) decided by a three-Judge Bench, a similar strict principle was laid down. The relevant Rule-Rule-3 of the Residuary Rules (see p.603, para 33) in that case did permit relaxation of the 'Rules'. Even so, this court refused to imply relaxation of Recruitment Rule and observed: (SCC pp. 603-04, para 33).

The condition precedent, therefore, is that there should be an appointment to the service in accordance with rules by operation of the rule, undue hardship has been caused,....It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to rules. The former cannot be relaxed. (emphasis supplied)

29. Similarly, in **State of Orissa v. Sukanti Mohapatra** it was held that though the power of relaxation stated in the rule was in regard to "any of the provisions of the rules", this did not permit relaxation of the rule of direct recruitment without consulting the Commission and the entire ad hoc service of a direct recruit could not be treated as regular service. Similarly, in **M.A. Haque (Dr) v. Union of India** it was held that for direct recruitment, the rules relating to recruitment through the Public Service Commission could not be relaxed. In **J&K Public Service Commission v. Dr Narinder Mohan** it was held that the provisions of the J&K Medical Recruitment Rules could not be permitted. (See also **Arundhati Ajit Pargaonkar (Dr) v. State of Maharashtra**). In **Surinder Singh Jamwal (Dr) v. State of J&K** this Court directed the

direct recruits to go before the Public Service Commission. Decisions cited for promotees distinguishable.

30. Two decisions which have been referred to by counsel for the promotees have to be referred to but these can be distinguished. In *V. Sreenivasa Rao v. Govt. of A.P.* there was an order of relaxation in favour of the promotees who were not regularised under Rule-23 of the A.P. State and Subordinate Service Rules. In that case, this Court felt that the Government's order relaxing the requirement of consultation with the Commission need not be interfered with because the promotees were placed by the Government below the direct recruits. This case is therefore clearly distinguishable. (We shall be referring to this case again under Point 3.) Again in *Ashok Kumar Uppal v. State of J&K* while holding that the power of relaxation could not be arbitrarily exercised, this court upheld the relaxation of the relevant standard prescribed for typing, in respect of five direct recruits. This was because the State Recruitment Board in that case had made a recommendation for relaxation of the requisite standard in their favour and this was accepted by the Government. The relaxation was upheld because the Government had retrospectively amended the promotion rules so that the promotees could just go into the promotion quota by sheer seniority rather than selection as was the rule earlier. The five direct recruits were very close to the other selected direct recruits and were more meritorious than the promotees".

48. Having regard to the above and in the light of Election Commission (Group 'A' and Group 'B' Posts) Recruitment Rules, 1998, though the minimum eligibility for promotion to the post of Assistant is five years' regular service in the feeder grade of UDC for promotees, though there exists power of relaxation to any of the provisions of Rules relating to any class or category but the Central Government has to form an opinion that it is necessary and expedient to do so. In that event the approval is from the Central Government. Before diverting the quota and filling up the posts no such approval has been sought. Accordingly, in absence of any valid relaxation the DPC held and promotions made of promotees against direct recruits quota the power does not include to relax the

45
Ba

rules of recruitment. As such, admittedly as no approval has been sought by the respondents from the Government the promotions are not in accordance with the recruitment rules.

49. It is equally settled by the decision of the Apex court in **Direct Recruit's** case (supra) that settled position cannot be unsettled. Though the promotions had been made long back in 1995 a challenge has been made by the direct recruits to the promotions only in 2002 when few of the persons have been further promoted on ad hoc basis as Section Officers. In this view of the matter we observe that though the promotions made were without any relaxation and not as per the quota, yet the same would not be disturbed. However, we also find that in supersession of orders passed from 1995-1998 order issued by the respondents on 10.12.2001 has been assailed by the direct recruits but the earlier orders have not been challenged.

50. The contention put-forth by the direct recruits that as no nominations have been sought from SSC they should not be made to suffer and their seniority should be reckoned for the purposes of inter-se-seniority between direct recruits and promotees from the date of holding of AGE is concerned, the Apex Court in **Suraj Parkash Gupta's** case (supra) held as follows:

"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 ante-dated 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.

81. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service. This principle is well settled. In N.K. Chauhan v. State of Gujarat (SCC at p.325, para 32) Krishna Iyer, J. stated:

Later direct recruits cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service. Again in A. Janardhana v. Union of India it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in A.N. Pathak v. secy. to the Govt. (SCC at p.767) that slots cannot be kept reserved for direct recruits for retrospective appointments."

51. In this view of the matter the direct recruits cannot claim appointment from the date of vacancies in quota before their selection and this mutatis mutandis applies to seniority as well.

52. In so far as seniority is concerned; respondents on a Full Court Commission meeting having regard to the fact that 20 vacancies meant for^h direct recruits had been diverted to promotee quota and in absence of any direct recruitment made from 1991 to 1995 in so far as inter-se-seniority is concerned, followed DOPT OM dated 4.11.1992, where it is provided that if adequate number of direct recruits are not available in any particular year, rotation of quota for determining seniority would take place only to the extent of the available direct recruits and promotees. In the event direct recruits are not available the excess 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 quota with reference to the actual number of direct recruits who become available and vice versa. Thereafter in the next 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 for the previous year would be placed enbloc below the last promotee. This resulted in pushing down of direct recruits from AGE 1995 with appointment against 1996 vacancies below the promotees on the basis of their reviewed regularisation from the date of eligibility. However, we find that once the quota has not ^{broken down} has to be rotated for the purposes of seniority.

The Apex Court in Suraj Parkash Gupta's case (supra) in so far as seniority to the promotees who have been appointed in excess of their quota against the quota meant for direct recruits held as follows:

"79. Summarising the position, we therefore hold that the ad hoc/stopgap service of the promotees cannot be treated as non est merely because PSC was not consulted in respect of continuance of the ad hoc/stopgap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no 'rota' rule applicable. The 'quota rule has not been broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota, after due regularisation. Such service outside the promotee quota cannot count for seniority. Service of the promotees which is regularised with retrospective effect from the date of vacancies within the quota counts for seniority. However, any part of such ad hoc/stopgap or even regular service rendered while occupying the

direct recruitment quota cannot be counted. Seniority of the promotees or transferees is to be fixed as per quota and from the date of commencement of probation/regular appointment as stated above. Seniority of direct recruits is from the date of substantive appointment. Seniority has to be worked out between direct recruits and promotees for each year. We decide Point 3 accordingly.

Point 4

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

53. If one has regard to the above the excess promotees occupying direct recruits posts have to be pushed down and adjusted in later vacancies within their quota after due regularisation. The service rendered outside the promotee quota cannot count for seniority. The principle assigned would be applicable when there is a rule of rota. If the quota rule is not broken the promotees in excess occupying direct recruits quota though their promotion cannot be disturbed at this point of time, but in so far as seniority is concerned, they have to be adjusted for regular appointments against the vacancies meant for 50% quota of promotion and accordingly deeming their promotions from the date of availability of vacancies, their seniority is to be assigned from the date of such appointment on regular basis. We also find that at one place it is admitted by the respondents that 20 unfilled vacancies earmarked for direct recruits have been diverted to promotees quota and there were no vacancies to carry forward, the principle relied upon on the basis of OM of 1992 would have no application because as per OM dated 3.7.1986 of DOPT regarding seniority as contained in paragraph 2.4.2 the unfilled direct recruit quota vacancies have to be carried forward and added to the corresponding direct recruits vacancies for the next year. In that event

(49) 2/9

the seniority would be determined between direct recruits and promotees to the extent of number of vacancies for direct recruits and promotees as per the quota. As no carry forward of direct recruits vacancies had^h taken place these instructions would have no application and as the rotation of the quota is a principle for seniority and the same is intact and has not been broken down the seniority has to be assigned strictly in accordance with rotation of the quota. The promotees who occupied the vacancies meant for direct recruits cannot be accorded seniority against those posts falling beyond their quota.

54. In the light of our answers to the relevant issues OA-1405/2002 filed by the direct recruits, seeking quashing of the promotion orders of respondents No.7-29 is rejected. However, the seniority list circulated on 1.5.2002, which is not in accordance with the rules is quashed and set aside.

55. In OA-1259/2002 promotees have sought seniority on the basis of initial appointment taking resort to Direct Recruits' case (supra) is concerned, we hold that as their appointments were not in accordance with the rules without any valid relaxation against the vacancies not meant for their quota the period of officiation against those vacancies on the basis of continuous officiation cannot be counted towards seniority. The aforesaid prayer is rejected.

56. In so far as OA-1259/2002 filed by the promotees where a challenge has been made to review of their regularisation without a show cause notice is

concerned, we find that even their earlier appointments were de hors the rules and has not been disturbed on account of unsettling the settled position. Merely because applicants have attained eligibility as per the recruitment rules their appointments cannot be made on regular basis for want of vacancies in their respective quota. Moreover, we find that the DPC earlier in derogation of the rules on invalid relaxation accorded them promotion with procedural illegality which can be rectified through a review DPC for which no reasonable opportunity to show cause is required.

57. In the result, for the foregoing reasons, though we dismiss OAs filed by the promotee Assistants, i.e., OA No.1259/2002 and OA-1507/2002, but partly allow OA-1405/2002 filed by the direct recruits. Accordingly the inter-se-seniority list of Assistants in Election Commission is quashed and set aside. Respondents are directed to revise the seniority having regard to the observations made above, within a period of six months from the date of receipt of a copy of this order. Applicants, i.e., direct recruits in that event shall be entitled to all consequential benefits. No costs.

58. Before parting with, we are constrained to observe that the Election Commission while according promotions and seniority in the grade of Assistants has acted in a manner to give go-bye to the statutory rules and principles as well as law laid down. This is beyond all canons of justice and has led to unnecessary litigation and administrative chaos, which should be avoided in future.

(Snanker Raju)
Member (J)

(V.K. Majotra)
Member (A)

'San'