

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA 265/90, OA 1210/90, OA 111/91 AND OA 253/91

DE: II-2-92

(1) OA 265/90

N Ravindran	...	Applicant
Mr VK Ravindran	...	Advocate for Applicant.
<u>Vs</u>		
The Central Provident Fund Commissioner 9th Floor, Mayoore Bhavan, Connaught Circus, New Delhi 110 001 & another ...		Respondents
Mr NN Sugunapalan, SCGSC	...	Advocate for Respondents.

(2) OA 1210/90

KK Narayanan and another	...	Applicants
Mr MR Rajendran Nair	...	Advocate for Applicants.
<u>Vs</u>		
The Central Provident Fund Commissioner New Delhi and another. ...		Respondents
Mr NN Sugunapalan, SCGSC	...	Advocate for Respondents

(3) OA 111/91

R Bojarajan	...	Applicant
M/s Mathews & Mathew	...	Advocate for Applicant.
<u>Vs</u>		
The Central Provident Fund Commissioner 9th Floor, Mayoore Bhavan, Connaught Circus, New Delhi-110 001 and others...		Respondents
Mr NN Sugunapalan, SCGSC	...	Advocate for Respondents 1 & 2
Mrs Sobhana Kumar	...	Respondents 4 to 6
Mr CS Rajan	...	Respondents 7 & 8

(4) OA 253/91

M Vasanthakumary	...	Applicant
M/s Mathews P Mathew	...	Advocate for Applicant
<u>Vs</u>		
The Central Provident Fund Commissioner 9th Floor, Mayoore Bhavan, Connaught Circus, New Delhi-1 & others..		Respondents
Mr NN Sugunapalan, SCGSC	...	Advocate for Respondent 1 & 2
Mr PS Biju	..	Respondent- 3

CORAM

Hon'ble Mr NV Krishnan, Administrative Member

and

Hon'ble Shri AV Haridasan, Judicial Member

JUDGMENT

Sh NV Krishnan, A.M

The four original applications listed above were heard together as the issues involved are identical. Two contempt petitions - CCP 47/90 and CCP 9/91 in OA 623/88- and two review applications - RA 11/91 and RA 12/91 in OAK 303/88-were also heard with these cases as it was represented that the judgment to be rendered in the original applications will facilitate the disposal of these contempt petitions/ review applications. By this common judgment we are disposing of the four original applications only. ^{u Orders} in the contempt petitions/review applications are being passed separately.

2 OA 111/91 is treated as the lead case from which the facts are stated and unless otherwise stated, all exhibits and annexures refer to those filed in this application.

3 The applicant in OA 111/91 is a Head Clerk in the Regional Provident Fund Commissioner's Office, Trivandrum

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(Respondent-2). The Employees Provident Fund Organizations is set up under the Employees Provident Fund & Miscellaneous Provisions Act 1952 (Act, for short). The rules for recruitment of staff to be employed in this organization are framed in exercise of the powers under Sub-section-7 of Section 5 D of the Act.

Provident Fund Commissioner's

4 The post of Head Clerks in the Regional Office are to be filled by promotion of Upper Division Clerks (UDCs). 75 per cent of the vacancies are reserved for promotion of UDCs on the basis of seniority, subject to rejection of the unfit and this quota is hereinafter referred to as the 'seniority quota' and the Head Clerks so appointed are referred to as 'Seniority HCs'. The balance of 25 per cent of the vacancies is reserved for promotion of UDCs serving in the Headquarters and Regional Offices on the basis of a ~~qualifying~~^{competitive} examination restricted to those who have rendered not less than 3 years' service ^{as} and is hereinafter referred to 'examination quota' and the Head Clerks so appointed are referred to as 'Examination HCs'. The promotions are, therefore, made in the ratio of 3 : 1 i.e., 3 from seniority quota and one from examination quota. The applicant was promoted as a Head Clerk on 18.3.82 on a regular basis against the examination quota i.e., he is an Examination HC.

5 A provisional seniority list of Head Clerks was published on 15.12.82 (Annexure A1) wherein the applicant

was ranked at Sl.No.71. It is seen from this list that seniority is given on the basis of a 3:1 ratio viz, 3 seniority quota promotees followed by one examination quota candidate, called i-n Annexure A1 as 'DR' i.e., "Direct recruits" .. It is alleged that nobody filed any representation against that seniority list and that therefore, it has become final. Similarly, another provisional seniority list dated 23.9.85 was published (Annexure A2) in which also the same principle of seniority was followed. No objection was filed thereto and that list has also become final.

6 It is submitted that the principle of seniority followed in these two lists is in accordance with "General principles for determining seniority of persons employed in the Employees Provident Fund Organization" enclosed to the Annexure A3 letter (No. Adm 20(17)/61 dated 1.11.1962) of the first respondent- hereinafter referred to as "General Principles-1962). These principles, it may be noted, were in force upto 9.12.89 on which date the "Employees' Provident Fund Staff (Fixation of Seniority Regulations, 1989" (1989 Regulations, for short) framed under Sub-section 7(a) of Section 5D of the Act and enclosed with letter (No.P IV/1 (12)/84/Seniority dated 19.12.89-Annexure A4) came into force as stated by Regulation 1(2) thereof. It is made clear in the Annexure A4 letter that the general principles-1962 stand repealed. It is, however, made clear in that letter that the fixation of seniority in respect of persons appointed ~~xxxxxxxxxxxxxx~~ or promoted to a cadre prior

to the commencement of the 1989 Regulations shall be governed by the earlier letter dated 1.11.62 (Annexure A3), so long as they continue to officiate in the same grade in which they were on the date of commencement of the 1989 Regulations. The 1989 Regulations shall apply to them when they are promoted to the next grade.

7 The main grievance of the applicant is that the respondents 1 & 2 have suddenly changed the principle of seniority on the basis of Annexure A1 and A2 seniority lists were prepared and have circulated a fresh provisional seniority list of Head Clerks with their letter dated 29.4.88 (Annexure A5) stated to be prepared on the basis of certain observations made by the Chandigarh Bench of the Central Administrative Tribunal (Tribunal, for short) in TA 556/86. That letter is reproduced below:

" A seniority list has been prepared in view of the observations made by the Central Administrative Tribunal, Chandigarh Bench. This decision has been forwarded by the Central Office to the Regional Commissioner for guidance and necessary action. A reference has been already made to the Central Office to issue clear instructions for the procedural part of it. Some of the staff members in this office have filed an application before the CAT, Madras Bench. Interim Orders have been passed by CAT, Madras Bench as under:

"The learned counsel for the applicant prays for stay of the operation of the impugned seniority list. However, it is unnecessary to stay the operation of the impugned seniority list as the applicants' interest can sufficiently be protected by making an order that any promotion on the basis of the impugned seniority list will be subject to the result of the application ordered accordingly".

" The Draft seniority list is hereby circulated for the information of all the staff members. This list is subject to further instructions to be received from the Central Office and the outcome of the final decision of the CAT, Madras Bench in the Application No. K 143/88 before the CAT (Camp at Cochin).

" The objection if any, may be forwarded to Regional Provident Fund Commissioner in duplicate before 20th May, 1988."

8 The applicant contends that the judgment of the Chandigarh Bench has nothing to do with the seniority of Head Clerks and that judgment has been relied upon by misinterpreting its import. In the impugned Annexure A5 seniority list, Examination HCs, like the ~~is~~ to certain seniority HCs applicant, who were seniors in the earlier Annexure 1 & 2 seniority list have now been shown as their juniors by reckoning ~~the~~ seeking for purposes of seniority the date from which the Seniority HCs were given adhoc promotion as Head Clerk and the principle of 3 : 1 has been given up. The applicant sent representations (Annexure A6 and A7) to the 2nd respondent against this provisional seniority list. The representations disclose that the applicant was aware of the reasons for the changes made in the seniority list (Annexure A5). These have not been disposed of by Respondents 1 & 2.

9 One PV Bhaskaran and 4 others approached this Tribunal by filing OAK 623/88 challenging the Annexure A5 seniority list. That application was allowed on 22.12.89 with the following directions, (Annexure A8)/to which my learned brother was party.

" In the facts and circumstances, we allow the application with the direction to the respondents 1 to 3 that the applicants should be promoted on a regular basis as Head Clerks with effect from the dates on which every fourth vacancy to which they are entitled in the examination quota on the basis of their rank, occurred subsequent to their qualifying in the 1983 examination. In other words, the 4th, 20th, 28th, 32nd and 36th vacancies materialising in the cadre of Head Clerks after the applicants qualified, should be made available to the applicants who ranked as 3rd, 5th, 7th, 8th and 9th in the departmental examination. The promotions should be made with retrospective effect from the date of occurrence of these vacancies with all consequential benefits of pay, allowances and seniority".

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10 In view of the tardy implementation of these directions, CCP 47/90 and CCP 9/91 have been filed.

In CCP 47/90, the Department has also filed MP 955/90 seeking certain clarifications. These are pending.

11 Subsequently, OA 303/88 was filed by certain applicants, who are Seniority HCs, for a direction that promotions from the cadre of Head Clerk, be made on the basis of the ~~Annexure A2~~ provisional seniority list issued on 29.4.88, which is Annexure A5 in OA 111/91. That was disposed of by a judgment dated 23.11.90 (Annexure A10) by this same Bench. It was noticed therein that a number of applications on this issue already stood transferred to the Principal Bench, pursuant to an order issued by the Hon'ble Chairman under Section 25 of the Administrative Tribunals Act of 1985, that in OA 327/88 of the Ernakulam Bench, the finalization of the provisional seniority list (Annexure A5) had been stayed, and, that in OA 143/88 a direction had been issued that promotions made in accordance with the seniority list issued on 29.4.88 shall be subject to the outcome of the final judgment in that application. It has also to be stated that when OA 303/88 was heard, it was not brought to our notice that a decision (Annexure A8) had already been rendered in OAK 623/88. In the circumstances, OA 303/88 was disposed of with the following directions to the respondents:

"(a) Promotions from the rank of Head Clerk will be made only on a provisional basis from the provisional seniority list (Ann. II). All such promotions shall be subject to the final orders of the Tribunal in OA 143/88 and all promotees should be informed of this condition.

"(b) For the present, the Ann.III order promoting the 4th respondent shall be provisionally reviewed within a period of two months from the date of service of this order in the Context of the fact that in the Annexure-II Seniority List the first applicant is shown as senior to the 4th respondent and the person entitled to promotion on such review be promoted, subject to the conditions mentioned in (a) above".

12 Two persons who were not parties to OA 303/88 have filed review applications 11/91 and 12/91 which are pending.

13 It is in this background that 11/91 has been filed. The grievance of the applicant is that all persons included in the Annexure-I seniority list, who are senior to him, have already been promoted from Head Clerks to the post of AAO/ESO. The applicant is the next person to be promoted on the basis of that seniority list and a retirement vacancy has arisen on 1.1.91. If, however, the Annexure A5 seniority list is relied upon for provisional promotions as now directed in OA 303/88, he may not get a promotion at all in the near future. In this connection, he alleges that

in assigning seniority to the Head Clerks promoted on the basis of seniority, the Annexure A5 provisional seniority list has unjustifiably given them/- contesting party respondents- whereas in the case of the Examination HCs, like the applicant, only the date of regular promotion is taken into account for seniority purposes. For this reason also they have been placed far below in the seniority list.

14 In the circumstances, the applicant has prayed for the following directions:

" (a) to declare that promotions to the post of AAO/ESO are bound to be made in conformity with the settled seniority of the incumbents of the post of Head Clerk as evidenced Annexure A1 and A2.

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- (b) to declare that the applicant is senior to all promotees to the cadre of Head Clerks who are promoted to that cadre on regular basis subsequent to the regular promotion given to the applicant on 18.3.1982.
- (c) to declare that respondent No.3 and others who got adhoc promotion in violation of the prescribed ratio 3: 1 are not entitled to get their adhoc service treated as regular service either directly or indirectly so long as the regularisation of the promotions of the incumbents of the posts of Head Clerks effected on the basis of the prescribed ratio of 3: 1 stand undisturbed.
- (d) to declare that Annexure A5 draft seniority list ceased to have effect in view of directions contained in Annexure A9 issued on behalf of the 1st respondent and no promotions should be effected to the next cadre on the basis of Annexure A5".

15 The applicant had impleaded only 3 respondents of whom Respondents 1 & 2 are respectively the Central Provident Fund Commissioner at New Delhi and the Regional Provident Fund Commissioner at Trivandrum - Administration, for short - and the contesting Respondent-3. However, others who appeared on their own were permitted to be impleaded as additional Respondents 4 to 8.

16 The Administration has filed its reply and a separate reply has been filed by the Respondents 7 & 8 who are all Seniority HCs.

17 In its reply, the Administration contends that the Annexure 1 & 2 were only draft seniority lists which were never finalized.

18 In transferred application T 556/1986, the Chandigarh Bench of the Tribunal had considered a similar matter relating to UDCs. The recruitment rule for promotion to the post of UDC is similar to that of promotion to the post of Head Clerk, except that the

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quota for promotion on seniority basis is 50 per cent and for promotion by examination of LDCs is 50 per cent.

The judgment rendered on 23rd January 1987 (Exbt.R1)

declared that the LDCs promoted on the basis of an examination cannot be considered or equated to direct recruits and the interse seniority among the two groups

cannot be fixed on that assumption and that therefore, 1962

para-7 of the General Principles for determining seniority, circulated with the Annexure A3 letter and dealing with relative seniority of direct recruits and promotees, should not be followed in this case and that instead, para 6 of the said principles alone should be followed - Para 17 and 18 of that judgment are reproduced below:

"17. Thus, in the present case, promotees on the basis of departmental examination who belong to the LDCs cadre cannot be termed as direct recruits and they belong essentially to the same category as promotees from the LDCs cadre, who were promoted to the UDCs cadre on the basis of seniority-cum-fitness. As a matter of fact, the promoted UDCs, whether on the basis of examination or on the basis of seniority, cannot be classified as direct recruits since all of them are promotees from the LDCs cadre. The promotee UDCs who have got promotion by qualifying departmental examination do not become 'direct recruits' just because the Central Provident Fund Commissioner has chosen to call them as such in his letter addressed to the Regional Provident Fund Commissioner. In fact the phrase 'direct recruit' is well understood in service law and it is difficult to agree that an administrative authority can categorise 'promotees' as 'direct entrants' just to suit administrative convenience. The argument regarding estoppel does not appear to be valid since the conditions as regards seniority incorporated in the promotion orders of the applicants were not statutory conditions."

"18. In view of the factual and legal position stated above, respondent No.1 is directed to recast the seniority list of UDCs treating all of them as 'promotees' under the general principles of seniority in the department as applicable to promotees (vide para 6 of the notification dated 1.11.1962)."

19 The SLP filed by the respondents was dismissed as follows on 11.8.1987 (Exbt.R2).

"We see no reason to entertain this Special Leave Petition. One ground in support of this petition was that there is contrary decision by one of the Benches of the Administrative Tribunal. That difficulty will not continue by refusing to grant leave. We are of the view that the appropriate rule for determining the seniority of the officers is the total length of service in the promotional posts which would depend upon the actual date when they were promoted."

20 The Additional Solicitor General of India was consulted whether "total length of service" in the above order would include adhoc service and whether 'actual date when they were promoted' would refer to date of adhoc or regular promotion. He gave the following advice. (original is in OA 253/91, copy kept on record).

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"On the facts mentioned in the judgment it is the actual length of service from the date of the adhoc promotion/has to be taken".

21 Administration contends that The L on the basis of the Chandigarh Bench/
in Annexure A5, the examination passed UDCs were also treated as promotees only and on the basis of the advice given by the Additional Solicitor General, adhoc service was counted for reckoning seniority.

22 In their reply, Respondents 7 & 8 have stated that the applicant cannot claim the benefit of direct recruitment for the purpose of seniority as he is also only a promotee, the only difference being that the promotion

has been made on the basis of an examination. Merely because he has passed the examination, he cannot be given a higher seniority over the persons who are senior to him. It is submitted that in the light of the Exbt.R2 Supreme Court's order in the SLP, the judgment of the Chandigarh Bench is binding on every one. It is also stated that the aforesaid judgment has been followed by the Hyderabad Bench of the Tribunal in their judgment dated 13.10.87, a copy of which was produced for our perusal. It is also contended that as they are the seniormost UDCs, their adhoc promotion as Head Clerk will count for seniority.

23 We have heard the arguments of the parties in ^U ~~defending~~ which they reiterated the stand taken by them in their pleadings.

24 The learned counsel for the applicant contended that the enclosure to the Annexure A3 dated 1.11.62 sets out the principles of seniority to be adopted till it was repealed by the Annexure A4 circular dated 19.12.89.

Para 5 thereof states that the relative seniority of direct recruits shall be determined by the order of merits in which they are selected. In para-6 relating to promotions, it is stated that the relative seniority of persons promoted shall be determined in the order of selection for such promotions. Para-7 is the most important guideline which states that the relative seniority of direct recruits and of promotees shall be determined "according to the rotation of vacancies between direct

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recruits and promotees which shall be based on the quota of vacancies reserved for direct recruits and promotions respectively in the recruitment rules." It is contended that it is on this basis that the Annexure A1 seniority list has been prepared assigning three places to departmental promotees from the seniority quota and assigning the fourth place to a examination quota candidate. This principle of seniority has been upheld and followed in the earlier judgment of the Tribunal in OA 623/88 (Annexure A8). It is submitted that the Chandigarh Bench judgment has nothing to do with the fixation of seniority of Head Clerks. It only decided that the LDCs promoted as UDCs on the basis of examination held in 1979 and 1980 cannot claim seniority over others who, on the basis of their seniority as LDCs, were first given adhoc promotion as UDCs in 1976 and ~~then~~ were given regular promotions from 11.5.1978.

25 On the contrary, the learned counsel for the respondents submit that the decision of the Chandigarh Bench produced at Annexure R1 is to the effect that LDCs promoted as UDCs on the basis of examination cannot be treated as direct recruits and their seniority should be determined under para 6 of the principles of seniority circulated vide Annexure A3. That judgment is equally applicable to the promotions to the cadre of Head Clerks from UDCs.

26 In the earlier judgment in OA 303/90 (Annexure A10), it is mentioned in passing that, though not called upon to determine the final principles of seniority, the Bench

agreed with the view expressed in the judgment of the Chandigarh Bench.

27 We have now considered the matter on merits.

28 There is, obviously, a difference between the conclusions reached by the Chandigarh Bench in the Exbt.R1 judgment and the judgment rendered by the Ernakulam Bench at Annexure A8, to which none of us was a party (Sh.A.V.Haridasan)

In the former judgment, the conclusion reached is that LDCs who have passed the examination and been appointed as UDCs cannot be treated as direct recruits and therefore, cannot get the benefit of the principles of seniority recruits.

On the contrary, in the judgment of the Ernakulam Bench in OAK 623/88, the issue whether UDCs who pass the examination and are appointed as Head Clerks are to be treated as direct recruits has not been examined at all on merits. This is clear for a perusal of this short judgment. Para 3 thereof is reproduced below:

"3. In the Counter Affidavit, the respondents 1 to 3 have conceded that for promotion as Head Clerks 75% of vacancies are earmarked for seniority candidates and the remaining 25% for those who qualified in the departmental examination. They have also conceded that the applicants had obtained 3rd, 5th, 7th, 8th and 9th ranks in the examination. However, the respondents have justified the adhoc promotions in excess of the seniority quota by stating that the promotions have been made on an adhoc basis, and in accordance with the past practice only the seniormost UDCs were considered for such adhoc promotions which were never offered to the examination qualified candidates. This practice according to them was done away with, after the decision of the Chandigarh Bench of the Tribunal in TA 556/86 and the decision of the Supreme Court in SLP No.7274/87. Nothing has been stated about the particulars of these decisions. They have further stated that the adhoc promotions of the applicants will be considered from the date of issue of Supreme Court's Order. They have, however, indicated that the first applicant who is the seniormost will now be promoted on a purely temporary and adhoc basis in his turn. They have repeated that ad-hoc promotions to examination

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qualified candidate will be made from the date of decision of the Chandigarh Bench while earlier they had stated that it will be made from the date of issue of Supreme Court's Order."

(emphasis added).

Again, in para 4 of that judgment, the following observations are made:

"The respondents 1 to 3 are hopelessly confused about the application of the rules to the filling up of vacancies of Head Clerks. They have not indicated how the decision of the Chandigarh Bench and of the Supreme Court in the SLP to which none of the applicants was a party would be relevant for denying to the applicants their rightful promotions as Head Clerks."

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"If the Chandigarh Bench and the Supreme Court had decided about how the seniority in the grade of UDCs should be fixed, that would have effect only amongst those who claimed promotion against the seniority quota and will have no effect whatsoever on the examination quota candidates like the applicants who having qualified in the examination held in 1983 are within the first nine positions." (emphasis added).

The respondents therein did not even raise the fundamental issue that the applicants therein, who are examination Head Clerks, are not to be treated as direct recruits. which is the crux of the judgment of the Chandigarh Bench.

29 In the circumstance, the judgment in OA 623/88 (Exbt.A8) cannot be treated as having decided this question on merits and is therefore, not binding as a precedent. That question is to be considered now.

30 Persons like the applicant appointed as Head Clerk on the basis of an examination held for UDCs cannot be considered to be direct recruits for, "direct recruit" has a totally different connotation in administrative parlance. The essential feature of direct recruitment is that an opportunity has necessarily to be given to

and, outsiders to participate in the recruitment for this purpose, the recruitment rules normally prescribe the age limits as also the minimum educational qualifications for recruitment ~~is~~ of the outsiders. The recruitment rules may, in addition, also permit the Departmental candidates to participate in such direct recruitment with or without conditions. Participation of outsiders is, however, the basic necessity without which it cannot be called direct recruitment. When para-7 of the General Principles-1962 circulated with Annexure A3 speaks of interse seniority between promotees and direct recruits, it, therefore, refers to only such direct recruits and not to persons like the applicant. It is a misnomer to call the applicant and others like him direct recruits and also the use of abbreviations 'DR' in the seniority list is totally inappropriate and misleading.

31 It is not necessary for us to press this point any further for, para 12 of the Chandigarh Bench judgment (Annexure R1) reproduces the Rules relating to recruitment of UDCs after the amendment made in November, 1984, by which direct recruitment was introduced as a third mode of recruitment. With that amendment, the Rules provide for 3 sources of recruitments for UDC viz; promotion by seniority, promotion by examination (like in the case of the applicant) and direct recruitment. Therefore, a direct recruit is totally different from one promoted on the basis of an examination. Hence, para-7 of the ^V General Principles - 1962

(b)

will not apply to determine the interse seniority of persons like the applicant (examination quota promotees) on the one hand and others promoted on seniority basis on the other.

32 Instead of merely giving a negative declaration that the UDCs who were promoted as Head Clerks on the basis of a competitive examination should not be treated as direct recruits for the purpose of fixing their seniority in the cadre of Head Clerks, we find it necessary to clarify as to how their seniority should be fixed. For, no guidance has been given in this regard either in the judgment of the Chandigarh Bench in TA 556/86 (Exbt.R1) nor in the judgment of the Hyderabad Bench of the Tribunal in DA 491/86 produced for our perusal.

33 That apart, even para 6 of the General Principles, 1962, which governs the relative seniority of promotees and is reproduced below, does not contain any guidelines which will apply to the present case.

6. Promotees:

- (i) The relative seniority of persons promoted to the various grades shall be determined in the order of their selection for such promotion; provided that where persons promoted initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their promotion, seniority shall follow the order of confirmation and not the original order of merit;
- (ii) Where promotions to a grade are made from more than one grade, the eligible persons shall be arranged in separate lists in the order of their relative seniority in their respective grades. Thereafter, the Departmental Promotion Committee shall select persons for promotion from each list upto the prescribed quota and arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of the persons on promotion to the higher grade."

34 As a matter of fact, the enclosure to Annexure A3
(i.e., General Principles-1962) is an adopted version
of the Ministry of Home Affairs OM No.1-11R55-RPS dated
22nd December 1959 (1959 instruction, for short) which has
been reproduced in Swamy's Compilation on Seniority and
Promotion in Central Government Service (2nd Edition) at
pages 6 to 10. The 1959 instruction authorise the issue
of such principles of other Departments of Government.
The promotion relating to seniority of direct recruits,
promotees and relative seniority of direct recruitments
are contained in paras 4,5 & 6 of the 1959 instructions
and in paras 5,6 & 7 of the General Principles 1962 are
the same. Both contain an explanatory memorandum to
the principles of seniority. The Explanatory Memorandum
to the 1959 instruction relating to seniority of promotees
is reproduced below:

"General Principle 5(i) - Where promotions are made on the basis of selection by a Departmental Promotion Committee, the seniority of such promotees shall be in the order in which they are recommended for such promotion by the Committee. Where promotions are made on the basis of seniority subject to the rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior, such person shall not, if he is subsequently found suitable and promoted, take seniority in the higher grade over the junior person who had superseded him.

"General Principle 5(ii) Illustration.- Where 75 % of the vacancies in the grade of Head Clerks are reserved for promotion from the grade of Upper Division Clerks and 25% from the grade of Store-Keepers, the eligible Upper Division Clerks and Store-Keepers shall be arranged in separate lists with reference to their relative seniority in those grades. The DPC will make selection of three candidates from the list of UDCs and one from the list of Store Keepers. Thereafter the selected persons from each list shall be arranged in a single list in a consolidated order of merit assessed by the DPC which will determine the seniority of the persons on promotion to higher grade".

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However, in the Explanatory memorandum to the General Principle 1962, only the first explanation, reproduced above, is included. The second explanation is, for some reason or other, omitted.

35 No doubt, the illustration given in the explanation to General Principle 5(ii) in the above extract from the 1989 instruction does not apply directly to the present case. Whether the inter-se seniority in the present application should also be, nevertheless, disposed of in the manner indicated therein will be considered a little later. For the present, it is necessary and sufficient to note that even when promotion is made from two different grades, with fixed percentages of promotion allocated to each grade, the simple rota rule is not directed to be followed. In other words, the allocation is not directed to be in the ratio of 3 UDCs : 1 Store Keeper.

36 It is in this circumstance that one has to find out what is the equitable basis/fixing seniority in the present case, keeping in view various provisions relating to seniority. It is quite possible to contend that even if the examination passed promotees are not to be treated as direct recruits, still, every block of four vacancies of Head Clerk should be taken as a separate unit and 3 seniority promotees and 1 examination promotee have to be appointed to those vacancies to satisfy the direction contained in the recruitment rules and thus follow a roster of 3 : 1 ratio. On the contrary, it could also be

seriously contended that, for this purpose, the vacancies
that arise in a calendar year will alone have to be taken
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as a block. We are in agreement with the latter view
because it is necessary to do so in the light of certain
other provisions relating to functioning of Departmental
Promotion Committees, when they consider promotions.

The following provisions from Chapter 3 of the
aforesaid Swamy's Compilation make it clear that vacancies
arising in a year have to be considered for promotion by
the D.P.C.

"3.1 The D.P.Cs. should be convened at regular
intervals to draw panels which could be utilised
on making promotions against the vacancies
occurring during the course of a year."

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"3.2 The requirement of convening annual meetings
of the D.P.C. should be dispensed with only after
a certificate has been issued by the appointing
authority that there are no vacancies to be filled
by promotion or no officers are due for confirmation
during the year in question."

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"6.4.1 Where for reasons beyond control, the
D.P.C. could not be held in any year(s), even
though the vacancies arose during that year(or
years), the first D.P.C. that meets thereafter
should follow the following procedures:-

- (i) Determine the actual number of regular
vacancies that arose in each of the
previous year(s) immediately preceding
and the actual number of regular vacancies
proposed to be filled in the current year
separately.
- (ii) Consider in respect of each of the years
those officers only who would be within
the field of choice with reference to
the vacancies of each year starting with
the earliest year onwards.
- (iii) Prepare a 'Select List' by placing the
select list of the earlier year above
the one for the next year and so on."

It is thus clear that vacancies occurring in a year have
to be considered as a block and that principles should

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apply in the present case also.

37 In that event, it is our considered view that the first 75% of the vacancies that arise in a year shall be assigned to the seniority quota and the last 25% of those vacancies shall be assigned to the examination quota and the seniority HCs should enbloc be ranked senior to the examination HCs. Their interse seniority should be fixed on this principle.. for the following reasons.

To facilitate analysis, an example of one year has been taken in which 20 vacancies of Head Clerks have arisen.

(i) If all the vacancies are to be filled up by promotion on the basis of seniority-cum-fitness, all the persons from Sl.No. 1 to Sl.No.20 in the seniority list will be promoted on the basis of seniority, if they are fit. The quota for such promotion has now been restricted to 75 per cent only by the Rules. Therefore, if there are 20 vacancies in a calendar year, the first 15 vacancies will be filled up by promoting the seniormost UDCs who are found fit.

(ii) The provision of 25 per cent for examination quota is to be construed as an exception to the rule that promotion is normally to be on the basis of seniority, subject to fitness. Its implication is that the persons at serial No.16 to 20 in the seniority list-assuming that Sl.Nos 1 to 15 have all been found fit and promoted to the first 15 vacancies reserved for the seniority quota - cannot claim consideration for promotion to the vacancies

at 16 to 20 merely because they are the next immediate seniors. This is due to the fact that these vacancies are reserved for the examination quota and there will be a competition to get promoted to these vacancies. Therefore, persons at Sl No.16 to 20 in the seniority list have to compete, alongwith many others who are juniors to them in service, but who have the necessary qualifications for appearing in the examination. The five vacancies from 16 to 20 will then be filled by promotion of those who pass the examination.

(iii) The recruitment rule placed on record also state " Provided further, that interse seniority of the successful candidates so appointed from the same examination whether from amongst the successful employees of the Regional Offices or the Head quarters Office shall be determined according to the merit on the basis of the marks" and therefore, the 5 vacancies will be filled in the order of merit in the examination. It is clear that amongst the examination passed candidates alone- and not among all persons eligible for promotion- the order of promotion will be on the basis of merit. They cannot be compared with the persons at Sl.No.1 to 15 in the seniority list except on the basis of their seniority, which is the only factor common to all of them. In that regard, they will all be junior to Sl.No. 1 to 15, and hence cannot get precedence over them.

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(iv) In a panel prepared for promotion, a person who is junior in service, cannot be placed above a person who is senior to him in service under any circumstance, unless the recruitment rules or the executive instructions regarding seniority specifically authorise this. The recruitment rules and the General Principles-1962 do not state that the Examination HCs will rank senior to all or any of the seniority HCs. In the absence of such a specific rule or instruction, all the examination passed UDCs to be promoted as Head Clerk to the 5 posts reserved for them will be juniors to those who have a right to be appointed to the first 15 vacancies on the basis of seniority-cum-fitness.

(v) Nothing, however, prevents any one or more senior UDCs (i.e., serial No.1 to 15) also to appear in the examination. It has only to be clarified that if such a person passes the examination, he cannot gain any advantage over any of his service seniors who have not passed the examination. He will still get his promotion only on his turn, according to his seniority, for the reason that the recruitment rules do not give him any other right, even in such a case. His promotion will also be treated as a promotion to the seniority quota. It would also make no difference to his consideration for promotion in his turn in the seniority quota vacancy, even if he fails in the examination and he shall not be penalized for having failed in the examination.

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(vi) It is here that it is appropriate to consider why the panel should not be prepared on the basis of the explanatory memorandum to the 1959 instruction relating to General Principles 5(ii) extracted in para 34 supra. The main reason is that in the illustration given in that explanatory memorandum there are two different feeder categories i.e., UDC and Store Keeper. Unless conditions of service - viz; number of posts, method of recruitment etc - are identical, the position of the eligible candidates in the respective seniority lists cannot be compared or matched with each other on the basis of their seniority in the respective lists. In other words, to mix the two seniority lists into one integrated list would be doing injustice to some persons in both groups and will be favouring others in both groups. The principle of selection from those eligible from those categories was adopted because there were two entirely different sources from which recruitment was being made. If they cannot be compared on the basis of seniority for the reason stated above, a comparative evaluation on the basis of merit alone was possible to determine the order of their placement in the panel.

In the present case the feeder category is only one. All are UDCs and as seniority is the only common factor for comparison, it can be taken into account for preparing the panel for promotion. Therefore, after identifying the examination passed candidates based

on their merit, a common panel, including both groups, can be drawn on the basis of their service seniority. It will then be found that the first 15 places are occupied by the seniormost amongst the 20 persons in the panel. It will also be noticed that all the examination passed candidates will necessarily be at the bottom of the panel, being the juniormost in the panel. For, if any of them had a higher ^{service} seniority, he would be entitled to promotion merely on the basis of his seniority as clarified in (v) above. In other words, the examination passed candidates will be only those persons who have a lower seniority, but as between them, their names will have to be rearranged on the basis of their merit in the examination.

(vii) In other words, the Recruitment Rules and the General Principles-1962 read together clearly establish that the examination quota promotees shall en bloc be placed below seniority quota promotees.

(viii) The aforesaid conclusions are reinforced by the 1989 Regulations (Annexure A4). The regulations treat promotion on the basis of examination as being different from direct recruitment which is the point decided in the Chandigarh Bench judgment. Secondly, Regulation-5 makes the following provisions for determining seniority.

"5 Relative seniority of direct recruits, promotees against examination quota and promotees against seniority quota:

The relative seniority of direct recruits, promotees against examination quota and promotees against seniority quota shall be determined according to the rotation of vacancies among them, which shall be based on the quotas of vacancies reserved for each in the Recruitment Rules."

It is this regulation which gives authority for the first time, for fixing seniority of examination quota promotees on quota basis. It is only under this Regulation that, for the first time, those who pass the examination (i.e., Examination HCs) may become senior to those who are otherwise senior to them (Seniority HCs), but have not passed the examination.

The General Principles-1962 did not have such a specific provision regarding examination quota promotees. As the 1989 Regulations have come into force only from 9.12.89 when they were published in the Gazette, they will not apply to earlier case, like the present one. Hence, it is clear that all those who were promoted prior to 9.12.89 as Head Clerks to the 75 per cent of vacancies to be filled up on the basis of seniority-cum-fitness, will en bloc be senior to the examination passed UDCs who have been selected to fill up the 25 per cent vacancies allotted to them. It has only to be added that the Examination HCs appointed to their quota in one year will, similarly, rank en bloc senior to the Seniority HCs appointed to the subsequent vacancies in the following year on the basis of seniority-cum-fitness.

38 That takes us to the last issue viz. the adhoc promotions made and the counting of the service rendered on the basis of adhoc service for purpose of fixing interse seniority. In para 37 supra, we have referred

in to the sequence/which promotions will be made from the two sources, if there are 20 vacancies in a calendar year. It can be stated straight away that any promotion which is contrary to the sequence/appointment specified in para 37 will be an adhoc promotion for such period as the contravention continues and that such period of adhoc promotion will not count for seniority. This proposition is not in any way contrary to the order of the Hon'ble Supreme Court in Exbt.R2 which is extracted / in para 19 supra. That/cannot be interpreted to mean that the Hon'ble Supreme Court implied that periods of adhoc service rendered contrary to law should also count for seniority.

39 A few imaginary instances will/helpful to establish this point by assuming that there are 20 vacancies in a year.

(i) It may be assumed that when the first vacancy arose - say on 1.1.80 - the panel for promotion on the basis of seniority-cum-fitness was not ready. Nevertheless, the Administration appointed 'X', the seniormost UDC, on an adhoc basis. Later on, in October 1980, the DPC met and prepared a panel in which 'X' was found fit for promotion. He was then regularly promoted from 1.11.80. In such a circumstance, he can count for seniority purposes the service rendered from 1.1.80 itself because, his initial appointment on 1.1.80 did not defeat the legitimate interest of any other person and was adhoc only to the

extent that his fitness for promotion had not been certified by the DPC then but was certified later. Further, the DPC did not specifically disapprove of that adhoc officiation.

(ii) If in the example at (i) above, 'Y' is substituted for 'X' at all places and it is assumed that he is 6th in the seniority list, his adhoc promotion from 1.1.80 to 1.11.80 cannot be reckoned for seniority purposes because, that adhoc promotion was granted without considering the cases of seniors like 'X'. His seniority can be counted from 1.11.80 only.

(iii) In the example at (i),^{if} 'X' is substituted by 'E', who is too junior to be considered for promotion on seniority basis, but had passed the examination with the greatest merit, he cannot count his seniority from that date, because that vacancy is earmarked for seniority quota and should have gone to 'X'.

(iv) If 'Z' whose place in the seniority list is 18 - and hence not eligible to be promoted on seniority basis to the 15 seniority quota vacancies - and who has not passed the examination is appointed on an adhoc basis to the 16th vacancy which arose on 2.11.80, his adhoc promotion will be irregular for two reasons. The first is that if examination passed UDCs are available for promotion the most meritorious should have been promoted. The second is that this is ^{an} officiation against a post in a quota to which he is not entitled to be promoted. The service of 'Z' from 2.11.80 till he is

regularly promoted has, therefore, to be ignored for seniority purpose.

These examples are only illustrative and not exhaustive.

40 Apparently, in the Annexure A5 seniority list, the seniority HCs have been given credit for all their adhoc service without considering whether the whole or any part of that service ought to have been excluded from reckoning for the purpose of seniority. This action is defended on the ground that this is based on the order of the Supreme Court and the advice given by the Additional Solicitor General extracted in para-20 supra. Needless to say, the Exbt. R2 order as well as the advice by the Additional Solicitor General has been grossly misinterpreted by the Administration. The Apex Court has dealt with this matter in great detail in their judgment in the Direct Recruitment case, as it is called (AIR 1990-SC 1607) wherein 11 propositions have been laid down to settle disputes in regard to seniority matters between direct

recruits and promotees. Propositions A & B/are as follows:

"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only adhoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority."

"(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

In a subsequent judgment in Keshav Chandra Joshi Vs Union of India (AIR 1991 SC 284), the judgment in the Direct Recruits case was followed and it was observed as follows:

" An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Adhoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Art.14 read with Art.16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Arts. 14 and 16(1)."

(para- 23-emphasis added)

The special circumstance in which proposition 'B' of the Direct recruits case could be applied was clarified as follows:

"25. As stated, the counsel for the promotees placed strong reliance on proposition 'B' while the counsel for the Direct Recruits relied on proposition 'A'. The controversy is as to which of the propositions would apply to the facts of this case. The proposition 'A' lays down that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The latter part thereof amplifies postulating that where the initial appointment is only adhoc and not according to rules and is made as a stop-gap arrangement, the period of officiation in such post cannot be taken into account for reckoning seniority. The quintessence of the propositions is that the appointment to a post must be according to rules and not by way of adhoc or stop-gap arrangement made due to administrative exigencies. If the initial appointment thus made was de hors the rules, the entire length of such service cannot be counted for seniority. In other words the appointee would become a member of the service in the substantive capacity from the date of his appointment only if the appointment was made according to rules and seniority would be counted only from that date. Propositions 'A' and 'B' cover different aspects of one situation. One must discern the difference critically. Proposition 'B' must, therefore, be read alongwith para 13 of the judgment wherein the ratio deciding of Narendra Chadha was held to have considerable force. The latter postulated that if the initial appointment to a substantive post or vacancy was made deliberately, in disregard of the rules and allowed the incumbent to continue on the post for well over 15 to 20 years without reversion and still the date of regularisation of the service in accordance with the rules, the period of officiating service has to be counted towards seniority. This Court in Narendra Chadha's case was cognizant of the fact that the rules empower the Government to relax the rule of appointment. Without reading paragraph 13 and Proposition 'B' and Narendra Chadha's ratio together the true import of the proposition would not be appreciated."

41 Therefore, adhoc service cannot be considered satisfies atleast for seniority purposes unless it ~~satisfies~~ three broad

tests:

- (i) the person was fully qualified on the date adhoc promotion was granted;

(ii) the case of all persons eligible to be considered for promotion had been considered by competent authority; and

(iii) it is within the quota to which alone the person could have been regularly promoted.

Therefore, Annexure A5 seniority has to be recast.

Where adhoc service has been counted for reckoning seniority, such service which is contrary to the Rules, as explained earlier has to be excluded.

42 For this purpose, a roster has to be maintained and the following directions are given for maintaining that roster.

(i) The respondents should consider the vacancies arising in each calendar year separately as a unit. The first 75 per cent should be reserved for promotion quota and the last 25 per cent should be reserved for examination quota.

(ii) The following, however, are exceptions to (i) above.

(a) If the vacancies in a year are less than 4, the examination candidates will get no chance of promotion at all. Therefore, the unit of consideration should be extended beyond one year in the roster till atleast 4 vacancies become available for allocation on 3 : 1 ratio.

(b) If the number is more than 4, but not capable of exact apportionment (e.g., 5,6 or 7) adjustment has to be made. As will be evident, the shortage in the

vacancies to facilitate exact apportionment on 3 : 1 basis cannot exceed 3. This shortage has to be drawn from the next vacancies arising in the next year. In the vacancies of the same year, the quota for the examination candidate shall be restricted to 25 per cent thereof in whole number, ignoring all fractions, and the full quota will be made good only in the next year by drawing the minimum number of vacancies which arise in the next year. Among them also the last vacancy only will be allocated to the examination quota. Thus, if the vacancies in a year are 5, the examination quota will be 25% thereof = $1.25 = 1$. Therefore, the first 4 vacancies will be allocated to the seniority quota and the last vacancy will be allocated to the examination quota. Three vacancies have to be drawn from the next year thus increasing the total to 8 vacancies, in which the share of seniority quota and examination quota will be 6 and 2 respectively. Hence, out of the 3 vacancies drawn upon ⁱⁿ the next year, the first 2 vacancies will be allocated to the seniority quota and the last vacancy to the examination quota. If on the other hand there are 7 vacancies in a year, the examination quota will be 25% i.e., $1.75 = 1$ only. Thus, the first 6 vacancies will be allocated to the seniority quota and the 7th vacancy will be allocated to the examination quota. The shortage to facilitate exact allocation is only 1 and this vacancy

will be drawn from the next years vacancies and allocated to the examination quota.

(iii) If, the examination quota candidates pass the examination after the vacancies had arisen their slots will be kept reserved for them and after they are appointed, they have to be given assumed dates for seniority purposes only which will be the dates when the vacancies arose. They will then rank senior to seniority HCs who have been appointed to these earmarked slots on an adhoc basis. This will then correctly indicate who their juniors are. This is necessary to satisfy the quota rule of reservation as will be clear from the emphasized portion of para 23 of the judgment in KC Joshi's case extracted in para-40 supra.

43 Having set out the principles of seniority to be followed and the manner in which they should be given effect to in imaginary situations, we now feel that final orders can be passed in this case. Accordingly, for the foregoing reasons, these applications are disposed of with the following declarations/directions:

(i) For the purpose of applying the 'General Principles for determining seniority' enclosed with the letter No. Adm.20(17)/61 dated 1.11.62 (Annexure A3), UDCs who have been promoted as Head Clerks to the 25 % of the vacancies reserved for the examination quota

shall not be treated as direct recruits, but shall be treated as promotees only and accordingly their inter-se seniority shall not be regulated by the principles mentioned in para-7 therefore.

(ii) For the period prior to the coming into force of the 1989 Regulation (Annexure 4) from 9.12.89, the Recruitment Rules relating to promotion to the post of Head Clerks and the General Principles- 1962 did not authorize that examination quota promotee should get the benefit of every fourth vacancy on the basis of the ratio of 3 seniority promotees : 1 examination promotee. A combined reading of all the provisions requires that the examination quota candidates are placed below all the seniority quota candidates en bloc in every year.

(iii) The interse seniority among persons promoted as Head Clerks to the seniority quota and to the examination quota, until Annexure-4 Regulation were published on 9.12.89, shall be determined for each calendar year separately. The first 75 per cent of the vacancies in a calendar year shall be apportioned to seniority quota and the last 25 per cent of vacancies shall be apportioned to the examination quota with marginal adjustments, where such extent apportionment is not possible. All seniority Head Clerks appointed in a year shall be placed enbloc senior to all Examination HCs appointed in that year.

(iv) Adhoc service as Head Clerks shall not be considered for reckoning seniority, if it is violative of

the Rules and the guidelines given by the Hon'ble Supreme Court and all such service shall be reconsidered in the light of paras 39 to 41 of this judgment.

(v) The respondents are directed to prepare, within three months from the date of receipt of this judgment, a fresh provisional seniority list in replacement of the Annexure A5 seniority list, keeping in view the declarations given above and the other observations made in this judgment and take further action with a view to finalizing it.

(vi) Until such a fresh provisional seniority list is prepared, promotions to the next higher grade will be made only provisionally on the basis of the Annexure A5 seniority list and be subject to the final orders in OA 143/88.

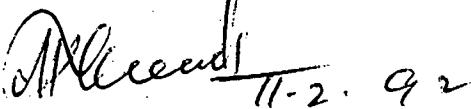
(vii) After the preparation of a fresh provisional seniority list as directed in (v) above, provisional promotions shall be made on the basis of that list, purely on a provisional basis, subject to adjustments to be made on the finalization of that list.

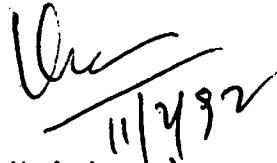
(viii) On the finalization of the seniority list prepared in pursuance of (v) above, all promotions of persons appointed as Head Clerks before 9.12.89 made in the past shall be reviewed. If, as a result of such a review, it is found that any Head Clerk has been promoted in the past to the next higher grade prior to the date of finalization of the seniority list prepared under (v) above,

prematurely and irregularly, he shall not be reverted, but he shall be accommodated in a supernumerary post till such time as he vacates that post or becomes eligible for promotion in accordance with the revised seniority list, according to his turn, unless he is found unfit for other reasons. The period of service rendered by such person on the higher grade, now found to be irregular, shall not count for seniority in the higher grade when regular promotion is made to that grade.

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We are of the view that such directions are needed to reduce the hardships that will, otherwise, have to be faced, after making the adjustments in accordance with the revised final seniority list, because the earlier promotions were given by the Administration on their wrong interpretation of the relevant rules and instructions.

44 A copy of this judgment as well as the judgments in OAK 303/88 and DA 623/88 shall be sent to the Hon'ble Chairman of the Central Administrative Tribunal, as the connected cases are stated to be pending before the Principal Bench vide para 11 of the latter judgment for such action as he may consider appropriate.


(A.V. Haridasan)
Member (Judicial)


(N.V. Krishnan)
Member (Administrative)