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CENTRAL ADMINISTRATIVE TRIBUNAL PRINCIPAL BENCH

1) OA No.2566/98

WITH

2) OA No.2153/2000.

New Delhi: this the 22nd day of JANUARY, 2001.

HON'BLE MR.S.R.ADIGE, VICE CHAIRMAN(A).

HON'BLE DR.A.VEDAVALLI, MEMBER(J)

1) OA No.2566/98

Shri Anil Kumar Gupta ,
S/o Shri B.N.Gupta,
R/o A-3/34-C, ODA Flats,
Pashchim Vihar,

New Delhi.

.....Applicant

(By Advocate: Shri Meera Chhibber)

Versus

1. Union of India
through Lt. Governor,
Raj Niwas Marg,
Delhi-54.
 2. Secretary,
Irrigation and Flood Control Deptt.
Govt. of National Capital Territory of Delhi.,
5/9 Under Hill Road, IInd Floor,
Delhi- 54.
 3. D.G.Khattar, DW(PM), CPWD, Nirman Bhawan,
New Delhi.
- ...Respondents.

2) OA No.2153/2000

Shri A.K.Gupta,
S/o Sh.B.N.Gupta,
R/o A-3/34C ODA Flats,
Paschim Vihar,

New Delhi

.....Applicant.

Versus

1. Union of India,
through
the Chief Secretary,
5, Sham Nath Marg,
Govt. of NCT of Delhi,
Delhi.
 2. Secretary,
Irrigation Flood Control Department,
Govt. of NCT of Delhi,
5/9 Under Hill Road,
IInd Floor,
Delhi-54
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3. Union Public Service Commission
through
Secretary,
Dholpur House,
New Delhi.

4. Sh.R.K.Khanna to be
served through
Deptt. of Irrigation and Flood,
5/9 Under Hill Road, IInd Floor,
Govt. of NCT of Delhi,
Delhi-54

.....Respondents.

Advocates:

Mrs. Meera Chhibber for applicant.

Mrs. Avnish Ahlawat for official respondents.

Shri Sohan Lal and Sh. Gyan Prakash for
Respondent No. 4 in OA No. 2153/2000.

Shri G.D. Gupta for Respondent No. 3 in
OA No. 2566/98.

ORDER
S.R. Adiga, VC(A):

As both these OAs are related, they are being
disposed of by this common order.

1) OA No. 2566/98

Applicant had filed OA No. 2566/98 impugning
respondents' letter dated 16.7.98 (Annexure-P-I)
inviting applications from willing, suitable and eligible
candidates for filling up the post of Chief Engineer,
Irrigation & Flood Control Department, Govt. of NCT of
Delhi (Rs. 5100-5700 Pre-revised) by transfer on deputation
basis from amongst officers of the Central Govt./ State
Govt./ Union Territories/ PSU/ Autonomous or Statutory
Organisations holding analogous posts (Chief Engineer or
equivalent) on regular basis or with 2 years' regular
service on the post in the pay scale of Rs. 4500-5700
(pre-revised) or with 5 years' regular service on the

post in the pay scale of Rs. 4100-5300 (pre-revised) or with 7 years' regular service on the post (S.E or equivalent) in the pay scale of Rs. 3700-5000.

3. The OA came up for hearing on 1.1.99 on which date notices were ordered to be issued to respondents to file reply and meanwhile as an interim measure respondents were directed not to proceed with the selection for the post of Chief Engineer pursuant to the impugned letter dated 16.7.98.

4. Meanwhile one Shri Khattar sought impleadment as a private respondent.

5. The question of allowing Shri Khattar to be impleaded as a private respondent, and of continuation of the interim order dated 1.1.99 was heard, and by order dated 16.4.99 Shri Khattar's impleadment was allowed. Furthermore the interim orders dated 1.1.99 were modified such that while respondents were permitted to proceed with the selection for the post of Chief Engineer pursuant to their letter dated 16.7.98 they were called upon to approach the Tribunal before taking a final decision in the matter.

6. Before OA No. 2566/98 could be disposed of respondents issued letter dated 16.11.99 (Annexure-P I of OA No. 2153/2000) in which applications were invited for the post of Chief Engineer in Irrigation & Flood Control Deptt., Govt. of NCT of Delhi in the pay scale of Rs. 16400-20,000 (pre-revised Rs. 5100-5700) on deputation basis (including short term contract) from amongst officers of Central/State Govt./UTs/PSUs/ Autonomous or

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Statutory Corporations. The particulars of the posts, eligibility conditions etc. were given in Annexure-I of the letter. This Annexure mentioned a Degree in Civil Engineering from a recognised University or equivalent with experience in Irrigation & Flood Control Works as one of the eligibility qualifications, which had been omitted to have been mentioned in official respondents' earlier letter dated 16.7.98. It was also made clear in this letter dated 16.11.99 that those who had already applied in response to earlier letter dated 16.7.98 need not apply again.

7. Pursuant to the aforesaid letter dated 16.11.99 official respondents issued advertisement regarding the aforesaid post on 11-17th December, 1999 (Annexure-P-II) inviting applications. It is not denied that pursuant to the same, candidates submitted their applications, and official respondents in consultation with UPSC have selected one Shri R.K. Khanna to fill up the post of Chief Engineer, Irrigation & Flood Control Deptt., Govt. of NCT of Delhi on deputation basis, but he has not yet been appointed as yet firstly because in terms of the Tribunal's order dated 16.4.99 in OA No.2566/98 official respondents were required to approach the Tribunal before taking a final decision in the matter.

2) OA No.2153/2000

8. Meanwhile applicant filed fresh OA No.2153/2000 impugning respondents' letter dated 16.11.2000, the advertisement dated 11-17th December, 1999 and the selection of Shri R.K. Khanna to the aforesaid post. This OA came up on 17.10.2000. Notice was directed

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to be issued to respondents to file reply, and meanwhile by way of an interim order official respondents were directed not to take any final decision on the question of filling up the post till the next date. Shri R.K. Khanna was made Respondent No.4 in the OA, the other than being official respondents. Respondents both official and the private have filed their reply and we have heard both sides.

9. Applicant's basic contention is firstly that his candidature for promotion as CE should have been considered by respondents before they resorted to filling up the post by transfer on deputation and secondly that the selection of Shri R.K.Khanna Respondent No.4 in OA No.2153/2000 as CE on the basis of transfer on deputation is illegal and arbitrary, not only because he is ineligible for appointment as CE as per the Recruitment Rules, but also because respondents were required to amend the rules in the light of certain executive instructions, before acting upon those rules which they did not do. Inter alia it has also been contended that in view of the interim orders dated 16.7.99 in OA No.2566/98 respondents could not have issued impugned letter dated 16.11.99 and acted upon the same.

10. On the other hand, respondents, both official and private, challenge these contentions. They assert that applicant was not considered for promotion as CE because he did not fulfil the eligibility condition as per the RRs, and they were therefore compelled to take recourse to the "failing which" clause, and fill up the post by transfer on deputation for which purpose letter dated 16.7.98 followed by letter dated 16.11.99 were issued. It is contended that as per

RRs a proper selection was held through UPSC upon whose recommendations Shri R.K. Khanna, Respondent No.4 has been selected for appointment who is fully eligible to be appointed. Respondents deny that the RR was required to be amended in the light of certain executive instructions, before they could be operated upon, ^{and as} ~~because~~ the official respondents have themselves approached the Tribunal for permission to go ahead with filling up the post of C.E., the question of violation of the Tribunal's orders dated 16.4.99 does not arise.

11. We have heard Mrs. Meera Chhibber for applicant, and Mrs. Avnish Ahlawat for the official respondents in both O.As. Shri G.D. Gupta was heard on behalf of Respondent No.3 in O.A. No. 2566/98, while Shri Sohan Lal and Shri Gyan Prakash were heard on behalf of Respondent No.4 in O.A. No. 2153/2000. Both sides have cited a number of rulings. Those cited by Smt. Ahlawat, Shri Gyan Prakash and Shri Sohan Lal on behalf of respondents included Dinesh Chandra Vs. State of Assam AIR 1978 SC 17 Para 21; J.Kumar Vs. Union of India AIR 1982 SC 1064; Y.V. Rangaiah Vs. J. Sreenivas Rao & Others 1983 (3) SCC 285; K.C. Joshi's case 1991 (2) SLJ 42; A.K. Bhatnagar Vs. Union of India & Others 1991 (16) ATC 501; 1993 (2) SCC 240; 1997 (10) SCC 419; Y. Rammohan's case JT 2000 Suppl. 2 Page 352; and Union of India Vs. Muddoboliah JT 2000 Suppl. 1 Page 229.

11A. On the other hand applicant's counsel Mrs. Chhibber has cited the rulings in Prem Baboo Vs. Union of India & Ors. 1987 (4) ATC 727; C.S.S. Direct Recruit Assistants Association Vs. Union of India & Others 1991 (16) ATC 891; J.D.Gupta Vs. State of H.P. & Others JT 1997 (7) SC 650; Selvaraj Vs. L.G. of Island, Port Blair; Direct Recruits' case 1990(2) SCC 715; and Secretary-cum-C.E. Vs. H.O. Sharma 1998 (5) SCC 87.

12. At the outset the contention that, in view of interim order dated 16.4.99 in OA No.2466/98 respondents were precluded from issuing letter dated 16.11.99 and acting upon the same, deserves to be dismissed straightway. The interim order dated 16.4.99 permitted respondents to proceed with the selection for the post of CE pursuant to letter dated 16.7.98 but called upon them to approach the Tribunal before taking a final decision in the matter. If, upon finding that the letter dated 16.7.98 did not make mention of the experience qualification, and the same was incorporated in subsequent letter dated 16.11.99, it cannot be said that there is any violation of the Tribunal's order dated 16.4.99. Indeed respondents' letter dated 16.11.99 has to be treated in continuation of letter dated 16.7.98, because it was made clear therein that those who had already applied in response to letter dated 16.7.98 need not apply again. Nothing in the Tribunal's order dated 16.4.99 can be construed as legally precluding respondents from issuing subsequent letter dated 16.11.99. Under the circumstance, this ground is rejected.

13. We shall now address ourselves to applicant's main contention, namely that his candidature for promotion as CE should have been considered by respondents before resorting to ^{the} alternative method ^{of} by transfer on deputation. The Recruitment Rules for ^{the} single post of CE (I & FC) in Govt. of NCT Delhi were notified on 21.6.90 under Article 309 of Constitution (Annexure-P-I) and prescribe the method of recruitment to the post to be promotion, failing which by transfer on deputation (including short term contract). In the case of

Promotion, S.Es with 7 year regular service in the post in the scale of Rs.3700-5000 and possessing a degree in Civil Engineering from a recognised University or equivalent are eligible. In the case of transfer on deputation, officers of the Central/State Govt./Union Territories/PSUs/Autonomous or Statutory Organisations.

- a) (i) holding analogous posts (Chief Engineer or equivalent) on a regular basis; or
- (ii) with 2 years regular service in posts in the scale of pay of Rs.4500-5700 or equivalent; or
- (iii) with 5 years regular service in posts in the scale of Rs.4100-5300 or equivalent; or
- (iv) with 7 years regular service in posts (SE or equivalent in the scale of pay of Rs.3700-5000 or equivalent).
- b) Possessing Degree in Civil Engineering from a recognised University or equivalent with experience in Irrigation and Flood Control Works,

are eligible.

14. At this point, it is necessary to trace applicant's career briefly. He joined the Irr. and Flood Control Deptt. in Govt. of NCT of Delhi as a JE in 1968. He was appointed as AE in March, 1974 on the basis of the exam. conducted by UPSC for the post of AE. On 21.5.80 he was appointed as E.E (C)/ Surveyor of Works (C) purely on adhoc and emergent basis for a period of six months or till further orders whichever was earlier (Annexure-P-II in OA No.2566/98) and by order dated 1.7.83 (Annexure-P-III in OA No.2566 of 1998), he was given regular promotion as E.E. The next higher post is that of SE which has to be filled 100% by way of promotion through selection from EEs with 5 year regular service and possessing a degree in Civil Engineering from a recognised University failing which by transfer on deputation (Annexure-P-IV in OA No.2566/98). Thus he became eligible for

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regular promotion as SE on 30.6.88.

15. Official respondents in their detailed reply affidavit in OA No.2566/98 themselves state that a vacancy of SE became available in 1988 and another vacancy became available in 1988-89 but they aver that OPC for filling up the vacancies of SE by regular promotion from amongst eligible EEs could not be held well in time due to a court case LPA No.123/85 relating to seniority in the grade of AEs which was sub-judice in the Delhi High Court and therefore as a temporary measure, applicant was assigned current duty charge of the post of SE vide order dated 30.12.91 (Annexure-P-V in OA-2566/98) till regular arrangement was made. That order dated 30.12.91 further states that applicant would continue to draw his salary as EE and it would not confer upon him any right to claim addl. remuneration or seniority in the grade of SE or any other equivalent grade or post., and furthermore that applicant would continue to work as EE in addition to his own duties as SSE (C) which is equivalent to SE till further orders.

16. Eventually the OPC for regular promotion to the post of SE was held on 31.3.95 in which six E.Es including Shri R.C.Sood, who, on that date was immediate senior to applicant as per seniority list of E.Es dated 19.6.91 (Annexure-R1 in OA -2153/2000), as well as applicant were considered; & others namely S/Shri A.S. Viridi, P.C.Guha and G.D.Bellani having retired in the meantime or were not eligible, owing to non-possession of Bachelor's degree in Civil Engineering or its equivalent. In that OPC meeting dated 31.3.95 Shri Sood was considered against the vacancy for the year 1988, while applicant was considered

against the vacancy for the year 1989-90, as official respondents have themselves averred in their detailed reply to OA No.2566/98, but they contend that the implementation of DPC's recommendations had to be put off because of an interim stay order dated 5.5.95 granted in aforementioned LPA No.123/85. Eventually, upon vacation of the aforesaid stay order, applicant was promoted as SE on regular basis on 29.3.96 (Annexure-P-VI in OA-2566/98) and subsequently vide order dated 10.7.97 (Annexure-P-VIII in OA-2566/98) applicant was given current duty charge as CE (I & FC) wherein it was stated that applicant would continue to draw his existing pay as SE and the above arrangement would not confer upon him any right of claiming addl. remuneration or seniority in the grade of CE or any other equivalent grade and post. This arrangement continues till date.

17. Mrs. Chhibber has vehemently contended that OP & T's OM dated 10.4.89 which is applicable to Govt. of NCT of Delhi and contains comprehensive guidelines for DPC proceedings, requires DPCs to be held annually and applicant should not be denied even consideration for promotion as CE, which is the first method of recruitment as per RRs notified under Article 309 of the Constitution, on the ground that he did not possess 7 years regular service as SE, when he was discharging all the duties of an SE since 1991, and indeed as per official respondents' own averments had been considered for regular promotion as SE against a vacancy of 1989-90, merely because of official respondents' own failure to hold DPC in time. In this connection she has pointed out that there was no stay order issued by the Delhi High Court in LPA No.123/85 between 1988

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and 5.5.95 preventing respondents from holding the DPC and acting upon its recommendations between that period and respondents could have easily finalised the seniority list of E.Es dated 19.6.91 (Annexure-R1), in which case applicant could have acquired the necessary eligibility qualification of 7 year regular service as SE making him eligible for consideration for promotion well before respondents resorted to the alternative mode of recruitment of transfer on deputation.

18. On the other hand, Shri Ahlawat as well as S/Shri Gyan Prakash and Sohan Lal have also relied upon OP & T's OM dated 10.4.89 according to which even if a DPC recommends for filling up vacancies belonging to earlier years, the promotions will be made in the order in the consolidated select list and such promotions will have only prospective effect, even in cases where the vacancies relate to earlier years. It is for this reason they state that applicant's candidature for consideration for promotion as CE had to be rejected as he was not possessing 7 year regular service as SE. In this connection, respondents have contended that even if the DPC was held between 1988 and 1993, applicant would not have been promoted as SE as other EXs senior to him namely S/Shri Roy Sikka, Virdi and Sood were also in the line of promotion against the available vacancies and applicant came to seniority position No.2 only in 1993-94 and was considered for promotion in 1989-90 because meanwhile abovementioned senior officers(except Shri Sood) had retired or being promoted at the time of DPC and his rank and position only then corresponded to the vacancy of 1989-90.

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19. In this connection it has stoutly been contended that the recruitment rules which had been notified under Article 309 of Constitution had to be adhered to strictly, and according to those recruitment rules, 7 year regular service as SE was required before any candidate could be considered for promotion as CE. It has also been emphasised that G.O. dated 30.12.91 (Annexure-P-V) gave applicant only current duty charge of the post of SE which under no circumstance could be deemed to be regular service, and applicant was not granted the pay scale of Rs. 3700-5000 with effect from that date, and hence he was rightly not considered for promotion as CE as he did not possess the requisite eligibility qualification. In this connection, it is further contended by the respondents that if at all applicant was aggrieved by order dated 30.12.91 giving him only current charge as SE, his cause of action arose from that date itself and he should have agitated the matter at that point of time and hence his claim for being treated as a regular SE from that date or any previous date is also hit by limitation.

20. We have considered the rival contentions on this point carefully.

21. We have already noticed that as per the relevant RRs notified on 21.6.90 under Article 309 of the Constitution, the method of recruitment for the post of CE(I & FC) is by promotion, failing which by transfer on deputation (including short term contract). In other words promotion is the preferred method of recruitment and only if that fails should the method of transfer by deputation be resorted to. For promotion

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SEs (Civil) with 7 year regular service in the pay scale of Rs. 3700-5000 and possessing a degree in Civil Engineering from a recognised University or equivalent are eligible. It is not denied that applicant possesses a degree in Civil Engineering from a recognised University. The question for adjudication is whether, although applicant has been continuously discharging the duties of SE since 1991 on current charge basis, and indeed the duties of CE since 1997 also on current charge basis, he can legitimately be denied even consideration for promotion as CE on regular basis because respondents did not hold the DPC in time to enable him to acquire 7 years regular service as SE in the pay scale Rs. 3700-5000 as required under the RRs.

22. We have already noted that official respondents themselves aver that applicant was promoted as SE against a vacancy that arose in 1989-90, although ^{the} DPC was held in 1995 and the actual order promoting him on regular basis was issued on 29.3.96. Even if the seniority in the lower grade of AE was the subject matter of LPA No. 123/85 which was pending in the Delhi High Court, nothing has been shown to us to establish that there were any stay orders operating in that LPA or indeed issued by any other Court of Law between 1988- and 1995 which restrained respondents from operating the available seniority list of Ex.Es. In the absence of any stay orders, it was always open to official respondents to have made the promotions subject to the outcome of the LPA or any other pending litigation, more particularly as DP & T's OM dated

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10.4.89 enjoins upon all departments/Ministries to hold DPCs annually. If official respondents rely upon that portion of the aforesaid O.M. dated 10.4.89 which lays down that promotions would have prospective effect even if they relate to earlier years, there was an equal obligation imposed upon official respondents by the aforesaid O.M. to hold DPC on annual basis to fill up vacancies (actual and anticipated) that became available in a particular year, which they failed to discharge in the present case.

23. As regards the assertion that S/Shri Roy Sikka and Viridi who were senior to applicant would have been promoted as S.E. on regular basis in 1989-90 instead of applicant, it is not denied that the post of S.E. is a selection post for which the minimum eligibility bench mark of ACRs is Very Good. Mrs. Chhibber has placed on record certain unsigned extracts from applicant's personal file No. F 1/4/74 I & FC dealing with his representation dated 28.1.2000 from which it appears that neither Shri Roy Sikka nor Shri Viridi possessed the minimum bench mark for promotion as S.E. Indeed if they had possessed the minimum eligibility bench mark, there was no reason to deny either of them instead of applicant with entrustment of the duties of S.E. on current charge basis in 1991. It is, therefore, reasonable to proceed on that basis that had respondents held the DPC for making promotions to the grade of S.E. in 1989-90, or even in the year 1991, applicant would have been promoted as S.E. on regular basis, in which case he would have acquired 7 years regular service as S.E. in the pay scale of Rs.3700-5000 as prescribed in the RRs for consideration for promotion as C.E., and in our view it would be unfair and unjust to deny applicant such consideration merely

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because official respondents themselves failed to hold the OPC in time.

24. The contention that applicant's claim for seniority as SE w.e.f. 1991 is hit by limitation, is also without merit, because we find that as late on 5.8.98, the Govt. of NCT of Delhi in its letter of even date addressed to UPSC, had itself recommended for grant of notional promotion as SE with effect from the date/year of vacancy against which the officers had been recommended for promotion by UPSC for the purpose of calculating their seniority for further promotion as CE. The Govt. of NCT of Delhi having itself recommended applicant's case for grant of notional seniority from 1989-90, it is not open to them to assert that applicant's claim for seniority as SE at least from the date he was called upon to discharge the duties of that post on current charge basis i.e. 30.6.91, is hit by limitation.

25. In this connection, we note that in UOI & Ors. Vs. K.B.Rajoria AISLJ XI-2000(3) page 276, the notional promotion granted to Shri Krishnamoorti w.e.f. 22.2.95 was held to satisfy the requirement of 2 year regular service in the grade which was the eligibility condition for promotion as Director General of Works, CPWD in terms of CPWD(DGW) Recruitment Rules, 1986 as amended in 1992.

26. On behalf of respondents, considerable reliance has been placed on the Hon'ble Supreme Court's decision in State of Haryana Vs. S.M.Sharma, AIR 1993 SC 2273 wherein it has been held that current duty charge of the post could not be treated as a case of promotion. Another ruling relied upon by respondents in the same vein is State of Haryana Vs. R.K. Agarwal 1997(4) SLR 733. Both

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these rulings were by a 2 Judge Bench of Hon'ble Supreme Court. However, in Secretary-cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma & Ors. 1998 (5) SCC 87 before a 3 Judge Bench of Hon'ble Supreme Court, where respondent Shri Hari Om Sharma who was a Meter Inspector had been denied the salary for the post of JE to which he had been posted ^{on current} duty charge basis in 1990, and had continued as such (copy of posting order taken on record) for a considerable length of time, the Hon'ble Supreme Court treated the matter to be one of promotion. Indeed after noticing their own ruling in S.M. Sharma's case (supra), they observed that applicant's argument that when respondent was promoted in stop-gap arrangement as JE, he had given an undertaking that he would not claim any promotion as of right nor would he claim any benefit pertaining to that post, was to say the least, a preposterous argument.

27. We may summarise.

28. The Recruitment Rules for the single post of CE (I & FC) prescribe the method of recruitment to be promotion from amongst SEs with 7 year regular service in the post in the scale of Rs. 3700-500 and possessing a degree in Civil Engineering from a recognised University or its equivalent, failing which by transfer on deputation. Admittedly applicant who possesses a degree in Civil Engineering, and became eligible for promotion as SE in 1988 itself, has been discharging the duties of SE on ^{duty} current charge basis in his own scale of EE since 30.6.91, and indeed in that capacity has also been discharging the duties of CE on ^{duty} current charge basis since 1997. Although DP & T's OM

dated 10.4.89 which is applicable to Govt. of NCT of Delhi enjoins upon all departments/Ministries to hold DPC annually, respondents did not hold a DPC between 1988 and 1995, for promotion to the grade of SE on the ground that an LPA regarding disputed seniority in the feeder grade of AE was pending in Delhi High Court, although there were no stay orders restraining them from holding the DPC. Eventually the DPC was held on 31.3.95, and admittedly applicant was promoted against a vacancy of 1989-90, although the actual order promoting him on regular basis issued on 29.3.96. There are strong reasons to believe that if respondents had held the DPC in time, applicant would have been promoted as SE on regular basis on 30.6.91 if not in 1989-90 itself, and under the circumstance it would be unjust and unfair to deny him even consideration for promotion as CE on the ground that he does not have the 7 years regular service as SE in the grade of Rs. 3700-5000 because of respondents' own failure to hold the DPC in time.

29. In the particular facts and circumstances of this case which is not to be treated as a precedent, the OAs succeed and are allowed to the extent that respondents are directed to consider applicant's claim for regular promotion as Chief Engineer (I & FC) in the light of the foregoing discussion, before resorting to the "failing which" alternative of transfer on deputation. Under the circumstances, it is not necessary for us to go into the question whether Respondent No. 4 in OA No. 2153/2000 who has been selected under the "failing which" alternative, is eligible for appointment or not, or whether any amendment to those RRs are required in the light of

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the executive instructions, before he could be
appointed. No costs.

30 . Let a copy of this order be placed on
each case record.

(DR. A. VEDAVALLI)
MEMBER (J)

(S. R. ADIGE)
VICE CHAIRMAN (A).

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