

Central Administrative Tribunal
Principal Bench

O.A.No.2785/2004

New Delhi, this the th30 day of August 2006

Hon'ble Shri Shanker Raju, Member (J)
Hon'ble Shri N.D. Dayal, Member (A)

Shri Rajesh Kumar & others

...Applicants

(By Advocates: Shri Ajay Kumar Bhat)

Versus

Election Commission of India & others

..Respondents

(By Advocates: Shri Shyam Babu for respondents 1 & 2 –

Ms. Minakshi Arora and Ms. Poli Kataria for respondents
3 to 53)

1. To be referred to the Reporters or not? ^{yes}
2. To be circulated to other Benches of the Tribunal or not? ^{yes}

S. Raju
(Shanker Raju)
Member (J)

**Central Administrative Tribunal
Principal Bench**

O.A.No.2785/2004

New Delhi, this the 30th day of August 2006

Hon'ble Shri Shanker Raju, Member (J)
Hon'ble Shri N.D. Dayal, Member (A)

1. Sh. Rajesh Kumar,
S/o Sh. Krishna Prasad
2. Smt. Suruchi Nawani,
W/o Sh. Sandeep Nawani
3. Sh. Prahlad Prasad,
S/o Sh. R.D. Prasad
4. Sh. Devesh Kumar,
S/o Sh. Dwarka Singh
5. Sh. Niranjana Kumar Sharma,
S/o Sh. Chandra Shekhar Sharma
6. Sh. Manoj Kumar,
S/o Sh. Satya Narayan Dubey
7. Smt. Neelam Bhateja,
W/o Sh. Pawan Bhateja
8. Sh. Chander Prakash,
S/o Sh. Sohan Lal
9. Sh. Jai Dev Singh,
S/o Sh. Shyam Singh

...Applicants

(All the above persons working as LDC in the office of Election
Commission of India, Nirvachan Sadan, Ashoka Road, New Delhi-1)

(By Advocate: Shri Ajay Kumar Bhat)

Versus

1. Election Commission of India,
Nirvachan Sadan,
Ashoka Road,
New Delhi.
2. The Under Secretary,
Personnel Administration Section,
Election Commission of India,
Ashoka Road, New Delhi.
3. Sh. Diwan Singh

4. Sh. Mithilesh Chandra Sharma
5. Sh. Sandeep Kumar
6. Sh. Vijay Gupta
7. Sh. Shakti Chand
8. Sh. Jai Prakash Mehto
9. Sh. Virender Kumar
10. Sh. Raj Kumar
11. Sh. Prem Chand Sharma
12. Smt. Anita Kukreja
13. Sh. Sheesh Ram
14. Sh. Mahendra Singh
15. Sh. Rajesh Kumar
16. Sh. Kamal Sharma
17. Sh. Dinesh Sharma
18. Sh. Nalin Garg
19. Smt. Sunita Sharma
20. Sh. Krishan Kumar
21. Sh. Trilok Chand Kalra
22. Sh. Sushil Kumar
23. Sh. Rajeshwari Dobhal
24. Smt. Sarla Mutreja
25. Sh. Hrminder Pal Singh
26. Sh. R.K. Luthra
27. Sh. Kapil Puri
28. Sh. Mohinder Singh
29. Sh. Dinesh Singh
30. Sh. Vikram Singh
31. Sh. Suresh Kumar
32. Sh. Rajendra Prasad

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33. Smt. Chander
34. Sh. Harish Kumar
35. Smt. Anita Gautam
36. Sh. Awadesh Kumar
37. Sh. Basant Kumar
38. Smt. Asha Satija
39. Sh. Ram Prasad
40. Smt. Bharti Chhabra
41. Smt. Veena Chawla
42. Smt. Geeta Bhardwaj
43. Smt. Usha Patwal
44. Smt. Sunita
45. Smt. Janki Devi
46. Sh. Satish Kumar
47. Smt. Rajni Chhabra
48. Smt. Mamta Sachdeva
49. Smt. Neelam Talwar
50. Sh. Kuldeep Negi
51. Sh. Bhawani Pandey
52. Sh. Chander Kanta Negi
53. Sh. Sant Ram

Respondents

(Respondents No. 3 to 53 are working as LDC/Officiating as UDC in the office of the Election Commission of India, Nirvachan Sadan, Ashoka, Road, New Delhi through Respondent No.2)

(By Advocates: Shri Shyam Babu for respondents 1 & 2 –
Ms. Minakshi Arora and Ms. Poli Kataria for respondents
3 to 53)

ORDER

Hon'ble Shri Shanker Raju, Member (J):

At the outset, we must express our discontent to the very callous and indiscreet attitude of the official respondents, i.e., Election Commission of India whereby a direction issued on conclusion of the proceedings to produce the record regarding approval accorded by the Central Government in writing in relaxing the provisions of recruitment rules to regularize the services of private respondents. Despite an assurance to produce the record by lunch on 10.8.2006, the same has not been produced till evening 11.8.2006 and no intimation of any sort has been communicated to the Tribunal. In such view of the matter, we have no option but to draw an adverse inference against the official respondents. The above attitude where the official respondents, being the Government, have to assist the Tribunal for proper adjudication of the controversy, has to be deprecated. We do so accordingly.

2. By virtue of this OA, direct recruits to the post of Lower Division Clerk (LDC) validly appointed on being nominated by the Staff Selection Commission (SSC), have assailed respondents' order dated 11.6.2004 whereby the seniority list of LDCs had been circulated and also Memoranda whereby the private respondents have been regularized. A direction to re-settle the seniority with grant of promotion to the post of Upper Division Clerk (UDC) over and above the persons appointed through Employment Exchange has to be sought.

3. At the outset, the recruitment rules for the post of LDC in Election Commission framed under Article 309 of Constitution of India, which are promulgated on 26.8.1988, are reproduced here-in-below:-

1.	2.	3.	4.	5.	6.	7.
3. Lower Division Clerk	*43 (1988) *Subject to variation dependent on workload	General Central Service, Group-C, Non-Gazetted Ministerial	Rs.950-20-1150-EB-25-1500	Not applicable	No	<p>Between 18-25 years (Relaxable for Government servants upto 35 years.)</p> <p>Note: Crucial date for determining the age limit shall be the closing date for receipt of applications from candidates in India</p> <p>(Other than those in Andaman and Nicobar Islands and Lakshadweep)</p> <p>In the case of recruitment through Employment Exchange, the crucial date for determining the age limit shall be the last date up to which the Employment Exchange is asked to submit the names.</p>

8.	9.	10.	11.
<p>(1) Matriculation or its equivalent from recognized University/ Board</p> <p>(2) Must be able to type 30 words per minute in Hindi</p> <p>Provided that a physically handicapped person who is otherwise qualified to hold a clerical post but does not possess the said qualification in typewriting may be appointed subject to the condition that the Medical Board attached to the Special Employment Exchange for handicapped or Civil Surgeon Certifies that the said handicapped person is not in a fit position to be able to type.</p>	Not applicable	Two years	<p>By direct recruitment failing which by transfer deputation:</p> <p>Provided that then per cent of vacancies shall be filled up by Group 'D' Employees (borne on regular establishment) of the Election Commission in the manner and subject to the conditions mentions hereunder:-</p> <p>(a) Five percent of the vacancies shall be filled through a departmental examination, to be held by the Election Commission confined to such Group D employees who fulfill the requirement of minimum educational qualification, namely, Matriculation or equivalent:</p> <p>(b) five percent of the vacancies shall be filled by promotion on the basis of seniority-cum-fitness from amongst such of the Group D employees who fulfill the requirement of minimum educational qualification,</p>

		<p>namely, Matriculation or equivalent;</p> <p>(c) the maximum age limit for the examination referred to at clause (a) shall be 45 years (50 years for the Scheduled Castes and the Scheduled Tribes candidates);</p> <p>(d) at least 5 years' regular service in a Group D post shall be essential for both cases referred to at Clauses (a) and (b);</p> <p>(e) the maximum number of recruitment by the methods referred to at Clauses (a) and (b) shall be limited to ten per cent (five per cent by each method) of the vacancies in the cadre of Lower Division Clerks occurring in a year: unfilled vacancies by either of the methods shall not be carried over.</p>
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12.	13.	14.
<p>By direct recruitment:</p> <p>Through the Staff Selection Commission</p> <p>Note: In case of urgency such as general election/bye-election, if qualified candidates from the Staff Selection Commission are not available, the Election Commission may fill the posts through Employment Exchange on short term ad-hoc basis to the replaced by the qualified candidates from the Staff Selection Commission</p> <p>By transfer on deputation:</p> <p>From among persons holding equivalent or analogous posts in other Central Government offices or State Election offices. (The period of deputation including the period of deputation in another ex-cadre post held immediately preceding this appointment in the Election Commission of India or some other Organisation/ Department of Central Government shall ordinarily not exceed three years).</p>	<p>Group 'C' Departmental Promotion Committee for Promotion & Confirmation:-</p> <p>1. Secretary (Administration) in Election Commission - Chairman</p> <p>2. Other Secretaries in the Election Commission - Members</p>	Not applicable

4. What is discerned on a plain reading of the rules is that in the grade of LDC, 90% appointment is to be made through direct recruitment, failing which by transfer deputation. The direct recruitment is through the nominated candidates from SSC. The

remaining 10% vacancies would be filled up among the Group 'D' Employees (borne on regular establishment) of the Election Commission; 5% of which is to be filled by a departmental examination of amongst the Group 'D' employees fully eligible and rest of 5% vacancies are to be filled by promotion on the basis of seniority-cum-fitness from amongst such of the Group 'D' employees, for which after completion of eligibility, DPC for Group 'C' has to be constituted by Secretary (Administration) as Chairman and other Secretaries in Election Commission as Members.

5. Apart from it, as an explanatory note in case of urgency and in the circumstances where General Election or Bye-Election are held when candidates from SSC are not available, the post may be filled up through Employment Exchange on short-term *ad hoc* basis but as soon as the qualified candidates from SSC are available, the *ad hoc* appointees are to be replaced.

6. Accordingly, relaxation of *ad hoc* appointee is not one of the modes of recruitment in the cadre of LDC in Election Commission. Statutory Rules of 1998 *ibid* in Rule 5 provides as under:-

"5. Power to relax. – Where the Central Government is of the opinion that is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons."

7. If one has regard to the above, any provision of the rules with respect to any class or category of person may be relaxed but a condition precedent is a reasoned order issued by the Central Government.

8. In the above backdrop, the brief factual matrix suggests that the applicants, who are direct recruits, on qualifying the Clerks Grade Examination 1996 conducted by the SSC had joined on regular post in the year 1999 whereas in 1993, the SSC had recommended 15 candidates, who qualified Clerks Grade Examination in 1993 but the official respondents had returned the dossier and prior to it in the year 1991 on reconsideration of appointment of candidates on the vacancies sponsored by SSC, a disappointing experience of inordinate delay of completion of the procedure, as no SSC recommended candidate was appointed on sudden dissolution of Lok Sabha in 1991 and in the wake of General Election to be over in 1992 and also elections to Legislative Assemblies of nine States in 1993 by invoking the Note in the appendix to the recruitment rules, about 43 LDCs have been appointed through the Employment Exchange and 8 persons from eligible Group 'D' employees have been promoted as LDC on *ad hoc* basis.

9. On compassionate grounds, *de hors* the regular process of recruitment without considering the nominated candidates from SSC and without holding the DPC, the official respondents have decided to regularize the services of all persons recruited from Employment Exchange and Group 'D' employees on availability of regular vacancies in a phased manner ranging from 11.10.1993 to 2.9.1996 after relaxing the provisions of the recruitment rules.

10. Accordingly, a draft seniority list was circulated on 9.12.1999, which was objected to by the applicants, which resulted in a seniority list issued on 24.3.2003 and ultimately the representations preferred have been rejected vide cumulative order issued on 11.6.2004 and a

final seniority list was published on the same day whereby the private respondents have been *enbloc* shown senior to the applicants by reckoning their seniority from the date of their initial appointment. This led to filing of the present OA and a grievance of the direct recruits as to illegal appointment of the private respondents and an incorrect grant of seniority to them over and above the direct recruits. It is pertinent to mention that these private respondents had further been promoted on an officiating basis as UDCs and are continuing in the above post.

11. Learned counsel for the applicants contended that the objection raised in the representation against the draft seniority list when it is finalized, has not at all taken into consideration the valid points agitated by them. Orders passed on their representation(s) are with closed mind without recording reasons.

12. Learned counsel for applicant has further stated that when appointment through the Employment Exchange is made though in contingency the said mode of appointment on *ad hoc* is valid till regularly selected candidates from SSC joined, is not a mode of appointment. As such the answering respondents, who have failed to produce any reasoned order of the Government as to relaxation exercised under Rule 5 of the statutory rules *ibid*, the private respondents are illegal appointees *de hors* the rules and even without relaxation their seniority cannot be reckoned from the date of their initial or even after their regularization a person, who has not been borne in the cadre as per the rules, would not entail the seniority till such time he is validly appointed to the post.

13. Learned counsel for applicants also stated that unless the private respondents qualified the Limited Departmental Competitive Examination held by SSC, they cannot be regularized and without any status their names placed above the applicants in seniority cannot be countenanced.

14. Learned counsel for applicants also stated that *ad hoc* promotion of 8 employees among Group 'D' employees was in excess of the 5% quota as fixed in the recruitment rules, as such they cannot be treated as regular.

15. Learned counsel stated that further promotion of these illegal appointees to the post of UDC is a wrong perpetuated by the official respondents. Lastly, it is contended that a fortuitous appointment cannot be taken into account for purposes of fixing seniority in the service *jurisprudence*.

16. Shri Shyam Babu, learned counsel for official respondents has vehemently opposed the contentions and has relied upon the decision of the Apex Court in **Santosh Kumar v. State of A.P. & others**, 2003 SCC (L&S) 721 to contend that after regularization, *ad hoc* arrangement does not survive and the applicants, who were even not borne in the cadre when the private respondents have been regularized, has no *locus standi* to challenge the regularization at this belatedly stage after 10 years to unsettle the settled position.

17. Learned counsel would contend that despite their inception in service, the applicants have not assailed the regularization of the

applicants. As such, they are estopped from challenging the same having acquiesced and waived of their right.

18. Learned counsel for official respondents stated that in the emergent situation, the private respondents have been appointed under the recruitment rules and on humanitarian and compassionate grounds on relaxing the provisions of Rule 5 *ibid*, their relaxation now cannot be challenged. In nutshell, limitation has been pressed into his arguments.

19. Ms. Poli Kataria, learned counsel appearing on behalf of private respondents by showing the chart stated that last date of regularization of the private respondents was 2.9.1996 and the applicants have been brought in the cadre only on appointment post-1999. Accordingly, before being borne in cadre when the private respondents had already been promoted as UDCs, a challenge to the regularization in the post of LDC of the private respondents only in the year 2005, suffers from latches.

20. Placing reliance on the decision of the Apex Court in **Secretary, State of Karnataka & others v. Uma Devi & others**, 2006 (4) SCALE 197, it is stated that as per the fact that applicants have been continuing for 10 years and their initial appointment was only irregular, they have to be regularized and accordingly this regularization now cannot be assailed. By giving example of one Shri Shish Ram and Shakti, it is stated that they had qualified the examination conducted by the SSC.

21. Learned counsel further stated that applicants, who had been aware about irregular regularization and allegedly chosen not to challenge, have waived of their right. She also stated that the private respondents were eligible and duly qualified as per the recruitment rules and were innocent in their matter of regularization. It is stated that the selection was not *de hors* the rules and no compromise was made in any other eligibility requirements. The experience gained by working for about 17 years or more, it would be causing hardship and doing-away of regularization would be inequitable. By relying upon the decision in **Direct Recruits Class II Engineers Officers Association v. State of Maharashtra & others**, 1990 (2) SCC 715, it is contended that if the initial ad hoc appointment is *dehors* not following the rules uninterrupted continued officiation when the persons are eligible, the seniority would be reckoned from the date of initial appointment.

22. Learned counsel would state that direct recruits cannot claim seniority from the date of examination conducted by SSC as at that time they were not in the cadre and their seniority is to be reckoned from the date of regular appointment, i.e., joining the post, which has been followed. As such, it is contended that neither the regularization is *dehors* the rules and law nor the seniority assigned to the applicants and accordingly, it is stated that the OA be dismissed.

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

24. Though the Election Commission of India regulates General Election and Bye-Election in this country in a very effective and efficient manner, yet their in-house conditions of service are not at all

regulated in a legal and proper manner whatsoever. Being a model employer, all the employees working under the Election Commission are to be treated uniformly with utmost consideration on their dint and hard working for redressal of their grievances and smooth progression in service tenure. When the Election Commission de hors the rules appoints persons as LDC without following due process of law, yet defend it before the Tribunal in a judicial review in the guise of having relaxed the provisions of defend the regularization of not only direct recruits taken from Employment Exchange but also the promotees on *ad hoc* basis in excess of the quota, yet the approval of the Government in writing to relax the provision is a missing link in the defence formulated by them before us.

25. The doctrine of legitimate expectation lays down that if an individual is promoted in any manner and is continued for a long time, is hopeful of getting the same acquired. This is based on equity and compassion. Legitimate expectation cannot be claimed as a right. In a recent decision of the Constitution Bench in **Uma Devi's** case (*supra*) in the matter of regularization of *ad hoc* appointee not appointed initially in accordance with the recruitment rules repelling such a principle to be overridden by the principle of equality enshrined under Article 14 of the Constitution of India, no right is stated to have been conferred on such an illegal appointment.

26. There is a marked difference between irregular and illegal appointment. In **Uma Devi's** case (*supra*), the Apex Court in paragraphs 14 & 15 laid down the following principles:

14. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In **STATE OF MYSORE Vs. S.V. NARAYANAPPA** [1967 (1) S.C.R. 128], this Court stated that it

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was a mis-conception to consider that regularization meant permanence. In R.N. NANJUNDAPPA Vs T. THIMMIAH & ANR. [(1972) 2 S.C.R. 799], this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated:-

"Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment, whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority, but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

In B.N. Nagarajan & Ors. Vs. State of Karnataka & Ors. [(1979) 3 SCR 937], this court clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This court emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

15. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the Court, in appropriate cases, would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court, would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional

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scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent."

27. If one has regard to the above, it is trite that regularization cannot be a mode of recruitment to public service. However, when rules are framed under Article 309 of Constitution of India, any appointment made in contravention of the rules right of regularization would be available if an appointment has been made after following the due procedure even though a non-fundamental element of the procedure has not been followed. Accordingly, the Apex Court in such view of the matter, insofar as right of such irregular appointees are concerned, has observed as under:-

"44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

45. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

28. In the light of above, the recruitment rules for the post of LDC in Election Commission clearly envisage two modes of recruitment, 90% of which by direct recruitment through SSC and 10% of the vacancies to be filled up either amongst the Group 'D' employees in their quota by either holding a departmental examination or after holding a DPC. The only exception in case of urgency on account of General Election or Bye-Election when qualified candidates from SSC are not available, the posts may filled up through Employment Exchange but only on short-term *ad hoc* basis and they have no right to be continued or claim appointment and are to be replaced by qualified candidates from SSC as and when available.

29. A long drawn history suggests that in 1993 a nomination of 15 candidates by SSC has been turned down and in the wake of General and Bye-Elections, a resort has been made to recruit 43 LDCs through Employment Exchange between 1991 to 1994 and also 8 persons from eligible Group 'D' employees. It is pertinent to mention that first batch of SSC candidates, i.e., applicants as direct recruitee were available on SCC Examination of 1996 had joined in 1999 by the time the private respondents had been regularized on purported relaxation of the rules.

30. Statutory rules under Rule 5 *ibid* empowers the Central Government, if it is found necessary or expedient so to do, power of relaxation of any provision of the rules with respect to any class or category but on a reasoned order passed.

31. Insofar as relaxation of rules is concerned, the Apex Court in *FCI v. Bhanu Lodh*, 2005 (2) SLJ SC 198 held that power to relax has to be used sparingly only in the marginal cases.

32. With regard to relaxation, the Apex Court in **Suraj Parkash Gupta & another v. State of J&K & others**, 2000 SCC (L&S) 977 where there has been a dispute between inter-se-seniority of direct recruits and promotee Engineers and in the wake of the provision of relaxation, observed as under:-

"28. The decisions of this Court have recently been requiring strict conformity with the Recruitment Rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment. In *Keshav Chandra Joshi v. Union of India* 1992 Supp (1) SCC 272: the Rule permitted relaxation of the conditions of service and it was held by the three-Judge Bench that the Rule did not permit relaxation of Recruitment Rules. The words "may consult PSC" were, it was observed, to be read as "shall consult PSC" and the Rule was treated as mandatory. In *Syed Khalid Rizvi v. Union of India* 1993 Supp (3) SCC 575 (SCC at p. 603) decided by a three-Judge Bench, a similar strict principle was laid down. The relevant Rule-Rule 3 of the Residuary Rules (see p.603, para 33) in that case did permit relaxation of the "Rules". Even so, this Court refused to imply relaxation of Recruitment Rule and observed: (SCC pp. 603-04, para 33)

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

29. Similarly, in *State of Orissa v. Sukanti Mohapatra* (1993) 2 SCC 486 it was held that though the power of relaxation stated in the rule was in regard to "any of the provisions of the rules", this did not permit relaxation of the rule of direct recruitment without consulting the Commission and the entire ad hoc service of a direct recruit could not be treated as regular service. Similarly, in *M.A. Haque (Dr.) v. Union of India* (1993) 2 SCC 213 it was held that for direct recruitment, the rules relating to recruitment through the Public Service Commission could not be relaxed. In *J&K Public Service Commission v. Dr. Narinder Mohan* (1994) 2 SCC 630 it was held that the provisions of the J&K Medical Recruitment Rules could not be relaxed for direct recruitment. The backdoor direct recruitment could not be

permitted. (See also Arundhati Ajit Pargaonkar (Dr.) v. State of Maharashtra 1994 Supp (3) SCC 380.) In Surinder Singh Jamwal (Dr.) v. State of J&K (1996) 9 SCC 619 this Court directed the direct recruits to go before the Public Service Commission.

Decisions cited for promotees distinguishable.

30. Two decisions which have been referred to by counsel for the promotees have to be referred to but these can be distinguished. In V. Sreenivasa Reddy v. govt. of A.P. 1995 Supp (1) SCC 572 there was an order of relaxation in favour of the promotees who were not regularized under Rule 23 of the A.P. State and Subordinate Service Rules. IN that case this Court felt that the Government's order relaxing the requirement of consultation with the Commission need not be interfered with because the promotees were placed by the Government below the direct recruits. This case is therefore clearly distinguishable. (We shall be referring to this case again under Point 3.) Again in Ashok Kumar Uppal v. State of J & K (1998) 4 SCC 179 while holding that the power of relaxation could not be arbitrarily exercised, this Court upheld the relaxation of the relevant standard prescribed for typing, in respect of five direct recruits. This was because the State Recruitment Board in that case had made a recommendation for relaxation of the requisite standard in their favour and this was accepted by the Government. The relaxation was upheld because the Government had retrospectively amended the promotion rules so that the promotees could just go into the promotion quota by sheer seniority rather than by selection as was the rule earlier. The five direct recruits were very close to the other selected direct recruits and were more meritorious than the promotees.

Summary

31. The result of the discussion, therefore, is that the wholesale regularization by order dated 2-1-1998 (for the Electrical Wing), by way of implied relaxation of the Recruitment Rule to the gazetted category is invalid. It is also bad as it has been done without following the quota rule and without consulting the Service Commission. Further, the power under Rule 5 of the J&K (CCA) Rules, 1956 to relax the Rules cannot, in our opinion, be treated as wide enough to include a power to relax rules of recruitment.

On facts, relaxation and

32. On facts, the reasons given in the Cabinet note for granting relaxation are hopelessly insufficient. In fact, the letter of the Commission dated 25-11-1997, shows that the Commission was prepared to give its opinion in regard to regularization of each promotee but the Government backed out when the Commission called for the records relevant for considering suitability for regular promotion. In our view, there can be no hardship for a person seeking appointment or promotion to go by the procedure prescribed therefore. The relevant Recruitment Rule for promotion cannot itself be treated as one producing hardship. Narender Chadha case (1986) 2 SCC 157 must be treated as an exception and not as a rule. In

fact, if such relaxation is permitted in favour of the promotees then the same yardstick may have to be applied for direct recruits. In fact the J&K Government has already started to do so and this has not been accepted by this Court in Narinder Mohan case (1994) 2 SCC 630 and Dr. Surinder Singh Jamwal case (1996) 9 SCC 619 referred to above. If it is to be held that direct recruitment can also be permitted without consulting the Service Commission (in case it is required to be consulted there will, in our opinion, be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and fancies of the Government). Such a blanket power of relaxation of Recruitment Rules cannot be implied in favour of the Government.

33. In the present case, the Government was merely carried away by sympathy for the promotees. By not making direct recruitment after 1984, by restricting direct recruits to 10% rather than permitting 20% and by deliberately promoting the Junior Engineer to the other 10% quota of the direct recruits, the State Government had definitely acted in a biased manner. There is an amount of justification for the grievance of the direct recruits that the State had passed an omnibus order on 2-1-1998 regularizing all ad hoc promotees (Electrical Wing) without consulting the Commission, by way of deemed relaxation, in a wholly arbitrary manner, counting the entire ad hoc service of promotion. Their illegal occupation of direct recruitment quota was not even noticed. Their eligibility or suitability was not considered. It is probable that even those who had bad ACRs were regularly promoted. The requirement of following the quota for each year was not respected. The regularization order dated 2-1-1998 was therefore bad and was therefore rightly quashed by the High Court. [This declaration is confined to Assistant Engineers and Assistant Executive Engineers (Electrical Wing) – as stated under Point 2 of the High Court's judgment.] We confirm the view of the High Court on this point. The result is that the promotees have to go through the Service Commission for getting into the gazetted category of Assistant Engineers. The Assistant Engineers have to go through DPC for promotion as Assistant Executive Engineers. Point 1 is decided accordingly."

33. If one has regard to the above, any relaxation *de hors* the rules where the only mode of recruitment for direct recruitment is through SSC, direct recruits if appointed on relaxation would be a backdoor entry and at the whims and fancies. Such a blanket power cannot be implied.

34. During the course of hearing, the private respondents have raised an issue of latches on part of the applicants to challenge their

regularization. It is trite that cause of action would arise only when anything adversely affects the concerned. Though on purported relaxation the private respondents themselves had been regularized upto 2.9.1996 whereas the direct recruits have joined in 1999, yet the tentative seniority list when finalized in 2004 led to a representation, which on its disposal gives a cause of action to the applicants to assail not only the grant of seniority to them but also grant of regularization of the private respondents, especially in view of the matter when their regularization is without any relaxation. **Santosh Kumar's** case (supra) relied upon though laid down that those direct recruits, who had joined later on than the persons who had been relaxed, are not affected is on the premise that the regularization has been done on relaxation in accordance with rules, cannot be assailed later on. In **Santosh Kumar's** case (supra), following observations are relevant:

"16. Another important factor to be kept in mind is that a finding is recorded by the High Court that the promotion given to the respondent to the post of Sub-Inspector was against the vacancies meant for the quota of promotees. The respondent was admittedly promoted on temporary basis as OSSI prior to the recruitment of the appellant. Once his services were regularized that too in the promotee quota, the appellant being direct recruit cannot make any grievance. In this view it cannot be said that the appellant was an affected person for want of notice before passing the order of relaxation to question the seniority of the respondent.

17. The decisions cited on behalf of the appellant, according to the High Court, did not support the case of the appellant having regard to the facts of those cases and rightly so in our view. That apart, in the light of the direct decisions of this Court dealing with Rule 47 of the General Rules the High Court was right in following them in the impugned order.

18. The case of N.K. Durga Devi vs. Commissioner of Commercial Tax, Hyderabad and others [(1997) 11 SCC 91] also does not help the appellant for three reasons (1) it is on the facts of that case, (2) as can be seen from paragraph 3 of the judgment, the order was made on the basis of concession made by the learned counsel that the relaxation could not have been validly passed without giving notice to all the

affected parties since that would be in violation of principles of natural justice, and (3) respondent was promoted as OSSI in promotee quota and not against quota meant for direct recruits to which category the appellant belonged."

35. If one has regard to the above, first of all the distinguishing features in the present case are that the relaxation has not been accorded as per Rule 5 of the statutory rules. Insofar as the employment of the candidates from the Employment Exchange is concerned, they have a right to be appointed on regular basis dehors the process of SSC but also the promotees, who were appointed in excess about 5% quota without holding the DPC. In such an event, the ratio in **Santosh Kumar's** case (supra) would have no applicability in the present case.

36. In the matter of seniority, if an appointment is made contrary to the rules would not confer benefit of seniority of appointees over and above the regular appointee to the service, the Apex Court in **Sanjay K. Sinha-II & others v. State of Bihar & others**, 2005 SCC (L&S) 169, observed as under:-

"17. It is settled law that appointments made contrary to the rules are merely fortuitous and do not confer benefit of seniority on the appointees over and above the regular/substantive appointees to the service. (See *C.K. Antony v. B. Muraleedharan*, (1998) 6 SCC 630, *M.S.L. Patil, Asstt. Conservator of Forests v. State of Maharashtra*, (1996) 11 SCC 361 and *State of Maharashtra v. Sanjay Thakre*, 1995 Supp (2) SCC 407."

37. In three Judges Bench's decision, which has been delivered as on majority view in **M. Subba Reddy & another v. A.P. State Road Transport Corporation & others**, 2004 SCC (L&S) 887, insofar as the claim of the applicants is concerned, placing reliance in the case of **Direct Recruits Class II Engineers Officers' Association** (supra)

contending that if the initial appointment is not by following the rules if continuously uninterruptedly continued for number of years, the seniority would be reckoned from the date of initial appointment, the following observations have been made:-

"8. Appellants have relied upon the judgment of this Court in the case of The Direct Recruit Class-II Engineering Officers' Association's case (supra). In that matter, an unusual situation had developed under which the rota and quota system had broken down. The promotees had worked for twenty years without being reverted and in view of that fact, the Constitution Bench of this Court confirmed the principles of counting towards seniority, the period of continuous officiation. The said judgment has no application to the facts of this case. In the present case, the argument of the appellants is that on the date when the appellants were regularized, there were no direct recruits available and consequently they cannot be pushed down in the integrated seniority list. Hence, the judgment of this Court in the case of The Direct Recruit Class-II Engineering Officers' Association (supra) has no application to the present case. In fact, in the later judgment of this Court in the case of State of West Bengal & Ors. v. Aghore Nath Dey & Ors. reported in [(1993) 3 SCC 371], it has been held, relying on the judgment in the case of The Direct Recruit Class-II Engineering Officers' Association (supra), that seniority has to be counted from the date of initial appointment and not from the date of confirmation provided the initial appointment is according to the rules. But the corollary to the above proposition is that where initial appointment is only ad hoc and not according to rules, the officiation cannot be taken into account for considering the seniority. The ratio of the judgment of this Court in the case of Aghore Nath Dey (supra) is that the benefit of ad hoc or temporary service is not admissible, if appointment was outside the rules. Applying the ratio of the said judgment to the facts of this case, the benefit of temporary promotion to the appellants under regulation 30 was not admissible to them for computation of seniority.

9. It was, however, urged on behalf of the appellants that the position changed when vacancies became available in the promotion quota and the appellants came to be regularized vide order dated 9.9.1988. By the said order, according to the appellants, regularization took place with retrospective effect from the dates indicated against their names and against the post earmarked for promotion and consequently in the integrated seniority list, they were not liable to be pushed down below direct recruits. We do not find any merit in this argument. Under regulation 30 read with regulation 34, temporary promotees were liable to be reverted as and when approved direct recruits became available. The promotees were liable to be replaced by direct recruits. Under regulation 34, the said revertees were to be considered for repromotion only against the quota of vacancies reserved for promotees. This is clear

from the terms of the order dated 9.9.1988. In the case of U.P. Secretariat U.D.A. Association & Ors. v. State of U.P. & Ors. reported in [(1999) 1 SCC 278], it has been held that a direct recruit is to be treated as in service from the date he joins it, whereas the promotee has to be fitted into service from the date when he becomes entitled to fitment in accordance with the quota and rota rule prescribed under the rules. In the case of A. N. Sehgal & Ors. v. Raje Ram Sheoram & Ors. reported in [AIR 1991 SC 1406], one of the arguments advanced on behalf of the promotees was that they were promoted as Executive Engineers against regular vacancies and they continued in service without break from the respective dates of their promotion, therefore, they were members of the service in substantive capacity from respective dates of promotion. It was argued that the direct recruit Shri Raje Ram was recruited long after the promotion of the appellants (promotees) and, therefore, the promotees cannot be pushed down and placed below the direct recruit. On examination of the rules, this Court found that recruitment to the service was from three sources, namely, direct recruitment, promotion and by transfer. A ratio was prescribed under rule 5(2) between the promotees and direct recruits. The ratio was 1:1. It was held that rule 5(2) had restricted the number of posts to promotees at 50%. Under the proviso to rule 5(2), it was laid down that the rigour of 50% quota may be relaxed in cases where direct recruits were not available. On reading rule 5, it was held by this Court that a promotee within his quota under rule 5 got his seniority from the date when the vacancy arose in his quota. It was held that the promotee occupying the post within 50% quota of the direct recruit acquired no right to the post and should yield to direct recruit though promoted later to him. It was held that the seniority of the promotee has to be reckoned only from the date of availability of the post and, therefore, he has to be placed below his immediate senior promotee within the said quota. The officiating period of the promotee between the date of initial promotion and the date of availability of vacancy would stand excluded. A direct recruit on promotion within his quota, though later to the promotee is interposed in between the periods and interjects the promotee's seniority; he snaps the links in the chain of continuity and steals a march over the promotee. It has been further held that the rule of quota is a statutory rule and must be strictly implemented. The result of pushing down the promotees may work hardship but it is unavoidable as it would nullify otherwise the statutory rules. In the case of U.P. Secretariat U.D.A. Association (supra), it has been held by this Court that mere inaction on the part of the government cannot be made ground to contend that the quota rule has broken down. In the present case, in the absence of direct recruitment, the appellants could not have got seniority over direct recruits. Where there is inaction on the part of the Government or employer or imposed ban on direct recruitment in filling up the posts meant for direct recruits, it cannot be held that the quota has broken down."

38. If one has regard to the above, such an appointee, who is appointed though in contingency as per the recruitment rules of

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Election Commission, has to be replaced by the regularly SSC selected candidate and for want of regularization as mode of appointment under the recruitment rules and further for want of any relaxation assumingly it is permissible, would not be conferred with right of appointment on a substantive capacity on regular basis and consequently such an appointment would not bestow right of seniority upon the concerned.

40. Insofar as appointment *de hors* the rules is concerned, the Apex Court in **Nazira Begun Lashkar & another v. State of Assam & others**, 2001 (1) SCC 143 in a three Judges Bench decision as regards illegal appointment, held that illegal appointment against the rules would not confer any right on the appointees nor any right to claim equitable relief from the Court. Mere passage of time or continuity would not confer any right upon the appointee, who had been appointed *de hors* the rules and outside the quota in case of promotees when holding the DPC, the Apex court in **Uma Devi's** case (*supra*) with regard to the aforesaid, clearly hold that mere continuity would not confer such an appointee who had been illegally appointed to confer any right to continue further and regularization, which does not precede a legal process in accordance with rules would also not confer any right upon the concerned.

41. Insofar as illegal appointment of the private respondents *de hors* the rule is concerned, as a legal fiction and also an exception carved out in **Uma Devi's** case (*supra*), the person, who had continued on completion of 10 years of service, though irregularly appointed, had to be, as one time measure, considered for regularization, but the effect would be prospective in nature. If it is so, then prospective

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appointment of the private respondents would not only obliterate and washing-off of their earlier service but also in the matter of seniority on prospective regularization, even as a prospective ruling of the Apex Court (supra) from that date, there would be implications.

42. It is established as an adverse inference drawn against the official respondents for non-production of records that both the categories, i.e., the candidates from Employment Exchange and promotee have not been appointed without following due process of law under the statutory rules. In the case of promotees, they were appointed in the guise of the quota and Employment Exchange candidates, who have no right to continue after the selected candidates from SSC are available in 1999, have been continued and rather accorded regularization on 2.9.1996. A vacancy meant under the quota for direct recruitment for the SSC candidates cannot be utilized by any other mode. The proviso only admits such an appointment in contingency without further right to continue on availability of SSC candidates. If this appointment is not to be treated as illegal, the fact that the private respondents had continued for more than 10 years, though for want of relaxation their continuance and regularization is null and void and is a continuing wrong perpetuated by the Government. Though legitimate expectation as a principle of equity would not prevail over the substantive right and the principle of equality enshrined under Article 14 of the Constitution, yet carving out them as an exception after so many years of their continuance in service dispensing with their services would amount to unsettling the settled position. This also holds good for regularization but with an exception that the applicants, who had been the first batch after regularization of the private respondents to join the

seniority of such a direct recruit for want of recruitment rules is determinable as per the provisions of DOPT's OM dated 3.7.1986 where the seniority of direct recruits is to be from the date of merit in the examination and as per paragraph 2.4.2 on rota-quota has to be followed. However, as held by the Apex Court in **Suraj Parkash Gupta's** case (supra), as at that time despite qualification they were not borne in the cadre and the seniority would be from the date they joined the substantive post as direct recruits.

43. The three Judges Bench in **B.P. Achala Anand v. S. Appi Reddy & another**, (2005) 3 SCC 313, observed as under:

"Unusual fact situation posing issues for resolution is an opportunity for innovation. Law, as administered by Courts, transforms into justice. 'The definition of justice mentioned in Justinian's Corpus Juris Civilis (adopted from the Roman jurist Ulpian) states 'Justice is constant and perpetual will to render to everyone that to which he is entitled.' Similarly, Cicero described justice as 'the disposition of the human mind to render everyone his due'." The law does not remain static. It does not operate in a vacuum. As social norms and values change, laws too have to be re-interpreted, and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment, human relations by elimination of social tensions and conflicts. Lord Denning once said:

"Law does not standstill; it moves continuously. Once this is recognized, then the task of a judge is put on a higher plain. He must consciously seek to mould the law so as to serve the needs of the time."

44. If one has regard to the above, as there is no methodology or direction as to the persons illegally regularized and their fate in the decision of the Apex Court in **Uma Devi's** case (supra), law should not be allowed to operate in vacuum. Any innovation, when a law is created, is administered transforms into justice. A legal fiction as per the Apex Court in **Bijender Singh v. State of Haryana & another**, (2005) 3 SCC 685 has to be given in its full effect, although with limitations. The purpose of legal fiction is to be ascertained and consequences,

which are incidental or inevitable corollaries are to be seen to give effect to it. The legal fiction should not be extended beyond the purpose for which it is created.

45. In the matter of function of judiciary, the Apex Court in **Rupa Ashok Hurra v. Ashok Hura**, (2002) 4 SCC 388 in a Constitution Bench decision, laid down as under:-

"The role of judiciary merely to interpret and declare the law was the concept of bygone age. It is no more open to debate as it is fairly settled that the courts can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice. In the recent years there is a discernable shift in the approach of the final courts in favour of rendering justice on the facts presented before them, without abrogating but by-passing the principle of finality of the judgment."

46. If one has regard to the above, when the ultimate object is to dispense ~~justice~~^{justice}, the same should be an underlined principle to be adopted. In the said case, though for want of relaxation in writing by the Central Government, the status of the private respondents remains as illegal appointees, yet the dicta in **Uma Devi's** case (supra) on a compassion protects their right on a prospective regularization. However, if this mode of appointment was to culminate on the availability of first batch of SSC candidates, then their right to be reckoned seniority from the date of their joining cannot be overridden and would not be allowed to be relegated in seniority by a person not substantially appointed to the post. Accordingly, balancing the situation, keeping in light the interest of both the parties, formulation of a via-media in consonance with the principles of law and rules, which on operation of one hand protects the long service and regularization of private respondents but also protects the seniority of the applicants

and on such an equation, what comes out is that the first appointee from SSC, i.e., applicants, would gain seniority over the private respondents and there would be a deemed legal fiction created in favour of the private respondents of regularization and thereupon, the seniority of private respondents, vis-à-vis, the applicants, would not be interfered to their supersession by appointees of SSC after 1999. We are aware of our judicial constraints but on innovation as per the decision of the Apex Court in **B.P. Achala Anand's** case (supra), we do not violate any law and the methodology resorted to is also in consonance with law and in the interest of both the parties.

47. Another aspect of the matter, we find from the perusal of order passed on representation that though the applicants have raised all these pleas before the official respondents as an objection to the tentative seniority circulated, yet on consideration of the aforesaid by passing a very casual and mechanical order and stating that Election Commission has considered this aspect of the matter whether the same eligibility, the private respondents have been further considered on officiating basis as UDCs, has passed a non-speaking order. We would like to observe that if the initial appointment is not in accordance with rules and is illegal, subsequent consideration would also be vitiated on that count but as we have not passed any adverse order as to the relaxation of the private respondents, we would also not like to disturb their promotions as UDCs.

48. In the result, for the foregoing reasons, we partly allow this OA. Final seniority list circulated by the respondents in the cadre of LDC and the orders passed on representation(s) are set aside. Respondents are directed to re-determine the seniority of the applicants, vis-à-vis,

private respondents in the light of the settled principle of law, rules and instructions and our observations made above. If on accord of seniority any right for consideration for promotion is accrued to the applicants in the post of UDC, the same shall also be considered as a consequence thereto. The aforesaid directions shall be complied with within a period of three months from the date of receipt of a copy of this order.

49. Before parting this, we express our dissatisfaction to utmost non-cooperation extended by the Election Commission, which has not only affected administration of justice but also an opportunity to be assisted by them. We deprecate this in very strong terms. In future we expect from the official respondents more cooperation and transparency of actions. As the private respondents are also the employees of the Election Commission, their right has not only to be protected but defended also by the official respondents. However, the official respondents have failed on both the counts.

No costs.


(N.D.Dayal)
Member (A)


(Shanker Raju)
Member (J)

/sunil/