IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 561/ 1986. and O.A. 67/1986.
~~T.A. No.~~

DATE OF DECISION 23-7-1987.

Shri O.B.L. Bhatnagar & Others — Petitioner / Applicants.
and
Shri V.K. Seth & Others

Shri R.L. Tandon with Shri L.K. Bhushan — Advocate for the Petitioner(s)

Versus

Delhi Administration & Others — Respondent

Shri P.P. Rao, Senior Advocate
Shri S.K. Mehta, Shri R. Venkataramani
and Shri M.M. Sudan — Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. Justice K. Madhava Reddy, Chairman.

The Hon'ble Mr. Kaushal Kumar, Member (A).

1. Whether Reporters of local papers may be allowed to see the Judgement ? Yes
2. To be referred to the Reporter ~~or not~~ ? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement ? No
4. Whether to be circulated to other Benches? No

(KAUSHAL KUMAR)
MEMBER (A)
23.7.1987.

(K. MADHAVA REDDY)
CHAIRMAN.
23.7.1987.

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, DELHI.

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(1) Regn. No. O.A. 561/1986.

Shri O.B.L. Bhatnagar & Others .... Applicants.

V/s.

Delhi Administration & Others. ... Respondents.

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CORAM: Hon'ble Mr. Justice K. Madhava Reddy, Chairman.
Hon'ble Mr. Kaushal Kumar, Member (A).

For the applicants .... Shri R.L. Tandon, Advocate with Shri L.K. Bhushan, Advocate.

For the respondents .... Shri P.P. Rao, Senior Advocate, Shri S.K. Mehta, Shri R. Venkataramani and Shri M.M. Sudan, Advocates.

(Judgment of the Bench delivered by Hon'ble Mr. Kaushal Kumar, Member)

JUDGMENT

These two applications have been filed by officials who were appointed to Grade II (Ministerial) of the Delhi Administration Subordinate Service through a Limited Departmental Competitive Examination held in January, 1977, which was one of the modes of recruitment to the Service prior to the Amendment made on 4th December, 1980 as per the Delhi Administration Subordinate Services (5th Amendment) Rules, 1980. The Delhi Administration Subordinate Executive Service and the Delhi Administration Subordinate Ministerial Service were merged into one Service called the Delhi Administration Subordinate Service and the method of recruitment to the Service through Limited Departmental Competitive Examination was done away with. The Delhi Administration Subordinate Services (5th Amendment) Rules, 1980 also sought to substitute a new rule 26 to provide for a principle for fixation of seniority whereby the inter-se seniority of the

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promotees belonging to various grades i.e., Ministerial and Executive, prior to the date of promulgation of rules was to be determined on the basis of their continuous length of service in their respective grades. The new rule 26 (1) as substituted by the Amendment of December, 1980 was struck down by the Delhi High Court vide its judgment dated 13th May, 1982. A new rule 26 was notified by the Delhi Administration on 12th July, 1985. The Delhi Administration also circulated a final seniority list of Grade II (Ministerial) officials on 6th January, 1986 and also issued an Order No. F.3(4)/85-JSC, dated the 6th January, 1986 purporting to regularise the promotees i.e., officials who had been promoted to the Service on the basis of seniority-cum-merit from the various dates shown in the said regularisation order. The Delhi Administration also issued orders on 26th February, 1986 and 25th July, 1986 promoting certain incumbents on the basis of the said seniority list to posts in Grade I (Ministerial).

2. In these two applications, the applicants have, inter-alia, challenged the Delhi Administration Subordinate Services (Third Amendment) Rules, 1985 promulgated by Delhi Administration's Notification No. F.2(2)/81-JSC/S-II, dated 12.7.1985 and have prayed for striking down the amended rule 26 of the Delhi Administration Subordinate Service Rules, for a direction to quash and set aside the final seniority list of Grade II (Ministerial) officers of the Delhi Administration circulated for the period from 10.2.67 to 3.12.1980 vide Delhi Administration circular letter No.F.3/4/85-JSC, dated 6.1.1986, a direction for quashing and setting aside the order of Delhi Administration No.F.3/4/85-JSC, dated 6.1.1986 purporting to regularise the officers of Grade II (Ministerial), for a direction to quash the promotion orders issued on 26.2.1986 and 25.7.1986

and for a direction to restrain the Delhi Administration from reverting and/or cancelling or annulling the appointments of some of the applicants from the posts of Grade I (Ministerial).

3. An interim direction had been given by us on 18th July, 1986 in O.A. 67/1986 and on 31st July, 1986 in O.A. 561/1986 staying reversion of some of the applicants and also directing that any further promotions made in accordance with the impugned seniority list dated 6th January, 1986 shall be subject to the result of these applications. Since the facts giving rise to these applications are more or less common and adjudication of the issues raised involve common points of law, it would be convenient to dispose of these two applications by a common judgment.

4. A few salient facts necessary to appreciate the various contentions made in these applications are stated below: -

Vide Notification No.F.3(16)/66-S(C), dated 10.2.1967, the Administrator of the Union Territory of Delhi under the proviso to Article 309 of the Constitution made the Delhi Administration Subordinate Service Rules, 1967 (hereinafter referred to as the 1967 Rules). Rule 3 of the said Rules provided for the constitution of two Services to be known as Subordinate Ministerial Service and the Subordinate Executive Service of the Delhi Administration having four Grades each, namely, Grade-I, Grade-II, Grade-III and Grade-IV. Rule 5 of the said Rules provided for the initial constitution of the Service. The method of recruitment to the two Services was provided by Rule 6, which envisaged in so far as Grade-II of the Ministerial Service was concerned that 50% of the vacancies in Grade-II (Ministerial) were to be filled in by the direct recruitment, 25% of the vacancies in Grade-II (Ministerial) were to be filled in by officers having at least

3 years service in that Grade and the remaining 25% in the Grade were to be filled in by promotion of officers of Grade-III on the basis of merit to be determined through a competitive examination. Subsequently, by an Amendment in the Rules on 27.4.1970, the aforesaid quotas provided for in Rule 6(II) of 1967 Rules were varied to provide for filling up 25% of the vacancies in Grade-II by direct recruitment on the basis of competitive examination, 50% of the vacancies t be filled in by promotion of officers of Grade-III and Junior Stenographers having at least three years service on the basis of seniority subject to rejection of the unfit on the recommendations of the Departmental Promotion Committee and the remaining 25% of the vacancies to be filled in by promotion of officers of Grade-III and Junior Stenographers having 3 years service in the grade on the basis of merit to be determined through a competitive examination. The Rule further laid down that the vacancies in Grade-II (Ministerial) shall be filled in by rotation in the following manner: -

1st vacancy	-	By direct recruitment.
2nd vacancy	-	By promotion on the basis of seniority.
3rd vacancy	-	By promotion on the basis of seniority.
4th vacancy	-	By promotion on the basis of merit to be determined as a result of competitive examination.

The applicants were initially appointed either in Grade IV (Ministerial) or Junior Stenographers or Grade-III (Ministerial). A large number of vacancies arose in Grade-II (Ministerial) from 1967 onwards and the applicants fulfilled the eligibility conditions. The Delhi Administration also issued various circulars in September 1970, April 1972, August 1973 and August 1974 intimating their decision to hold Departmental Competitive Examination for filling up 25% of the vacancies in Grade-II (Ministerial) as provided for

in the Rules. However, for one reason or another, the Departmental Competitive Examination was postponed and the vacancies which were meant to be filled up through this method of recruitment were filled up on an ad-hoc basis by promotion of Grade-III incumbents on the basis of their seniority. Ultimately the Departmental Competitive Examination was held in January 1977 and the applicants were promoted to the posts of Grade-II (Ministerial) on a regular basis.

5. Rule 26 of the 1967 Rules regarding seniority lays down that "the inter-se seniority of the members of the service appointed to any grade substantively or in a temporary capacity under rule 6 shall be determined in accordance with the principles laid down in the Delhi Administration (Seniority) Rules, 1965". Rule 7 of the Delhi Administration (Seniority) Rules, 1965 regarding 'Relative seniority of direct recruits and promotees' lays down that "the relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the percentage of vacancies reserved for direct recruitment and promotion respectively in the recruitment rules." The Delhi Administration issued on 8th May, 1978 a tentative seniority list of Grade II (Ministerial) officers of the Delhi Administration for the period from 10.2.1967 to 30.4.1978. The said tentative seniority list did reflect the seniority of the applicants from the dates on which the seniority ought to have been fixed on the basis of the occurrence of the vacancies in Grade II (Ministerial) in accordance with the 1965 Seniority Rules. However, the said seniority list of 1978 was scrapped by an order of the Chief Secretary, vide Delhi Administration letter dated the 14th May, 1980. This scrapping was rescinded by the Delhi Administration, vide its Memorandum dated the 13/14th July, 1981 and thus it had the

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effect of reviving the tentative seniority list, which was issued on 8th May, 1978.

6. The Administrator of Delhi also framed the Delhi Administration Subordinate Services (5th Amendment) Rules, 1980 (hereinafter referred to as the 1980 Rules), vide Notification No. F.3(35)/79-S.II, dated the 4th December, 1980. By the 1980 Rules, the two Services, namely, Ministerial and Executive were merged into one to be known as the "Subordinate Service of the Delhi Administration". The 1980 Rules also dispensed with the method of recruitment to Grade-II through Departmental Competitive Examination and raised the quota of vacancies to be filled in Grade-II to 33-1/3 per cent by direct recruitment and 66-2/3 per cent by promotion in the manner so that the first and second vacancies were to be filled by promotion and the third vacancy by direct recruitment. The earlier Rule 26 which provided for determination of seniority on the basis of the 1965 Rules was also substituted by a new rule providing for determining the inter-se seniority of officers belonging to various Grades i.e., Ministerial and Executive, appointed under rule 6 prior to the date of amendment, on the basis of their continuous length of service in their respective grades. The first proviso to the amended Rule 26(1) also laid down that "Provided that the persons belonging to the same grade shall be ranked inter-se in order of their relative seniority in the present grade, as the case may be."

7. The applicants and some others similarly situated challenged the amendment of 1980 before the Delhi High Court in CWP No. 1345 of 1980 - Shri G.R. Gupta and Others v. The Union of India and Others, and CWP No.1354 of 1980 - Shri H.L. Suri & Others v. Delhi Administration & Others. The Delhi High Court, vide its judgment dated 13th May, 1982, while upholding the merger of the Ministerial and the Executive wings of the Delhi Administration Subordinate Service, struck down the

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substituted Rule 26 as inserted by the 1980 Amendment mainly on the ground that the first proviso was contrary and repugnant to the main rule. The operative part of the judgment dated May 13, 1982 of the Delhi High Court reads as follows: -

> "The result of the above discussion is that the challenge of the petitioners in C.W.Ps 1882, 1883 and 1885 of 1980 to the merger of the two subordinate services of the Delhi Administration into one known as "Subordinate Service of the Delhi Administration" by the 5th Amendment of the 1967 Rules fails. The aforesaid three petitions and C.W.Ps 1345 and 1354 of 1980 succeed to the extent that the four impugned orders, one of June 18, 1980 and three of September 27, 1980 are held ultra vires of the powers conferred on the Administrator and are hereby quashed. The substituted Rule 26 by the 5th Amendment of the 1967 Rules is also struck down. It will be open to the Administrator to promulgate a new Rule 26 in accordance with law or to take such remedial action as he may be advised. On the facts and circumstances of the case, the parties are left to bear their ow cost."

8. By a Notification dated 12th July, 1985, the Delhi Administration issued an Amendment called the Delhi Administration Subordinate Service (3rd Amendment) Rules, 1985 substituting a new rule 26 for fixation of seniority. Rule 26, as introduced by the Amendment of 1985, which is challenged in these applications reads as follows: -

> "26(1) The following principles will be followed for fixation of seniority of persons appointed to various grades under rule 6 and 19 prior to 4th December, 1980: -

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(a) The inter-se seniority of direct recruits in particular grade shall be determined from the date of appointment in the respective grade with due regard to their position in the merit list;

(b) The seniority of two sets of promotees i.e. promotees on the basis of seniority subject to rejection of unfit and those promoted on the basis of merit determined through a competitive examination shall be determined in the following manner: -

i) The inter-se seniority of persons promoted to a particular post in the cadre on the recommendations of a regularly constituted Departmental Promotion Committee, shall be determined from the date of their appointment to such post whether on a short-term or purely temporary or on ad hoc basis followed by regularisation on that post without entailing any break in service in that grade, subject to their position in the merit list, if any, prepared by the Departmental Promotion Committee;

ii) Persons promoted on the basis of an examination of Departmental candidates shall be assigned seniority from the date of their appointment in the grade to which they are promoted subject to their position in the merit list.

(2) A seniority list of officers in such grade of the Executive and Ministerial Service appointed against any post in the cadre under rules 5, 6 and 19 prior to the 4th Dec., 1980 shall separately be prepared on the basis of principles as laid down in sub-rule (2) of rule 5 and sub-rule (1) of this rule, as the case may be

showing position of each officer in the respective grade as on 3.12.80.

(3) The inter-se seniority of officers appointed against various posts in the cadre under rule 5 or rule 6 or rule 19 in the Ministerial and executive service prior to the 4th Dec., 1980 shall be integrated and determined on the basis of the date of their respective seniority as shown in the list prepared under sub-rule (2) so as to indicate the position of each such officers in a particular grade in the Subordinate Service of the Delhi Administration as on 4th Dec. 1980.

PROVIDED THAT where the date of appointment of two officers is the same, elder in age will rank senior to younger one; and

(4) The seniority of officers appointed against various posts in the service by direct recruitment or by promotion, as the case may be in a substantive or in a temporary capacity on or after the 4th Dec., 1980 shall be determined in accordance with principles laid down in the Delhi Administration (Seniority) Rules, 1965 for determination of inter-se seniority of direct recruits and promotees."

9. In pursuance of the new Rule 26 introduced by the 1985 Amendment, the Delhi Administration on 6th January, 1986 circulated a final seniority list of Grade II (Ministerial) officers and also issued an order on the same date purporting to regularise the seniority promotees mentioned therein from the various dates indicated in the said order. The Delhi Administration also made certain promotions on 26th February, 1986 and 25th July, 1986 to Grade I (Ministerial). The new Rule 26, the seniority list issued on 6.1.1986 and the other orders referred to above have been challenged in these

applications. The main attack on the new Rule 26 rests on the ground that it suffers from the same infirmity and vice on account of which Rule 26 of the 1980 Amendment Rule was struck down by the High Court of Delhi. It has been contended that under Rule 26 of the 1980 Amendment Rules, it was provided, as has been done in the 1985 Amendment Rules, that the inter-se seniority of the officers belonging to various services of different grades shall be determined on the basis of their length of service. However, the proviso thereto provided, inter-alia, that the persons belonging to the same grade shall be ranked inter-se in the order of their relative seniority in the present grade as the case may be. Rule 26 of the 1985 Amendment Rules also seeks to provide that the seniority of the persons belonging to the same grade shall be fixed having regard to their position in the merit list. The fixation of seniority having regard to the position in the merit list is totally foreign to and de hors the fixation of seniority on the principle of length of service. It is contended that under Rule 26 of the 1980 Amendment Rules also, the fixation of seniority under the proviso thereof was foreign to and de hors the fixation of seniority on the principle of length of service. The Delhi High Court struck down the said rule as inserted by the 1980 Amendment Rules as the two proviso relating to the fixation of seniority could not stand together and were repugnant and absurd. It is argued that the two principles of fixation of seniority contemplated under Rule 26 of the 1985 Amendment cannot also work together and are also repugnant and absurd, inter alia, for the same reason as aforesaid on account of which Rule 26 of 1980 Amendment Rules was struck down by the High Court of Delhi. It is further contended that the cut off date provided in the amended Rule 26 namely 4.12.1980 is purely arbitrary and invalid. When the new Rule was framed and promulgated on 12.7.85 the

Administrator was aware that even after 4.12.1980 the appointments had not been made to the various grades in question strictly in accordance with the quota prescribed in the Rules, and as such, it would be inequitable to determine the inter se seniority of persons appointed by the different methods of recruitment by the principle of rotation of vacancies. It is stated in the application that between 4.12.1980 and 12.7.1985 appointments to the posts in various grades had not been made in accordance with the prescribed quota and the prescribed quota Rule had not been followed in making the appointments. It is also contended that whereas Rule 26(1)(a) provides that the inter-se seniority of direct recruits in a particular grade shall be determined from the date of appointment in respective grade with due regard to their position in the merit list, and Rule 26(1)(b)(ii) also provides that persons promoted on the basis of an examination of departmental candidates shall be assigned seniority from the date of their appointment in the grade to which they are promoted subject to their position in the merit list, Rule 26(3) provides that the integrated seniority list of officers shall be prepared on the basis of dates of their respective seniority as shown in the list prepared under sub-rule (2) thereof. By adopting the criterion of the date of respective seniority for the determination of seniority in the integrated list, a necessary corollary that would follow would be that the basis of merit which has been adopted as a principle under Rule 26 sub rules (1) and (2) would in a large number of cases be given a go by. It is also pointed out that the working of the new Rule 26 would result in an anomalous position where the date of appointment of two or more persons is the same but a person is assigned a position in seniority higher than another person on account of his position in the merit list being higher in accordance with the provision of sub-rule 1 of

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Rule 26, the said person who is so assigned a higher position would on the integration and determination of seniority under sub-rule 3 of Rule 26 become junior and be assigned a position lower in the seniority under the proviso to sub-rule 3 of rule 26 of the 1985 Amendment Rules if he happens to be younger in age than the other person.

10. The main questions for consideration in these applications are the principles to be followed for determination of seniority and the vires of the new Rule 26 regarding seniority. For the period prior to the date of merger of the two wings of the Delhi Administration Subordinate Service on 4th December, 1980, the Rule seeks to determine the seniority on the basis of continuous length of service. Shri R.L. Tandon, learned counsel for the applicants, who were promoted on the basis of Departmental Examination held in January, 1977 (in short referred hereinafter as Test Promotees) contended that on the basis of the various rulings of the Supreme Court, the applicants were entitled to the fixation of their seniority in accordance with the rotation of vacancies against which they were appointed i.e., the vacancies earmarked for the Test Promotees in the Recruitment Rules, although they would get their seniority from the dates of their actual appointment in the Service and not from the dates when the vacancies earmarked for them actually arose. In other words, the Test Promotees would be adjusted against the slots reserved for them, but their seniority would be pushed down to the dates of their actual appointment and any persons appointed against these vacancies by way of ad-hoc promotion would be placed below them. Shri Tandon argued that the appointment of seniority promotees in excess of their quota was ab initio void. In this connection, he relied on certain observations of the Delhi High Court in their judgment of May 13, 1982 that "If entry in the service is not permissible under the statutory rules,

then regularisation cannot introduce a new mode of appointment". He also referred to the findings of the Delhi High Court in the same judgment that "The officials who have been recruited against the quota reserved for direct recruitment on the basis of a Competitive Examination or promotees on the basis of merit to be determined through a competitive examination are entitled to be appointed against the vacancies reserved for them in the 1967 Rules. At the same time they are entitled to the seniority to be determined according to the rotation of the vacancies reserved for direct recruitment and promotees in the recruitment rules." Shri Tandon also referred to a number of rulings in support of his contention.

11. Shri P.P. Rao, learned counsel for the respondents (Delhi Administration), refuting these arguments contended that the observations of the Delhi High Court referred to above were in the nature of obiter and the operative part of the judgment did not give any such direction. The Delhi Administration has proceeded in the matter on the basis of the law as laid down by the Supreme Court, in its various judgments.

12. We now proceed to examine the various pronouncements of the Supreme Court which have been the subject matter of interpretation and arguments before us by the counsel on either side.

13. In S.G. Jaisinghani v. Union of India and others (AIR 1967 S.C. 1427), the Supreme Court made the following observations: -

> "....We are of opinion that having fixed the quota in exercise of their power under rule 4 between the two sources of recruitment, there is no discretion left with the Government of India to alter that quota according to the exigencies of the situation or to deviate from the quota in any particular year,

at its own will and pleasure. As we have already indicated the quota rule is linked up with the seniority rule and unless the quota rule is strictly observed in practice, it will be difficult to hold that the seniority rule i.e., rule 1(f) (iii) and (iv), is not unreasonable and does not offend Art. 16 of the Constitution. We are accordingly of the opinion that promotees from Class II, Grade III to Class I, Grade II Service in excess of the prescribed quotas for each of the years 1951 to 1956 and onwards have been illegally promoted and the appellant is entitled to a writ in the nature of mandamus commanding respondents 1 to 3 to adjust the seniority of the appellant and other officers similarly placed like him and to prepare a fresh seniority list in accordance with law after adjusting the recruitment for the period 1951 to 1956 and onwards in accordance with the quota rule prescribed in the letter of the Government of India No.F.24(2) Admn. I.T./51 dated October 18, 1951. We, however, wish to make it clear that this order will not affect such Class II Officers who have been appointed permanently as Assistant Commissioners of Income-tax. But this order will apply to all other officers including those who have been appointed Assistant Commissioners of Income-tax provisionally pursuant to the orders of the High Court." (para 13)

14. In Bachan Singh and another v. Union of India and others (AIR 1973 S.C. 441), it was held that the direct recruits were appointed against their own quota and as such the departmental promotees could not have grievance on the

ground of their seniority against the absorption and seniority of direct recruits. The Supreme Court made the following observations: -

> "18. The direct recruits who were appointed by interview fell within the class of direct recruits. The quota fixed for direct recruits was never infringed by absorbing direct recruits by interview beyond the quota. The confirmation of direct recruits and departmental promotees against permanent vacancies was in accordance with the quota fixed. By reason of relaxation of rules in regard to increase of quota for departmental promotees they gained advantage during the years 1959 to 1963 when because of the emergency direct recruits by interview were selected by the Union Public Service Commission."

15. In Mervyn Continho and others v. Collector of Customs, Bombay and others (AIR 1967 S.C. 52), the following observations of the Supreme Court are relevant: -

> "....The order of the Board of 1963 on the basis of which the impugned seniority list of Appraisers has been prepared clearly lays down that "the principle of determination of seniority of the direct recruits and the promotees inter se in the prescribed ratio of 1:1 should be worked out." This order is in accordance with the circular of 1959 and as we have said already, there is no inherent vice in the principle of fixing seniority by rotation in a case where a service is composed on fixed proportion of direct recruits and promotees. Nor do we think that this system is on a par with the carry-forward rule, which was struck down by this Court in T. Devadasan v. Union of India AIR 1964 SC 179, and on which strong reliance is placed on

behalf of the petitioners. In the case of the carry-forward rule certain quota is fixed annually for a certain class of persons and it is carried forward from year to year. This is very different from a case where a service is divided into two parts and there are two sources of recruitment, one of promotion and the other by direct recruitment. In such a case, the whole cadre of a particular service is divided into two parts and there is no question of carrying anything forward from year to year in the matter of annual intake. The basis on which the carry-forward rule was struck down by this Court does not, therefore, apply to a case where the whole cadre of a service is divided in certain fixed proportions between promotees and direct recruits. The petitioners, therefore, can get no assistance from Devadasan's case, AIR 1964 SC 179." (para 7)

16. In Bishan Sarup Gupta v. Union of India and others (AIR 1972 SC 2627), the Supreme Court observed:

"....If there were promotions in any year in excess of the quota, those promotions were merely invalid for that year but they were not invalid for all time. They could be regularised by being absorbed in the quota for the later years. That is the reason why this court advisedly used the expression "and onwards" just to enable the Government to push down excess promotions to later years so that these promotions can be absorbed in the lawful quota for those years." (para 7)

".....The vacancies for any particular year being ascertained, not more than 1/3rd of the same were to go to the promotees

and the rest to the direct recruits. The ratio was not made dependent on whether any direct recruit was appointed in any particular year or not. We are, therefore, unable to accept the construction put on the quota rule by the High Court. In our opinion, the promotees were entitled to 1/3rd of the vacancies in any particular year whether or not there was direct recruitment by competitive examination in that year."

(para 14)

17. In A.K. Subraman and others v. Union of India and others (AIR 1975 SC 483), the Supreme Court reiterated the same view when they made the following observation:

"28. When recruitment is from two or several sources it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation. The existence of a quota and rotational rule, by itself, will not violate Article 14 or Article 16 of the Constitution (See Mervyn Continho v. Collector of Customs, Bombay (1966) 3 SCR 600 = (AIR 1967 SC 52) and Govind Dattatraya v. Chief Controller of Imports & Exports, (1967) 2 SCR 29 = (AIR 1967 SC 839). It is the unreasonable implementation of the same which may, in a given case, attract the frown of the equality clause. If the seniority list is now properly prepared in the manner indicated in this judgment, there may be no objection on the score of Article 14 or Art. 16 of the Constitution."

18. The position was further clarified by the Supreme Court in P.S. Mahal v. Union of India (AIR 1984 SC 1291).

The following observations of the Supreme Court are relevant: -

"..... But it is now well settled as a result of several decisions of this Court that in the absence of any statutory rule or executive memorandum or order laying down a rule for determining seniority in a grade, the normal rule applicable would be to determine seniority on the basis of length of continuous officiation in service. Vide the observations of Palekar, J. in B.S. Gupta v. Union of India, (1975) 1 SCR 104 at p. 113: (AIR 1974 SC 1618 at p. 1624). To the same effect we find the observations of Krishna Iyer, J., speaking on behalf of the Court in Chauhan v. State of Gujarat, (1977) 1 SCR 1037 (AIR 1977 SC 251), where the learned Judge said at page 1057 of the report:

"Seniority, normally, is measured by length of continuous officiating service - the actual is easily accepted as the legal." Chandrachud, J., as he then was, also reiterated the same principle when he said in S.B. Patwardhan v. State of Maharashtra (1977) 3 SCR 775 at p. 800 : (AIR 1977 SC 2051 at p. 2068), that "all other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear similar responsibilities". The inter se seniority of Executive Engineers

promoted from the grades of Assistant Engineers and Assistant Executive Engineers regularly within their respective quota from and after 22nd Dec., 1959 was, therefore, determinable on the basis of length of continuous officiation in the grade of Executive Engineers and the Court was, in the circumstances, justified in A.K. Subraman's case (AIR 1975 SC 483) in holding in paragraph 1 of the summary of its conclusions that "when Assistant Engineers (Class II) are initially appointed in a regular manner in accordance with the rules to officiate as Executive Engineers, their seniority in service in Grade I will count from the date of their initial officiating appointment as Executive Engineers was within their quota". It is undoubtedly true that in reaching this conclusion the Court proceeded on the assumption that "the Memorandum dated 22nd June, 1949 was clearly applicable" and equally it must be conceded that this assumption was erroneous in so far as inter se seniority between Assistant Engineers and Assistant Executive Engineer promoted from and after 22nd December, 1959 was concerned, since the rule of seniority based on length of continuous officiation enunciated in the Memorandum dated 22nd June, 1949 was repealed by the Memorandum dated 22nd December, 1959. But it can hardly be disputed that the conclusion reached by the Court was correct in law, because in the absence of any specific rule of seniority governing determination of inter se seniority between Assistant Engineers

and Assistant Executive Engineers promoted from and after 22nd December, 1959, their inter-se seniority was clearly governed by the rule of seniority based on length of continuous officiation. We do not think it would be right to assume that the Court in A.K. Subraman's case overlooked that the rule of seniority laid down in the Memorandum dated 22nd June, 1949 was repealed by the Memorandum dated 22nd December, 1959 and it is, therefore, quite possible that when the Court said that "the Memorandum of June 22, 1949 will clearly apply", what the Court meant was that the rule of seniority based on length of continuous officiation would clearly apply for determination of inter se seniority between Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers. We may point out that in any event the decision in A.K. Subraman's case holding that the inter se seniority between Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers should be governed by the rule of seniority based on length of continuous officiation and that their inter se seniority should be determined on the application of this rule of seniority, must be regarded as binding on the parties and it is not open to the petitioners or to the respondents to raise any contention contrary to this conclusion reached by the Court. This conclusion, we may repeat, was not limited to Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers prior to 22nd December, 1959 but also covered Assistant Engineers and Assistant Executive Engineers promoted subsequent to that date right up to the date of decision of the Court. We must, therefore, hold that notwithstanding Rules 2 (iii) and 2 (iv) of the Rules of 1976, the inter se seniority between Assistant Engineers and Assistant Executive

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Engineers promoted regularly within their respective quota up to 11th December, 1974 must be determined on the basis of length of continuous officiation in the grade of Executive Engineers, subject of course to the length of continuous officiation in the case of Assistant Engineers being computed from the date of their confirmation as Assistant Engineers."

(para 19)

In the same judgment, the Supreme Court also observed:

"....This Court also held, relying on the observations in Bishan Swaroop Gupta v. Union of India, 1975 Supp SCR 491 : (AIR 1972 SC 2627)(hereinafter referred to as the 1st Bishan Swaroop Gupta case) that the ratio of promotions in the grade of Executive Engineers in any particular year was not dependent upon whether any persons from one class or the other were promoted or not and this was made clear by giving an illustration that if there were three vacancies in a particular year, two would go to Assistant Executive Engineers while one would go to the Assistant Engineers and even if there were no eligible Assistant Executive Engineers who could be promoted to fill in the two vacancies belonging to their quota, one vacancy would have to be filled by promotion of an Assistant Engineer. If, in such a case, having regard to the exigencies of the situation the two vacancies belonging to the quota of Assistant Executive Engineers had to be filled in by Assistant Engineers for want of availability of eligible

Assistant Executive Engineers, the appointment of Assistant Engineers to fill in such two vacancies would be irregular because that would be outside their quota but in that event, observed the Court, they would have to be pushed down to later years when their appointment could be regularised as a result of absorption in their lawful quota for those years." (para 7)

19. In N.K. Chauhan v. State of Gujarat (AIR 1977 SC 251), the Supreme Court had occasion to consider the question of determining seniority where the quota and rota rule was not strictly observed. The Supreme Court observed:

"3. The quota rule does not inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier."

"33. These formulations based on the commonsense understanding of the Resolution of 1959 have to be tested in the light of decided cases. After all, we live in a judicial system where earlier curial wisdom, unless competently over-ruled, binds the Court. The decisions cited before us start with

the leading case in Mervyn Continho v. Collector of Customs, Bombay, (1966) 3 SCR 600 = (AIR 1967 SC 52) and closes with the last pronouncement in Badami v. State of Mysore, (1976) 1 SCR 815. This time-span has been dicta go zigzag but we see no difficulty in tracing a common thread of reasoning. However, there are divergencies in the ratiocination between Mervyn Continho (Supra) and Govind Dattatraya Kelkar v. Chief Controller of Imports and Exports, (1967) 2 SCR 29 = (AIR 1967 SC 839) on the one hand and S.G. Jaisinghani v. Union of India, (1967) 2 SCR 703 = (AIR 1967 SC 1427), Bishan Sarup Gupta v. Union of India, (1975) Supp SCR 491 = (AIR 1972 SC 2627), Union of India v. Bishan Sarup Gupta, (1975) 1 SCR 104 = (AIR 1974 SC 1618) and A.K. Subraman v. Union of India (1975) 2 SCR 979 = (AIR 1975 SC 483) on the other, especially on the rota system and the year being regarded as a unit, that this Court may one day have to harmonize the discordance unless Government wakes up to the need for properly drafting its service rules so as to eliminate litigative waste of its servants' energies."

20. In A. Janardhana v. Union of India and others (SLR 1983 (2) 113), the Supreme Court held:

"Where the rule provides for recruitment from two sources and simultaneously prescribes quota, unless there is power to relax the rule as has been held in a catena of decisions, any recruitment in excess of the quota from either of the sources would be illegal and the excess recruits unless they find their place by adjustment in subsequent years in the quota, would not be members of the service." (para 21)

The Supreme Court further observed:

> ".....Therefore, once the quota rule was wholly relaxed between 1959 and 1969 to suit the requirements of service and the recruitment made in relaxation of the quota rule and the minimum qualification rule for direct recruits is held to be valid, no effect can be given to the seniority rule enunciated in para 3(iii), which was wholly inter-linked with the quota rule and cannot exist apart from it on its own strength." (para 29)

21. In Karam pal v. Union of India (SLR 1985 (1) 639), the Supreme Court held that quota and rota have got to go hand in hand and if the quota is not properly adhered to, the rota system must fail. The following observations made in the said case are relevant:

> "15. The Rules have held the field for 22 years now. During this period direct recruitment had not been made only in two years being 1966 and 1970. Though in the writ petitions a general stand had been adopted that direct recruitment had not been made in several years, after the counter affidavit was filed and it was emphatically asserted that excepting in these two years direct recruitment had been made in other years, there has been no challenge to that assertion. We agree with the contention that quota and rota have got to go hand in hand and if the quota is not properly adhered to, the rota system must fail. In fact, the scheme is such that it can operate in an appropriate way only when recruitment is effected through both the processes as envisaged."

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"20. In the course of arguments reference was made to certain decisions of this Court. In N.K. Chauhan & Ors. V. State of Gujarat & Ors (2), this Court held that the quota system does not necessitate the adoption of the rotational rule in practical application and many ways of working out quota prescribed can be devised of which rota is certainly one. It was further held that while laying down a quota when filling up vacancies in a cadre from more than one source, it is open to Government, subject to tests under Article 16, to choose 'a year' or other period or vacancy by vacancy basis, to work out the quota among the sources. But once the Court is satisfied, examining the constitutionality of the method proposed, that there is no invalidity, administrative technology may have free play in choosing one or the other of the familiar processes of implementing the quota rule. This court did indicate that as Judge we cannot strike down a particular scheme because it is unpalatable to forensic taste. This Court further pointed out that ordinarily seniority is measured by length of continuous officiating service."

22. In G.S. Lamba and others v. Union of India and others (SLR 1985 (1) 687), the Supreme Court observed that where there was an enormous departure in following the quota rule year to year, an inference was permissible that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority and once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be illegal or invalid. The following

observations made in the said case are relevant: -

> "28. Once the promotees were promoted regularly to substantive vacancies even if temporary unless there was a chance of their demotion to the lower cadre, their continuous officiation confers on them an advantage of being senior to the later recruits under Rule 21(4). If as stated earlier by the enormous departure or by the power to relax, the quota rule was not adhered to, the rota rule for inter-se seniority as prescribed in Sec. 25(1)(ii) cannot be given effect. In the absence of any other valid principle of seniority it is well-established that the continuous officiation in the cadre, grade or service will provide a valid principle of seniority."

23. In Narender Chadha and others v. Union of India and others (AIR 1986 SC 638), the Supreme Court made the following observations:

> ".....But we, however, make it clear that it is not our view that whenever a person is appointed in a post without following the Rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that post. Such a person may be reverted from that post. But in a case of the kind before us where persons have been allowed to function in higher posts for 15 to 20 years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as persons not belonging to the Service at all,

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particularly where the Government is endowed with the power to relax the Rules to avoid unjust results." (para 14)

"19. As observed in D.R. Nim v. Union of India (1967) 2 SCR 325: (AIR 1967 SC 1301) when an officer has worked for a long period as in this case for nearly fifteen to twenty years in a post and had never been reverted it cannot be held that the officer's continuous officiation was a mere temporary or local or stop gap arrangement even though the order of appointment may state so. In such circumstances the entire period of officiation has to be counted for seniority. Any other view would be arbitrary and violative of Arts. 14 and 16(1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstances."

24. In Ajit Singh Rana and others v. Delhi Administration and others (1985 (2) SLR 558), a Division Bench of the Delhi High Court held that "The seniority between the petitioners must be determined in accordance with the respective dates of their continuous officiation in Grade III and those of the respondents who are appointed after the petitioners so appointed, cannot rank higher in seniority over the petitioners."

25. It has been argued by the learned counsel for the applicants that the decision of the Delhi High Court in Ajit Singh Rana's case is not binding in so far as the applicants in the present case are concerned on the grounds that these applicants were not a party to that case, that in the case of Ajit Singh Rana, the parties were those belonging to the Executive side who had been promoted from

Grade IV to Grade III and that the dispute in that case related only to two classes of promotees and for fixation of their seniority there was no provision in the 1965 Rules. We are unable to agree with the contention of the learned counsel for the applicants. The mere fact that the applicants in Ajit Singh Rana's case belonged to the Executive cadre of the Subordinate Service or that the promotions involved were from Grade IV to Grade III would not make a difference in so far as the principle for determining seniority is concerned. In that case also, the seniority list issued on 8.5.1978 was under challenge and the same was held to be invalid on the ground that the quota rule had been violated and so seniority could not be determined on the basis of rotation of incumbents recruited from various sources. The decision in the case of Ajit Singh Rana may not operate res-judicata in so far as the present applicants are concerned, but we see no valid reason for coming to a different conclusion in the background of the present case, which is more or less the same as in the case of Ajit Singh Rana.

26. The seniority list issued on 8th May, 1978 was not only set aside by the Division Bench of the Delhi High Court in Ajit Singh Rana's case but the prayer (b) in Civil Writ Petition No.1345 of 1980 of Shri G.R. Gupta and others v. The Union of India & others for upholding the seniority list of 8th May, 1978 was not granted. It was pointed out by Shri P.P. Rao, learned counsel for the respondents that as per explanation 5 to Section 11 of the Civil Procedure Code, a relief having not been granted, should be deemed to have been rejected.

27. In Mathura Prasad v. Dossibai N.B. Jeejeebhoy (AIR 1971 S.C. 2355), the Supreme Court made the following observations on the doctrine of res judicata: -

"5. But the doctrine of res judicata belongs to the domain of procedure, it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties and cannot be reopened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which

are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata....."

28. We find force in the contention of learned counsel Shri P.P. Rao that prayer (b) in Civil Writ Petition No.1345 of 1980 (Shri G.R. Gupta & others v. The Union of India & others), which reads as under, having not been granted by the Delhi High Court vide their judgment dated May 13, 1982 and the said judgment having become final on the parties, it is not open to the applicants to ask for the same relief again:

"(b) a writ of or in the nature of mandamus or other appropriate writ order or direction and/or mandatory order do issue commanding the Respondents to give effect to the said Seniority List issued on 8th May, 1978 for all purposes and to confirm the same;"

29. It has been argued by Shri Tandon that by issuing various circulars from time to time for holding the departmental test, the Delhi Administration had been holding out to the applicants that the test would be held and if such a test were held every year, as provided in the rules, the applicants would have got their due seniority on the rotational principle. They could not now back out from the said promise or representation and deny to the applicants what had accrued to them as a vested right.

30. According to the learned counsel, the doctrine of promissory estoppel was applicable in the facts and circumstances of the case in so far as the applicants were concerned. We now proceed to examine this doctrine in the light of the various pronouncements of the Supreme Court.

31. In Union of India v. Anglo Afghan Agencies (A.I.R. 1968 S.C. 718), the Supreme Court had the occasion to examine the doctrine of promissory estoppel. The Court quoted with approval the observations of Jenkins, C.J. in Municipal Corporation of the City of Bombay v. Secretary of State, (1904) ILR 29 Bom 580, which are reproduced below:-

> " 'The doctrine involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is a correct, though it may be a convenient name to apply.'
>
> 'It differs essentially from the doctrine embodied in Sec. 115 of the Evidence Act, which is not a rule of equity but is a rule of evidence that was formulated and applied in Courts of law; while the doctrine with which I am now dealing, takes its origin from the jurisdiction assumed by Courts of Equity to intervene in the case of, or to prevent fraud.' "

The Supreme Court noted:

> "After referring to Ramsden v. Dyson, (1866) LR 1 HL 129 (170) the learned Chief Justice observed that the Crown comes within the range of equity and proceeded to examine whether the facts of the case invited the application of that principle.
>
> "(20) This case, is in our judgment, a clear authority that even though the case does not fall within the terms of S. 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution."
>
> (para 19 and 20)

The Court further observed:

> "(23) Under our jurisprudence the Government is not exempt from liability to carry out

the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen. ...."

32. In M.P. Sugar Mills v. State of U.P. (AIR 1979 S.C. 621), the Supreme Court referred to the decision in the Indo-Afghan Agencies case and summed up the position as follows: -

"The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Govt. would be held bound by the promise and the promise would be enforceable against the Govt. at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Art. 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Every one is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned; the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel? .....It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If

the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. .....But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J. pointed out in the Indo-Afghan

Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole judge of its liability and repudiate it "on an ex parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the subsequent events on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those events are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability; the Government would have to show what precisely is the changed policy and also its reason and justification so the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position"

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provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise could become final and irrevocable. Vide Ajayi v. Briscoe (1964) 3 All ER 556."

(para 24)

33. The legal position in this regard came up for review once again in Union of India v. Godfrey Philips India Ltd. (AIR 1986 S.C. 806). The Supreme Court summarised the law regarding promissory estoppel in the following words of Chief Justice P.N. Bhagwati: -

"14. Of course we must make it clear, and that is also laid down in Motilal Sugar Mills case (AIR 1978 SC 621) (supra), that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. ....."

34. In the background of the facts and circumstances

of the case under our consideration, the applicants cannot invoke the doctrine of promissory estoppel for claiming seniority based on the rotational principle of vacancies in accordance with their quota even while conceding that the seniority as it stands will be pushed down to the actual dates of appointment. The invoking of the said principle calls for a number of hypothetical assumptions and also transgresses and negatives the very principle for determining seniority in cases where the quota-rota rule has broken down. It would be inequitable to deny seniority based on continuous officiation or length of service where quota - rota rule has broken down. The promise or representation, if any, for holding Limited Departmental Test in earlier years was not held out to an identified or clearly defined class of officials. The number of persons who would have been eligible to take the test would have been changing from year to year and the test was purely optional or voluntary. There is also no guarantee that if the persons concerned had appeared in the test if the same were held earlier, they would necessarily have qualified or secured rankings which would have entitled them for appointment on the basis of merit. A person cannot rest his claim or right on a hypothetical situation or assumption that may not materialise. As held by the Supreme Court, the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires and we have no hesitation in holding that the considerations of equity do not warrant the invoking of the said doctrine in the circumstances of the present case.

35. In the present case, we have to consider whether the rules of recruitment were at all followed. Although the rules prescribed Limited Departmental Competitive Examination as a source of recruitment, this method, for one reason or another, was not resorted to till January, 1977. The

Examination was held only once during the period from 1967 to 1980 when the rule itself was amended to scrap this source of recruitment. Great emphasis has been laid by the learned counsel for the applicants on the fact that from time to time, the Delhi Administration had issued circulars for holding the test and the applicants as also others similarly placed, were pinning their hopes on being selected through this mode of recruitment. It is also asserted that the Delhi Administration has not come out with any valid reason for not holding the Departmental Test. It has been argued that since a quota was fixed for departmental test promotees, they had acquired the vested right for being appointed against the said quota and merely because the test was not held, they could not be deprived of seniority in accordance with their fitment by rotation against vacancies earmarked for them. Shri Tandon vehemently contended that although the applicants could not claim seniority from the dates when the vacancies actually arose in accordance with the principle laid down in G.S. Jaisinghani and Mervyn Continho's cases, they were entitled to seniority from the date of their actual appointment by fitment in slots or vacancies earmarked for them in accordance with the principle enunciated in A.K. Subraman and P.S. Mahal's cases. According to him, the departmental promotees who were promoted earlier on the basis of their seniority because the Departmental Competitive Examination could not be held, would have to be pushed down in the matter of seniority, which would accrue to them only from the date that they could be fitted against vacancies earmarked for them as per the quota rule. He further argued that the seniority promotees could claim seniority only from the dates when they were regularly appointed and such regular appointments could only be from the dates when

vacancies earmarked for them became available. Any promotions made in excess of the quota would have the effect of pushing down the seniority promotees lower down below the test promotees, if according to the principle of rotation of vacancies, such vacancies in accordance with the quota for seniority promotees became available on later dates.

36. We are unable to uphold or agree with any of these contentions. This is a case where the rule of quota and rota had completely broken down and the only reasonable and fair principle to determine seniority would be on the basis of continuous officiation or length of service in Grade-II. In view of the dicta laid down in the cases of G.S. Lamba and Narender Chadha that where there is a rule of relaxation the said rule should be deemed to have been exercised in favour of the persons who were promoted to higher posts against the provision of quota rule, the theory of deemed relaxation is applicable to the facts of this case. Rule 32 of the 1967 Rules gives the power of relaxation to the Administrator. It has been argued that this power is vested only in the Administrator, who was not at all aware as to why promotions were not being made in accordance with the rules and that the theory of deemed relaxation could not be invoked in the context of the facts and circumstances of this case. We find no basis for sustaining this argument; once the power of relaxation is there in the rules, the theory of deemed or implied relaxation would not call for an inquiry into the factum of the competent authority being aware or not of the circumstances regarding the strict implementation of the rules or any departures therefrom. Be that as it may, we have no hesitation in holding that the applicants can claim seniority only on the basis of their continuous officiation or length of service in Grade-II and not with reference to the vacancies meant for them in accordance with

the quota rule. The quota rule having completely collapsed, the question of seniority based on rotation of vacancies does not arise. The fact of Limited Departmental Competitive Examination having not been held for a long period of time made the quota rule non-operative and since the quota rule was not implemented, rather it was observed in its breach, the application of the rotation rule after several years would not only be grossly discriminatory, unjust and unfair, but would also not stand the test of Articles 14 and 16 of the Constitution.

37. It has also been argued before us that a large number of seniority promotees were not promoted against regular vacancies in accordance with Rule 6. Their promotions were made on an ad-hoc basis or as a stop-gap arrangement and in some cases, the promotions were not made even on the recommendations of the Departmental Promotion Committee. We saw some of the minutes of the meetings of the D.P.C. and noticed that in some cases, the record notes were not even signed by all the persons who participated in the discussions. Shri P.P. Rao, learned counsel for the respondents, contended that Rule 19 of the 1967 Rules also provides one mode of recruitment. The said rule envisages officiating appointment of an officer included in the list referred to in Rule 12 of the said Rules, if a cadre officer is not available for holding a duty post. The said officiating appointment has, however, to be subject to certain other conditions mentioned in Rule 19. Rule 19 also provides that the officiating appointments have to be made from the list prepared under Rule 12 on the recommendations of the Departmental Promotion Committee. The records produced by the Administration do not clearly establish that in all cases of persons who were promoted

on an officiating basis, the requirements of Rule 12 and Rule 19 were strictly adhered to. However, notwithstanding the fact that these requirements might not have been complied with in all cases, if there has been continued uninterrupted officiation in the higher post over a long period of time and the promotion has been subsequently regularised on the recommendations of a D.P.C. as provided for in the rules, those promotees would be entitled to seniority on the basis of their continuous officiation or length of service.

38. Now we come to the question of the vires of new Rule 26 of seniority as introduced by the Amendment of 1985. While the new Rule 26 does recognise that seniority shall be determined on the basis of continuous length of service, in so far as appointments were made during the period prior to 4.12.1980, the amended Rule in so far as it relates to the subsequent period suffers from the same vice which it seeks to cure. Sub-rule (4) of Rule 26 provides that seniority of officers appointed against various posts in the Service by direct recruitment or promotion, as the case may be, in a substantive or in a temporary capacity on or after the 4th December, 1980 shall be determined in accordance with the principles laid down in the Delhi Administration (Seniority) Rules, 1965 for determination of inter-se seniority of direct recruits and promotees. The amendment was issued on 12th July, 1985 and is based on the assumption that appointments and promotions on or after 4th December, 1980 were made in accordance with the quota rule. We find no basis warranting the correctness of this assumption. It has been contended that 4th December, 1980 was the date when Ministerial and Executive Wings of the Services were integrated into one and the mode of recruitment through Limited Departmental Competitive Examination was abolished, and as such there will be no difficulty in implementing the

seniority rule as envisaged by Rule 7 of the Delhi Administration Subordinate Service Rules, 1967 for determining the inter-se seniority of direct recruits and promotees from that date onwards. However, the principle of seniority has to be determined not with reference to the date of amalgamation or integration of two wings of the Service or abolition of a particular mode of recruitment, but with reference to the actual recruitments made on or after 4th December, 1980 till the date when the new Rule was notified. It has been contended in ground (D) of the application that between 4/12/1980 and 12/7/1985, "the appointments to the posts in various grades had not been made in accordance with the prescribed quota and the prescribed quota Rule had not been followed in making the appointments to the grades by different methods of recruitment." This position is sought to be controverted in the counter filed by the respondents where it is stated that "the Administration has been recruiting from both the sources in normal course and, therefore, sub-rule (4) of Rule 26 is being applied to persons recruited and appointed after 4th of December, 1980."

39. The question here is not whether persons are being appointed from both the sources viz., direct recruitment and promotion, but whether appointments have been made in accordance with the quota rule. The rota rule of seniority can be invoked only if the appointments had been made strictly in accordance with the quota rule. Even assuming for a moment for the sake of arguments that appointments were in fact made in accordance with the quota rule, this could have been done only separately to the two segments of the Service, namely, Ministerial and Executive and not to the integrated Service,

which is supposed to have come into being with effect from 4.12.1980. It is admitted on both sides that the process of integration has not been completed so far and one integrated cadre of Ministerial and Executive segments has not come into being. Promotions and appointments continued to be ~~xxx~~ made from 4.12.1980 onwards to the two separate wings, Ministerial and Executive, and even if such appointments were made in accordance with the quota rule - for which there is no basis - this would not warrant the application of the rota rule of seniority to the integrated cadre of Ministerial and Executive wings retrospectively from 4.12.1980. For a valid application of the rota rule of seniority, the vacancies in the integrated cadre have to be filled in strictly in accordance with the quota rule which has admittedly not been done in the present case.

40. The new Rule 26 is not workable in many other respects also in so far as the period prior to 4.12.1980 is concerned. There is force in the contention of the applicants that in accordance with the seniority rule 26(1)(b), the seniority of two sets of promotees i.e., those promoted on the basis of seniority subject to rejection of the unfit and those promoted on the basis of merit determined through a competitive examination is to be determined in accordance with their position in the merit list, as prepared by the D.P.C. or the examining body, as the case may be. Sub-rule (3) of Rule 26 lays down that in the integrated list, the inter-se seniority of officers shall be determined on the basis of the date of their respective seniority as shown in the list prepared under sub-rule (2). Such an exercise in the determination of seniority would result in some cases in disturbing the seniority of persons which may already have been fixed on the criterion of merit. According to the respondents, whereas the inter-se seniority among direct recruits, test

promotees and seniority promotees of a particular batch is to be determined according to the merit list, in the integrated list the persons in a batch who had been appointed earlier, would take precedence in the matter of seniority over the persons of a batch who had been appointed subsequently. However, this position is not clearly brought out from a plain reading of the rule. Sub-rule (3) of Rule 26 reads as follows: -

> "(3) the inter-se seniority of officers appointed against various posts in the cadre under rule 5 or rule 6 or rule 19 in the ministerial and executive services prior to the 4th December, 1980 shall be integrated and determined on the basis of the date of their respective seniority as shown in the list prepared under sub-rule (2) so as to indicate the position of each such officers in a particular grade in the Subordinate Service of the Delhi Administration as on 4th December, 1980.
>
> PROVIDED that where the date of appointment of two officers is the same, elder in age will rank senior to younger one and: "

The expression "the date of their respective seniority as shown in the list prepared under sub-rule (2)" presumably refers to the date of appointment as shown in the list prepared under sub-rule (2) and this date can offset the principle of seniority as determined by merit under sub-rule (2). The intention of the respondents, as brought out in the counter affidavit is not reflected in the rules. Whereas sub-rule (3) provides for integration of seniority of persons appointed under rule 5 or rule 6 or rule 19 in the Ministerial and Executive services, sub-rule (2) does not specify as to how the integration is to be effected first in a particular grade of the executive or ministerial service. The only provision for integration is in sub-rule (3) which

lends itself to an equivocal interpretation whether lists prepared under Rules 5, 6 and 19 in a particular grade of the Ministerial or Executive wing are first to be amalgamated among themselves as is intended by the Delhi Administration or lists prepared under different rules in a particular grade of the Ministerial wing are first to be merged with the corresponding lists of the same grade of the Executive Wing.

41. Proviso to sub-rule (3) also lays down that "where the date of appointment of two officers is the same, elder in age will rank senior to younger one". The working of the said proviso would result in an anomalous position inasmuch as where the date of appointment of two or more persons is the same, but one person is assigned a position in seniority higher than that of another on account ofhis position in the merit list being higher in accordance with the provision of sub-rule (1), the said person who is so assigned a higher position, on integration under sub-rule (3) may become junior and be assigned a position lower in seniority by virtue of proviso to sub-rule (3) of Rule 26 because he happens to be younger in age than the other person.

42. In actual implementation of the rules, a number of instances were pointed out where there were serious aberrations or distortions in seniority because of conflict arising from the application of the twin principles of merit and continuous officiation or length of service as mentioned in the Rule. Shri P.P. Rao conceded these distortions, but pointed out that if individual instances were brought to the notice of Administration, they would take necessary remedial steps.

43. Although the amended Rule 26 does recognise the principle of continuous officiation or length of service for determining seniority prior to 4th December, 1980, it suffers from serious lacuna in regard to its workability and application. Whereas sub-rule (2) of Rule 26 envisages preparation of a seniority list of officers in each grade of the Executive and Ministerial Service in respect of persons appointed against any post in the cadre under Rules 5, 6 and 19 prior to 4th December, 1980, there is no provision in the said sub-rule for integration of the lists prepared under Rules 5, 6 and 19 in each grade of the Executive and Ministerial Service. Such integration is provided for under sub-rule (3) of Rule 26, which envisages that separate lists prepared under Rules 5, 6 and 19 in the Ministerial and Executive services prior to 4.12.1980 shall be integrated, meaning thereby that there will not be any integrated list of seniority of a particular grade separately for the executive or ministerial side. The integrated list shall be available only after the lists prepared under Rules 5, 6 and 19 in one grade on the Ministerial side have been integrated with the corresponding lists in the same grade on the Executive side. Thus, there is no provision for integration of three seniority lists prepared under rules 5, 6 and 19 in each grade separately on the Ministerial and Executive sides. In actual preparation of the seniority list Grade II (Ministerial) as on 4.12.1980, this integration has already been done, which is not warranted under sub-rule (2) or sub-rule (3). In actual practice, recruitment on the Ministerial and Executive sides, whether direct or by way of promotion, has been made separately to each grade of Ministerial and Executive sides and as such, there has to be provision for integration of seniority lists in each grade

on the Ministerial and Executive sides before the final merger takes place under sub-rule (3), but there is no provision for integration of separate lists under rules 5, 6 or 19 under sub-rule (2).

44. In sub-rule (b)(i) of Rule 26(1), it is provided that the inter-se seniority of persons promoted to a particular post in the cadre on the recommendations of a regularly constituted Departmental Promotion Committee shall be determined from the date of their appointment to such post whether on a short-term or purely temporary or on ad-hoc basis, followed by regularisation on that post without entailing any break in service in that grade, subject to their position in the merit list, if any, prepared by the Departmental Promotion Committee. It was pointed out at the time of arguments that actual appointment letters are issued by the various Heads of Departments in the Delhi Administration and there was bound to be a great divergence in the actual dates of appointment in various Departments, with the result that the criterion of the date of appointment could not be reconciled with the merit position as recommended by the Departmental Promotion Committee. It was clarified by Shri P.P. Rao, learned counsel for the respondents at the time of arguments that the date of appointment in such cases would be the date of nomination by the Chief Secretary of Delhi Administration. Unless such an explanation is incorporated in the Rules by way of an amendment, its workability in actual practice may lead to serious jeopardy of the interests of the person concerned.

45. In regard to workability, it has been contended that sub-rule (3) of Rule 26 envisages integration and determination of the inter-se seniority on the basis of the date of respective seniority as shown in the list prepared

under sub-rule (2). This would have the effect of eroding seniority determined on the basis of merit under sub-rule (1). In preparing the integrated seniority list of the amalgamated Service, integration will have to be effected in three stages - first in preparing the list under Rule 6 which provides for different modes of recruitment, secondly integration of lists prepared under Rules 5, 6 and 19 in a particular grade separately for the two wings of the Service and thirdly integration of seniority lists of the Ministerial and Executive sides in a particular grade. The amended Rule 26 does not spell out as to how integration is to be effected in the various stages. This vagueness can lead to arbitrariness in actual implementation.

46. We have examined Rule 26 with a view to finding if any valid provisions can be severed and salvaged so that the rule can be implemented to achieve the objective of determining seniority on the basis of continuous length of service but reach the conclusion that this is not feasible, since sub-rule (3) which provides for integration on the basis of the date of respective seniority i.e., the date of continuous officiation or length of service cannot in some cases be reconciled with the principle of merit as envisaged under sub-rule (1). Thus whereas sub-rule (4) which is based on assumptions which are not correct and suffers from the vice it seeks to cure, other provisions of Rule 26 are liable to be struck down on the ground either of vagueness, or unworkability or irreconcilability of the principles of merit and continuous length of service.

47. In view of the above discussion, not only the amended Rule 26 is liable to be struck down, but the final seniority list of Grade II (Ministerial) as on 3.12.1980 issued on 6.1.1986 which is based on amended Rule 26 is also liable to be quashed. The promotions already made to Grade I (Ministerial) on the basis of the seniority list

dated 6.1.1986 cannot also be sustained. But since these persons have already worked in higher posts in Grade I for a certain length of time, it would be in the interest of justice if they are not reverted at this stage and are adjusted against the existing or future vacancies or by creation of supernumerary posts. Any promotions made on the basis of seniority list of 6.1.1986 after the filing of these applications which were made subject to the result of these applications, however, cannot stand nor can such persons claim any protection against reversion. However, we do not find any reason for quashing the order of regularisation dated 6.1.1986 because it proceeds on the basis of date of appointment in the grade and continuous officiation therein.

48. To sum up, the applicants who were promoted on the basis of Limited Departmental Competitive Examination held in January, 1977 are not entitled to fixation of their seniority on the basis of the vacancies meant for them in the quota rule since the quota rule, in fact, did not work and the seniority by rotation interlinked with the quota rule cannot be invoked in their cases. They would be entitled to seniority only on the basis of the date of appointment and continuous length of service in a particular grade. The seniority list issued on 8th May, 1978 no longer survives. The amended Rule 26 as introduced by the amendment of 12th July, 1985 is liable to be struck down on the grounds of its unworkability, vagueness in regard to certain aspects and adoption of different principles for determining seniority prior to 4.12.1980 and on and after 4.12.1980 when the integration of the Ministerial and Executive segments

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of the Service did not in effect come into being on 4.12.1980 and the quota - rota rule did not come into play with reference to the integrated or merged cadre from the said date. The final seniority list of Grade II circulated on 6.1.1986 which is based on the amended Rule 26 is also liable to be quashed and promotions made to Grade I on the basis of the said seniority list cannot be legally sustained but persons already promoted to Gr. I before the filing of these applications shall be protected against reversion on grounds of equity. However, the regularisation of officers from the date of their appointment based on continuous officiation in the grade vide Order dated 6.1.1986 is upheld.

49. In the light of the above, the two applications are partly allowed with the following directions: -

(1) The amended Rule 26 as incorporated vide Notification No. F.2(2)/81-JSC/S.II, dated the 12th July, 1985 is hereby struck down.

(2) The seniority list of Grade II (Ministerial) issued on 6.1.1986 for the period from 10.2.1967 to 3.12.1980 based on the amended Rule 26 is hereby quashed.

(3) The promotions made on the basis of the seniority list dated 6.1.1986 to Grade I in so far as they relate to the period prior to the filing of these applications, shall stand. The concerned persons shall be adjusted against existing or future vacancies and, if necessary, supernumerary posts may be created to accommodate them.

(4) The regularisation, made as per order No.F.3(4)/85-JSC dated 6.1.1986, which are based on continuous officiation from the date of their appointment

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in the grade shall stand.

50. There shall be no order as to costs.

(KAUSHAL KUMAR)
MEMBER (A)
23.7.1987.

(K. MADHAVA REDDY)
CHAIRMAN
23.7.1987.