(19)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO.2068/2003
O.A. NO. 2107/2003
WITH
O.A. NO.124/2004

New Delhi, this the 22nd day of September, 2004

HON'BLE SHRI V.K. MAJOTRA, VICE CHAIRMAN (A)
HON'BLE SHRI SHANKER RAJU, MEMBER (J)

O.A. NO.2068/2003
Shri C.P.S. Yadav and others Vs. Union of India and Ors.

WITH

O.A. NO. 2107/2003
Shri Mahender Partap and others Vs. Union of India and Ors.

O.A. NO.124/2004
S.K. Puri (II) and others Vs. Union of India and Ors.

Present : Shri M.L. Ohri, Shri K.B.S. Rajan and Shri K.C. Mittal with Shri Harvir Singh, learned counsel for applicants in OAs respectively.
Shri V.P. Uppal, learned counsel for official respondents in all OAs
Shri A.K. Behra, learned counsel for private respondents in all OAs.

1. To be referred to the reporter or not? Yes/~~No~~ yes

2. To be referred to the outlying Benches of the Tribunal or not? Yes/~~No~~ yes.

S. Raju

(SHANKER RAJU)
MEMBER (J)

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HON'BLE SHRI V.K. MAJOTRA, VICE CHAIRMAN (A)
HON'BLE SHRI SHANKER RAJU, MEMBER (J)

O.A. NO.2068/2003

1. Shri C.P.S. Yadav
Inspector of Income Tax,
C-256, Sarojini Nagar,
New Delhi.

2. Shri H.U. Khan
Inspector of Income Tax,
C-320, Minto Road Complex,
New Delhi-110002. .....Applicants

Versus

Union of India through,

1. The Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.

2. The Chairman,
Central Board of Direct Taxes,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.

3. The Chief Commissioner of Income Tax,
Central Revenue Building, Room No.355,
I.P. Estate, New Delhi.

4. Shri Chhutan Lal Meena
Inspector of Income Tax,

5. Shri Prem Meena
Inspector of Income Tax,

6. Shri Sardar Lal Meena,
Inspector of Income Tax,

7. Shri Sanjeev Kumar Meena,
Inspector of Income Tax,

8. Shri Murari Lal Meena
Inspector of Income Tax,

9. Shri Anil Kumar
Inspector of Income Tax,

10. Shri Prem Veer Singh,
Inspector of Income Tax,

11. Shri Rajesh Kumar
Inspector of Income Tax,

12. Shri Navin Kumar Aggarwal
Inspector of Income Tax,

13. Shri Om Parkash Verma
Inspector of Income Tax,

14. Shri Shiv Pal Singh
Inspector of Income Tax,

15. Shri Bal Kishan Gopal
Inspector of Income Tax,

16. Ms. Bhawana Sharma
Inspector of Income Tax,

17. Shri Satinder Kumar
Inspector of Income Tax,

18. Shri Preet Pal Singh
Inspector of Income Tax,

19. Shri Sunil Rana
Inspector of Income Tax,

20. Shri Umesh Kumar
Inspector of Income Tax,

21. Shri Virender Singh (Yadav)
Inspector of Income Tax,

22. Shri Rajesh Jain
Inspector of Income Tax,

23. Shri Vinod Kumar
Inspector of Income Tax,

24. Shri Mukesh Kumar
Inspector of Income Tax,

25. Shri Virender Kumar
Inspector of Income Tax,

26. Shri Rakesh Kumar
Inspector of Income Tax,

27. Shri Ashok Kumar Vishrant
Inspector of Income Tax,

28. Shri Surender Kumar Sharma
Inspector of Income Tax,

29. Shri Ajay Kumar
Inspector of Income Tax,

30. Shri Raj Singh,
Inspector of Income Tax,

31. Shri Rajinder Singh Joon
Inspector of Income Tax,

32. Shri Bhagat Singh
Inspector of Income Tax,

33. Shri Nepuni Mao
Inspector of Income Tax,

All C/o the Chief Commissioner of Income Tax,
Delhi-110001, Room No.355, I.P. Estate, New Delhi. ....Respondents

<u>O.A. NO. 2107/2003</u>

1. Mahender Partap
S/o Late Shri K.D. Singh,
Inspector, Office of CIT, Delhi-XII,
IInd Floor, 'D' Block, Vikas Bhawan,
New Delhi.

2. R.G. Aggarwal
S/o Late Shri Din Dayal Aggarwal
Inspector, Office of Addl. CIT Range 35,
Ground Floor , 'D' Block, Vikas Bhawan,
New Delhi

3. Mukand Lal
S/o Late Shri Khiali Ram
Inspector, Office of Addl. CIT Range 33,
IInd Floor, C.R. Building,
New Delhi.

4. V.K. Kapoor,
S/o Shri M.P. Kapur,
Inspector, Office of Addl. CIT Range 39,
C.R. Building,
New Delhi. .....Applicants.

Versus

1. Union of India,
through Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.

2. The Chairman,
Central Board of Direct Taxes,
Department of Revenue,
Ministry of Finance & Company Affairs,
North Block, New Delhi.

3. The Chief Commissioner of Income Tax
Delhi-I, Central Revenue Building,
I.P. Estate, New Delhi.

4. The Secretary,
Department of Personnel
North Block, New Delhi. .....Respondents.

O.A. NO.124/2004

1. S.K. Puri (II)
S/o Late Shri B.R. Puri,
Inspector, Office of Additional Comm. of Income Tax,
Range 12, IIIrd Floor,
C.R. Building,
New Delhi.

2. Kusmakar Sood,
S/o Late Shri J.C. Sood,
Inspector, Office of Additional Comm. of Income Tax,
Range 36, H-Block, Vikas Bhawan,
New Delhi. ....Applicants

Versus

1. Union of India
through Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.

2. Chairman,
Central Board of Direct Taxes,
Department of Revenue,
Ministry of Finance, North Block,
New Delhi.

2A Chief Commissioner of Income Tax, C.R. Building,
New Delhi.

3. Shri Anil Kumar

4. Shri Prem Bir Singh

5. Shri Rajesh Kumar

6. Shri Om Prakash Verma

7. Shri Shiv Pal Singh

8. Shri Bal Kishan Gopal

9. Ms. Bhavna Prashar

10. Shri Satender Kumar

11. Shri Pritpal Singh

12. Shri Sunil Rana

13. Shri Umesh Kumar

14. Shri Varinder Singh Yadav (XS)

15. Shri Rajiv Jain

16. Shri Praveen Kumar

17. Shri Rajesh Kumar

18. Shri Ashok Kumar Vishrant

19. Shri Surrender Kumar Sharma

20. Shri Ajay Kumar

21. Shri Sagar Preet

22. Shri Mohish Sood

23. Shri Chander Kumar Srivastava

24. Shri Himanshu Riyal

25. Shri Gurjas Kaur

26. Shri Vishesh Prakash

27. Shri Arjun Singh Negi

28. Shri pridipta Dutta

29. Shri Abhay Kant Das

30. Shri Pankaj Kumar Pruthy

31. Shri Surinder Kumar Verma

32. Shri Sunil Prakash

33. Shri prince Raj K

34. Shri Rishi Dev Verma

35. Shri Ravinder Kumar (PH)

36. Shri Ashok Verma

37. Shri Vijay Kishore

38. Shri Bharat Vikas

39. Shri Virender Singh

(All through Chief Comissioner of Income Tax,
C.R. Building, New Delhi.)

.....Respondents

Present : Shri M.L. Ohri, Shri K.B.S. Rajan and Shri K.C. Mittal with Shri Harvir Singh, learned counsel for applicants in OAs respectively.
Shri V.P. Uppal, learned counsel for official respondents in all OAs
Shri A.K. Behra, learned counsel for private respondents in all OAs.

ORDER

SHRI SHANKER RAJU, MEMBER (J) :-

Having grounded on the same set of facts involving identical question of law, these three OAs are disposed of by this common order.

2. Lis pertaining to seniority between direct recruits and promotee Inspectors of Income Tax has surfaced again which has to be resolved. In

all these OAs, final seniority list of Inspectors (Part –3) w.e.f. 1.3.1986 issued by letter dated 8.9.2003, Office Memorandum dated 5.9.2003 disposing the representation is also assailed.

3. Reliefs sought by the promotees to restore the seniority of 2001 and consideration of promotion to the post of Income Tax Officer on the basis of restored seniority. Impugned seniority orders are sought to be set aside. Seniority list of 17.7.2003 is also being assailed.

4. Applicants in OA No.2107/2003 are Inspectors of Northern Region. On provisional seniority list issued as per the consolidated instructions of the Government of India objections had been filed rejecting the representation seniority was finalized which had relegated their position in the seniority with giving slots of the yesteryear to the direct recruits and reckoning the seniority from the date without being appointed is the grievance.

5. In OA 2068/2003 applicants, who are Inspectors, have been placed higher in the seniority list of 2001. Their position being relegated led to filing of the present case.

6. In OA 124/2004, applicants, who are promotee Inspectors, being aggrieved with rejection of their request against relegation of seniority assailing the action of the respondents.

7. All the counsel Shri M.L. Ohri, Shri K.V.S. Rajan and Shri K.C. Mittal representing applicants of all the OAs have strongly relied upon the interpretation given to the consolidated instructions of seniority issued by the DOP&T on 7.2.1986 and 3.7.1986 to contend that the recruitment process pertaining to direct recruit would indicate its availability only from

the date of actual appointment and mere initiation of recruitment process would not be indicative of the availability for the purpose of rotation of quota for assigning of inter se seniority. Several decisions of the Apex Court have been relied upon.

8. Decision of the Division Bench of this Tribunal at Ahmedabad in OAs No.92/2003 and 123/2003 in the case of ***R.C. Yadav and Others Vs. Union of India and others*** decided on 12.1.2004 pertaining to a lis between direct recruits Income Tax Inspector and promoted Income Tax Inspectors regarding seniority published on 6.1.2003. After meticulous discussion of the consolidated instructions as well as law on the subject ruled by an order dated 12.1.2004 that the seniority of direct recruit Inspectors would commence from the date of their actual appointment and would not be on the basis of date of vacancies or recommendations of the Staff Selection Commission. As a consequence thereto, seniority list was set aside and the seniority assigned earlier had been restored.

9. The aforesaid decision was carried to the Hon'ble High Court of Gujarat at Ahmedaband and by an order dated 17.8.2004 in Special Civil Application No.3574/2004 in the case of ***Union of India and others vs. N.R. Parkar and others***, the order passed by the Tribunal was affirmed.

10. In the above conspectus, it is contended by the counsel appearing on behalf of the applicants that having attained finality the decision of the Tribunal at Ahmedabad Bench whereby the mode of assigning seniority has been enunciated *mutates mutandis* applies to the present case and accordingly, the seniority list issued and order on representation are liable to be set aside and the original seniority should be restored to the applicants as per OMs dated 7.2.1986 and 3.7.1986 with consequential benefits.

11. The aforesaid has been objected to by the learned counsel appearing on behalf of official respondents Shri V.P. Uppal. He has also filed his written submissions. According to Shri Uppal, OM dated 7.2.1986 is a clarificatory one regarding rota quota system. Word 'available' figuring in the OM refers to number of recruits. It is stated that on harmonious construction of OM, the delay in appointment of direct recruits where the process had started in the particular year then the rota quota was to be operated. The direct recruits were available as the recruitment process was initiated.

12. As regards OM dated 3.7.1986, arithmetically, an attempt has been made to explain that availability is with regard to both promotees and direct recruits. A situation has been visualized where direct recruits are available within the same year but for want of any DPC promotees were not available. Accordingly, as per OM dated 3.7.1986, the promotees would be rotated with availability of direct recruit of that year and would be bunched at the bottom of seniority list. This violates para 2.2 of the OM, where it is stipulated that promotees of later year would not become senior to the promotees of earlier year. Accordingly, emphasis of availability of both the categories within the year would get frustrated, as direct recruits are never available when the recruitment process initiates. By demonstrating this, it is stated that the only workable interpretation is available with regards to number of direct recruits. In case of direct recruits where the recruitment action is initiated simultaneously till actual appointments, which is delayed without any attribution the direct recruits would be barred by age. The decision of the High Court of Delhi in CWP No.4656/1995 in ***Vijay Kumar Dua Vs. Union of India and others*** has been relied upon to buttress that

delay in appointment at best can be a case of demotion but there is no breaking down of rota quota.

13. Shri A.K. Behra, learned counsel appearing on behalf of private respondents has strongly submitted his arguments. At the outset, he advances the principle of *per incuriam* to attack the decision of the Hon'ble High Court of Gujarat at Ahmedabad. He placed reliance on a decision of Constitutional Bench in ***A.R. Antulay Vs. R.S. Nayak and another***, (1988) 2 SCC 602 to contend that *per incuriam* are those decisions which are pronounced in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the court concerned. The following cases are also cited in support of principle of per incuriam:-

1. Ex. Constable Maan Singh Vs. Union of India and others, 86 (2000) DLT 484 (DB);
2. Ex. Constable (DRI.) Kali Ram Vs. Union of India and others, 86 (2000) DLT 163 (DB); and
3. Shamrao Vs. District Magistrate, Thana and others, AIR 1952 SC 324.

14. Learned counsel Shri Behra further contends that in the light of the decision in ***Pilla Sitaram Patrudu and others Vs. Union of India and others***, 1996 (8) SCC 637, direct recruit whose appointment has been delayed on no fault of him has to be given seniority and ranking at the due place in the select list.

15. Referring to the decision rendered by the Tribunal and also of the High Court, it is contended that the decision of the Apex Court in ***M.Subba Reddy and Anr. Vs. A.P. State Road Transport Corporation and Ors.***, 2004 (2) SC SLJ 58, which was three Judge Bench decision binding as a precedent on the High Court has not been deliberated and considered.

Accordingly, the decision of the High Court is *per incuriam* and is to be ignored.

16. Shri Behra further states that there has been no discussion as to the interpretation of DOP&T's OMs dated 7.2.1986 and 3.7.1986, as such the statutory provisions had not been considered, the decision of the High Court is *per incuriam*. In the Ahmedabad decision by the Tribunal, there is no reference to DOP&T OM dated 7.2.1986.

17. As regards the decision in ***Rajesh Kumar and others Vs. Union of India and others*** in OA No.403/2001 decided on 26.11.2001, eight persons of 1988 Bench, who had been appointed in 1994, had accorded seniority from 1988, it is stated that in the light of the decision of the Tribunal, which has attained finality after issue of the show-cause notice, the seniority has been changed. As such the applicants cannot be successfully assailed this order which has attained finality.

18. Shri K.V.S. Rajan, one of the applicants' counsel has drawn our attention to the decision of the Apex Court in ***Gaya Baksh Yadav Vs. Union of India and others***, JT 1996 (5) SC 118 to contend that OM dated 7.2.1986 was considered.

19. In his brief written submissions, it is contended that the decision of the Ahmedabad has interpreted the provisions of OM and there is a detail examination reflected from the body of the judgment.

20. As regards ***Rajesh Kumar's*** case (supra), the decision in ***Rajesh Kumar*** is *per incuriam* decided on a wrong legal provision. The basis of decision in Rajesh Kumar was the decision in the case of ***Sanjeev Mahajan and others Vs. Union of India*** in OA No.2307/1999 dated 23.2.2000 by the

Tribunal and on remand by the High Court to consider it on merit, the same was withdrawn on 26.4.2003. As the decision of ***Sanjeev Mahajan*** (supra) is set aside, the same fate is expected in Rajesh Kumar's case (supra).

21. As regards applicability of decision of the Apex Court in ***Suraj Prakash Gupta and others Vs. State of J & K & others***, JT 2000 (5) SC 413, it is contended that the same has a universal application.

22. As regards ***M.Subba Reddy's*** case (supra), the same rested upon the particular facts and circumstances.

22. In nutshell, what has been stressed by the counsel is that it does not lie within the jurisdiction of this Court where the decision of the High Court has a binding effect which should be left to the High Court to exercise its authority over the principle of *per incuriam*. Moreover, it has been stated on the strength of the decision in ***State of Bihar Vs. Kalika Kuer Alias Kalika Singh and others***, 2003 (5) SCC 448 that unless there is a glaring obtrusive omission *per incurriam* would not apply.

23. We have carefully considered the rival contentions of the parties and perused the material on record.

24. In the light of the doctrine of precedent, as the decision of the High Court is a binding precedent, the only issue left to resolve is whether the decision of the High Court of Gujarat at Ahmedabad (supra) is *per incuriam* to be ignored and the claim of the applicants is to be out rightly rejected in the light of the decision of the Apex Court in the case of ***A.P. State Road Transport Corporation*** (supra).

25. Principle of *per incuriam* is decided by a Constitutional Bench in ***A.R. Antulay*** (supra) with the following observations:-

> "42. It appears that when this Court gave the aforesaid directions on February 16, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar case[5]. SeeHalsbury's Laws of England, 4th edn., Vol. 26, page 297, page 578 and page 300, the relevant notes 8, 11 and 15; Dias on Jurisprudence 5th edn., pages 128 and 130; oung v. Bristol Aeroplane Co. Ltd.[17] Also see the observations of Lord Goddard in Moore v. Hewitt[18] and Penn v. Nicholas[19]. "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelly v. Wakeling[20]. Also see State of Orissa v. Titaghur Paper Mills Co. Ltd.[21] We are of the opinion that in view of the clear provisions of Section 7 (2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong."

26. The following are the observations in the case of ***Allen v. Flood***, [1898] A.C.1, reproduced in the Division Bench decision of the High Court in the case of ***Dr.Panakkal Mohamed v. Union of India***, 1993(3) SLR 32:-

> "We are also reminded of the following famous passage of Earl of Halabury L.C. in Quinn v. Leathem, [1901] A.C. 495 (House of Lords)] :-
>
> > "Now, before discussing the case of *Allen v. Flood,* [1898] A.C.1, and what was decided therein, there are two observations of a general character which I wish of make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what is actually decides.""

27. In the ***State of Bihar Vs. Kalika Kuer Alias Kalika Singh and Others***, (2003) 5 SCC 448, after meticulous discussion on the precedent or

principle of per incuriam, the following are the observations of the Apex Court:-

> "5. At this juncture we may examine as to in what circumstances a decision can be considered to have been rendered per incuriam. In Halsbury's Laws of England (4th End.) Vil. 26: Judgment and orders: Judicial Decisions as Authorities (pp.297-98, para 578) we find it observed about per incuriam as follows:-
>
> > "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow[2]; or when it has acted ignorance of a House of Lords decision in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force[3]. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties[4], or because the court had not the benefit of he best argument[5], and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority[6]. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake."[7]

Lord Godard, C.J. in *Huddersfield Police Authorities case2* observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incurriam.

6. In a decision of this Court reported in *Govt. of A.P. v. B. Satyanarayana Roa*[8] it has been held as follows: (SCC pp.264-65, para 8)

> "The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court while deciding that issue. ... We, therefore, find that the rule of per incuriam cannot be invoked in the present case. Moreover, a case cannot be referred to a larger Bench on mere asking of a party. A decision by two Judges has a binding effect on another coordinate Bench of two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to laying down a correct law."

7. According to the above decision, a decision of the coordinate Bench may be said to have ceased to be good law only if it is shown that it is due to any subsequent change in law.

8. In State of U.P. v. Synthetics and Chemical Ltd.[9] this Court observed: (SEE pp. 162-63, para 40)

> "40. 'Incuria' literally means 'carelessness', In practice *per incuriam* appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority'. (Young v. Bristol Aeroplane Co Ltd.)[2]. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law".

9. In Fuerst Day Lawson Ltd. V. Jindal Exports Ltd.[10] this court a observed: (SCC pp. 367 & 368, paras 19 & 23)

> A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment 'per incuriam'. It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of per incuriam.

10. Looking at the matter, in view of what has been held in mean by per incuriam, we find that such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature, is not the reason indicated by the Full Bench in the impugned judgment, while saying that the decision in the case of Ramkrit Singh[1] was rendered per incuriam. On the other hand, it was observed that in the case of Ramkrit Singh[1] the Court did not consider the question as to whether the Consolidation Authorities are courts of limited jurisdiction or not. In connection with this observation, we would like to say that an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways – either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits. Though hardly necessary, we may however, refer to a few decisions on the above proposition.

11. In Vijay Laxmi Sadho (Dr) v. Jagdish[11] it has been observed as follows: (SCC p.256, para 33)

"33. As the learned Single Judge was not in agreement with the view express in Devilal case[12] it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress than the said course was not followed. It is well settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of 'different arguments' or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs."

12. In Pradip Chandra Parija v. Pramod Chandra Patnaik[13] it has been held that where a Bench consisting of two Judges does not agree with the judgment rendered by a Bench of three Judges, the only appropriate course available is to place the matter before another Bench of three Judges Bench also concludes that the judgment concerned is incorrect then the matter can be referred to a larger Bench of five Judges.

13. The decision and reasoning in the two judgments of the Full Benches i.e. in the case of Ramkrit Singh[1] and on impugned in this appeal run contrary to each other on almost all points. In our view the doctrine of per incuriam has been misapplied by the High Court to the earlier decision in the case of Ramkrit Singh[1]."

28. In ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and others***, (1985) 2 SCC 260, following observations have been made by the Apex Court:

"We desire to add and as was said in Cassell & Co. Ltd. v. Broome[6] we hope it will never be necessary for us to say so again that "in the hierarchical system of courts" which exists in our country. "it is necessary for each lower tier", including the High Court, "to accept loyally the decisions of the higher tiers". "It is inevitable in hierarchical system of courts that there are decisions of the Supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary.... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted." [7] The better wisdom of the court below must yield to the higher wisdom of the court above. That is the strength of the hierarchical judicial system. In Cassell & Co. Ltd. v. Broome[6], commenting on the Court of Appeal's comment that Rookes v. Barnard[8] was rendered per incuriam. Lord Diplock observed:

The Court of Appeal found themselves able to disregard the decision of this House in Rookes v. Bardnard[8] by applying to

> it the label per incuriam. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a Judge of the High Court to disregard a decision of the Court of Appeal.
>
> It is needless to add that in India under Article 141 of the Constitution the law declared by the Supreme Court shall be binding on all courts within the territory of India and under Article 144 all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court."

29. What is discernible from the established law as to the principle of *per incuriam* is that a decision which is *per incuriam is* not a binding precedent, if a Court has acted in ignorance of the previous decision or in ignorance of terms of statute or rules having statutory force. Merely because the Court had not the benefit of its argument or there has been a misinterpretation laid down would not apply. If, however, an omission to consider a binding precedent of the superior court, the same would attract the principle of *per incuriam*.

30. In ***Fuerst Day Lawson Ltd. V. Jindal Exports Ltd*** (supra), unless there is a glaring action of obtrusive omission, it is not desirable to depend on the principle of judgment "per incuriam", as rightly held in ***Cassell & Co. Ltd.*** (supra).

31. In ***Cassell & Co. Ltd. v. Broome***, 1972 AC 1027, in the hierarchical systems of Courts, it is obligatory to accept loyally the decisions of the higher tiers. The judicial system workable only if someone is allowed to have the last word, which is loyally accepted. The better wisdom of the court below must yield to the higher wisdom of the court above.

32. *Per incuriam* would not be attracted if a decision cited has not been commented upon in a particular manner favouring a particular party. It is to be treated as a glaring obstrusion or ignorance of the decision cited as a

binding precedent. If a decision is considered and conclusion has been arrived at or there may be abnormality in conclusion, the same would not be in ignorrantia to attract the principle of judgment 'per incuriam'. Particular facts, arguments and submissions are also taken into consideration, if the arguments as tendered in other cases following the decision of the High Court and a plea advanced that whatever has been contended has not been taken note of in the earlier decision would not be permissible and would rather an infraction to the doctrine of precedent and would never allow a decision to attain finality. Once a plea had been raised by either of the contesting party whose interests are jeopardized on an adverse decision taken against shall always resort to this principle. Accordingly, a safeguard has been incorporated to the exception i.e. doctrine of stare decisis and binding precedent. A plea not taken shall not attract this principle of *pre incuriam*.

33. Basically the contention of Shri Behra by introduction of doctrine of precedent and to enforce its applicability is that neither OMs dated 7.2.1986 and 3.7.1986 have been discussed in true prospective nor decision of the Apex Court in ***M.Subba Reddy*** case (supra) has been considered and operated.

34. To find the basis of aforesaid, it is relevant to extract few paragraphs of the decision of the High Court of Gujarat at Ahmedabad as regards, the decision in ***M.Subba Reddy*** case (supra) is concerned:-

> "6.1 The learned counsel sought to distinguish the ratio of the judgment of the Supreme Court in SURAJ PRAKASH GUPTA & OTHERS v. STATE OF JAMMU & KASHMIR & OTHERS [AIR 2000 SC 2300] on the basis that there were, in the facts of that case, specific rules regarding recruitment, retrospective regularisation and seniority. Relying upon the ratio of the judgment in SWAPAN KUMAR PAL & OTHERS v. SAMITABHAR CHAKRABORTY & OTHERS [AIR 2001 SC 2555], it was submitted that, if the recruitment rules applicable in a particular case were different, the

conclusion would also be different. He also sought to distinguish the judgment of the Supreme Court in JAGDISH CHANDRA PATNAIK v. STATE OF ORISSA [(1998) 4 SCC 558] on the grounds that specific words and provisions of Rule 26 were interpreted and applied in that case. The learned counsel relied upon a recent judgment of the Supreme Court in R.V.N.AGHARTULU & ORS. V. A.P. STATE ROAD TRANSPORT CORPORATION [AIR 2004 SC 3511 (sic)] in which the promotees who had been pushed down in the seniority list below the direct recruits and approached the Supreme Court. That petition, however, appears to have been rejected by majority relying upon the express regulation under which the promotees were liable to be reverted as and when approved direct recruits became available and replaced the promotees."

35. If one has regard to the above, the contention raised by the counsel for direct recruits to distinguish their case, in fact decision in ***Suraj Prakash Gupta*** case (supra) in the case of ***A.P. State Road Transport Corporation*** (supra) was cited and was also considered.

36. It may be that the decision has not found favour with the direct recruits but the fact that the decision of the High Court is not *per incruiam* of this decision. What Shri Behra buttress is that the decision should have been further evaluated, considered and a finding should have been arrived at. This cannot be the scope of judgment *per incuriam*. The decision of the ***A.P. State Road Transport Corporation*** (supra) has been considered. Moreover, we find that the above decision was in particular facts and circumstances of the rules and regulations and in the light that the promotees were on ad hoc whereas in the present case the factual situation is different. However, we do not want to comment upon the decision of the High Court. It would suffice if we return a finding that the decision of the High Court is not ***per incuriam***. As regards consideration of the Apex Court decision (supra), the contention put forth that OM dated 7.2.1986 has not been considered by the High Court is also not correct. The specific plea

of delay in appointment of direct recruits meticulously discussed and the finding arrived at with the following observations:-

> "10. There was a clear consensus that the inter-se seniority of DPs and DRs was governed by the Office Memoranda and Instructions referred to in paragraph 4 hereinabove. In view of the clear finding in the impugned decision of the Tribunal and in absence of any material to the contrary, it is assumed that no ITI is a promotee in excess of the quota for promotees. Therefore, in view of the clear and consistent ratio of the decisions of the Supreme Court in N.K.CHAUHAN (supra) and SURAJ PAKASH GUPTA (supra), the question of pushing down any promotee in the seniority list which does not include excess promotees.
>
> 10.1 The basic rule for relative seniority of direct recruits and promotees, as laid down in paragraph 2.4.1 in O.M. dated 22.12.1959, is that their vacancies are to be rotated on the basis of the quota reserved for direct recruitment and promotion. However, in case adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority can take place only to the extent of the available direct recruits and promotees as clearly laid down by paragraph 2.4.2 in O.M. dated 7.2.1986. That provision is further clarified and illustrated to show that the unfilled direct recruit quota vacancies would be carried forward and added to the vacancies of the next year with the additional direct recruits selected against the carried forward vacancies being placed en-bloc below the last promotee in the seniority list based on the rotation of vacancies for that year. Thus, any claim for seniority in the year in which a vacancy had arisen but not filled up could not have been entertained. The clear mandate in paragraph 2.4.2 referred hereinabove to the effect that rotation of quotas would take place only to the extent of the available direct recruits and promotees is not susceptible to any other interpretation.
>
> 11. However, the argument vehemently canvassed on behalf of the Department and the direct recruits was that the phrase "If adequate number of direct recruits do not become available in any particular year has to be understood and applied in such a manner that no injustice is caused to the direct recruits whose recruitment process usually takes more than one year as also to ensure that quota rule was not violated by consistent failure to fill up in time the vacancies arising for DRs. It was to meet with such a situation that the Department had issued the advice dated 2.2.2000, according to which, the year of initiation of action for recruitment was relevant for the purpose of reckoning seniority of the DRs. It was vehemently argued that the said advice was meant to strike a balance between the interests and further promotional prospect of the DPs and DRs whose actual appointment might have been delayed due to administrative reasons and without any fault on their part. And, to that extent, departure from the rule that seniority has to be determined only on the basis of the respective date of appointment to

the post was reasonable and legal as held by the Supreme Court in A.K. Nigam (supra). It was also argued that while the departmental candidates for promotions would generally be available and can eb easily promoted, the process of direct recruitment through are and the other necessary formalities always take a (sic) the resulting into delay in actual appointment of DRs.

12. Reading the expressions "direct recruits" and "do not become available in any particular year" in paragraph 2.4.2 in the context of the (sic) provided for fixing seniority, it is clear that the DRs contemplated by the rule and those who are actually available for placement by rotation in the seniority list in a particular year. The candidates who are undergoing the process of recruitment cannot be said to be available for rotation of quotas till they are appointed. If later appointees against the quota of vacancies of an earlier year were to be considered for seniority in that earlier year, the clarification for carrying forward such vacancies and placing them in the seniority list en-bloc in the year of appointment would not have been required. Paragraph 2.4.4 of the O.M. dated 7.2.198 takes care of the tendency of unreporting/suppressing the vacancies to be notified to the concerned authorities for DRs and provides for pushing down the excess promotees. It has no bearing on the promotees appointed against their own quota of the year concerned. Paragraph 2.4.2 read with its clarification and illustration clearly envisages giving of seniority to the DRs of the year of their actual appointment disregarding the year in which the recruitment process for DRs was initiated or completed. Realising the incongruity and injustice caused by the DRs stealing a march over regular promotees by being placed against a reserved slot in the earlier year and in tune with the catena of judgments on the issue, the memos and clarifications have been issued by the DOPT with illustrations to leave no scope for doubt. Such just and clear scheme circulated for its (sic) application cannot be supplanted by any inter-office memo or so-called advice so as to revert to the confusion which was sought to be cleared by the O.M. dated 7.2.1986 and 3.7.1986."

37. If one has regard to the above, the aforesaid finding is indicative of the fact of OM dated 7.2.1986, which lays down the principles of assigning seniority between direct recruits and promotes and rota quota system has been dealt with in extenso and above justified finding arrived at.

38. To establish the principle of *per incurima*, these statutory provisions, which have taken shape, for want of any laid down principle of inter se seniority have not been ignored, it has been considered. Assuming if the conclusion is erroneous would not attract the principle of *per incuriam*. We

also find that on 11.5.2004 order passed by the Ministry of Finance, CBDT, addressed to the Joint Commissioner of Income Tax of Chandigarh in consultation with DOP&T, it has been clarified that as regards seniority of direct recruits viz a viz promotees shall be reckoned from the year in which they were actually recruited and direct recruits cannot claim seniority of the year in which the vacancies had arisen. As a nodal authority, the aforesaid is a clarification of OM dated 7.2.1986 as well as 3.7.1986, puts an end to an interpretation of availability of direct recruits.

39. In our considered view the decision of Ahmedabad Bench of the Tribunal (supra) having affirmed by the Hon'ble High Court has to be treated as a precedent, which is binding on us. The aforesaid decision has not attracted the principle of *per incuriam*. As such we have no hesitation to follow it in the present case to which it applies mutates mutandis as the issue pertains to inter se seniority of direct recruits and promotes.

40. In the result, having regard to the reasoning given above, we allow these OAs. The seniority list and orders on representation are set aside. Respondents are directed to restore to the applicant their earlier seniority and in that event, they would be entitled to all consequential benefits. No costs.

41. Let copies of this order be placed in all OAs.

(Shanker Raju)
Member (J)

(V.K. Majotra)
Vice Chairman (A)

22.9.04

/ravi/