

(10)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW BOMBAY BENCH

O.A. No. 366/89 & O.A. No. 343/89 198
T.A. No.

DATE OF DECISION 23-3-1990

<u>Pratiraksha Mazdoor Sangh Trade Union.</u>	<u>Toney & 42 others</u>	<u>Mr. D. V. Gangal, Advocate for Mr. L. K. Masand, Advocate for Versus</u>	<u>Petitioner in O.A. 366/89</u>	<u>Applicants in O.A. 343/89</u>	<u>Advocate for the Petitioner(s) in O.A. 366/89</u>	<u>Advocate for the Petitioner(s) in O.A. 343/89</u>
			<u>GM, Machine Tool Prototype Factory</u>	<u>Respondent</u>		
			<u>Ambernath</u>			
			<u>S. R. Atre, for Mr. P. M. Pradhan</u>	<u>Advocate for the Respondent(s)</u>		

CORAM

The Hon'ble Mr. Justice Kamleshwar Nath, Vice-Chairman

The Hon'ble Mr. M. Y. Priolkar, Member (A)

1. Whether Reporters of local papers may be allowed to see the Judgement ? *for*
2. To be referred to the Reporter or not ? *for*
3. Whether their Lordships wish to see the fair copy of the Judgement ? *for*
4. Whether it needs to be circulated to other Benches of the Tribunal ? *for*

On 23-3-90
 (JUSTICE KAMLESHWAR NATH)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH

(11)

O.A.366/89 & O.A.343/89

O.A.366/89

1. Pratiraksha Mazdoor Sangh Trade Union,
Machine Tool Prototype Factory,
Ambernath,
Dist.Thane
through
Secretary,
Shri S.M.Das.
2. Shri D.N.Khatavkar,
UDC, YL,
Machine Tool prototype Factory,
Ambernath. .. Applicants

vs.

1. Union of India
through
Ordnance Factory Board,
10,Auckland Road,
Calcutta.
2. The General Manager,
Machine Tools Prototype Factory,
Ambernath,
Dist.Thane. .. Respondents

O.A.343/89

1. Shri Toney & 42 others
Machine Tool Prototype Factory,
Ambernath. .. Applicants

vs.

1. The General Manager,
Machine Tool Prototype Factory,
Department of Defence Production,
Ambernath. .. Respondents

Coram: Hon'ble Shri Justice Kamleshwar Nath, Vice-Chairman
Hon'ble Shri M.Y.Priolkar, Member(A)

Appearances:

1. Mr.D.V.Gangal
Advocate for the
Applicants in
O.A.366/89
2. Mr.L.K.Masand
Advocate for the
Applicants in
O.A.343/89
3. Mr.S.R.Atre for
Mr.P.M.Pradhan
Advocate for the
Respondents.

JUDGMENT

(Per Justice Kamleshwar Nath, Vice-Chairman)

Date:21-3-1990

The two original applications described
above raise: common questions of law and therefore

have been consolidated for the purposes of hearing and decision.

2. The subject matter of the controversy are Type II quarters of the Ordnance Factory situated at Ambernath, Dist. Thane; the General Manager of the Factory is respondent No. 2 in O.A. 366/89 and ~~Osle~~ respondent in the other O.A. The applicants are employees of the factory and claimed certain right of allotment of the quarter.

3. In both the petitions a list dated 4-1-1988 of employees entitled to allotment is sought to be quashed.

4. In O.A. 366/89 an order dtd. 21-6-1988 containing certain criteria of allotment also is sought to be quashed whereas in O.A. 343/89 that order along with an order dated 27-7-88 are sought to be implemented.

5. It is useful to set out the history of the scheme of allotment as it was modified from time to time and especially in the wake of enforcement of the pay scales recommended by the IIIrd and IVth Pay Commissions and applied to the concerned employees. The various circulars containing the rules and instructions have been filed by the various parties in the two cases; a compilation thereof has also been furnished to us by the learned counsel appearing on behalf of the respondents.

6. The earliest document placed before us is a set of allotment rules issued under F.O. Part-I dtd. 12-3-1957 which only sets out the rights and liabilities of the occupants and the powers of the Factory Management but ^{does} not lay down the eligibility or priority criteria.

7. F.O. Part-I No.3 to 6 dtd. 24-7-1964

contains a revised classification of the quarters and the criteria of entitlement. For the purposes of present cases it is enough to refer to only two of the types; old Type 'J' renumbered as Type-I concerned employees whose pay range was below Rs.110/-, and old Type 'H' described as Type-II concerned employees who were in the pay range below Rs.250/- but not below Rs.110/-

8. By letter No.657 dtd. 7-11-1967 the pay ranges as mentioned earlier were continued and the eligibility for a particular type was fixed as on the date of entry into the pay range at the minimum stage, and inter-se seniority of the employees within a particular type was determined by the length of continuous service within the pay range.

9. By letter No.659 of 13-11-1968 the provisions of 7-11-1967 were reiterated and further provisions was made in cases of equal seniority. It was laid down that among persons of equal seniority priority would be given to persons with higher pay on the date of entitlement.

10. No substantial change was brought about by the two subsequent letters dtd. 28-4-1969 and 18-9-1970. Indeed in letter dtd. 18-9-1970 the provisions of letter dtd. 7-11-1967 were reaffirmed. The position till then therefore was that eligibility for allotment was determined on the date of entry at the minimum of pay range and seniority was determined according to length of continuous service within the pay range; among persons of same length of continuous service within the pay range, priority to persons who had higher pay was retained.

11. The IIIrd Pay Commission's recommendations were made operative from 1-1-1973 but the decision in consequence thereof for our purposes was taken for the first time by the letter dated 22.9/4-10-1979. The decision contained therein was issued after the JCM. The document sets out all five types of quarters with the relevant pay ranges. Of these Type-I concerned pay range upto Rs.259/- and Type-II concerned pay range from Rs.260/- to Rs.499/-. The date of eligibility was retained as date of entry at the minimum stage of pay range. In matters of common date of eligibility, seniority was prescribed to be in accordance with total length of regular service including the period admissible for lower type of quarters.

12. The letters dtd. 29-10-1979 and 16-10-1981 retained the same position.

13. Then came letter dtd. 8/12-4-1982 which was repeated in letter dtd. 26/28-6-1982. These letters mentioned that it was realised that due to revision of pay from 1-1-1973 a number of persons had their date of eligibility as 1-1-1973, hence there was difficulty in determining seniority. It was held that persons having higher basic pay within the pay range would be senior; but where two or more persons had the same basic pay in the same pay range on the same date, then the total length of service would be considered in accordance with letter dtd. 22/9/4-10-79.

14. Till that stage all the five types of quarters were being dealt with on the same criteria.

15. In March, 1983 a meeting of the Joint Consultative Machinery was held and minutes thereof were recorded on 21.3.1983. For the first time in that

meeting a special treatment in respect of quarters of Type-I and II was worked out. While all other conditions of letter dtd. 26/28-6-82 were maintained, the seniority criterion of basic pay in respect of Type-I and II was replaced by the criterion of total length of service where the date of eligibility was same. The earlier system of entitlements on the basis of the date of entry at the minimum of the relevant pay range for the types was preserved, but amongst persons who become eligible on the same date preference was to be given to those having longer years of service. This decision was followed by orders dtd. 31-3-1983/2-4-1983; application O.A.343/89 seeks to enforce those decisions.

16. The IVth Pay Commission's recommendations were applied with effect from 1-1-1986 but decision by the respondents in consequence thereof in the matter of quarters was taken on 21-6-1988. This decision dealt with all types of quarters similarly and adopted the old rule of eligibility. The pay scales ~~having been changed~~ ^{the} relevant pay range for Type-I was kept to the pay of less than Rs.950/- and the pay range for Type-II was kept at the pay of less than Rs.1500/- but not less than Rs.950/- It did not, in terms, set out the criteria for seniority and hence the instructions which were then existing on the subject, perhaps continued. In O.A.343/89 again this decision is sought to be enforced but in O.A.366/89 it is sought to be quashed.

17. The continuance of earlier instructions in the matter of seniority after orders dtd. 21-6-88 was reaffirmed in the letter dtd. 16-3-89 which said that guidelines in that respect as contained in letters dtd. 29.9/4-10-1979, 8/12-4-82, 26/28-6-82 and

31.3/2.4.83 shall be continued. It may be mentioned that this letter further says that since from 1-7-87 recovery of rent was prescribed to be done at flat rate instead of percentage of the salary hence the date of eligibility for the quarters would be 1-7-1987. In the meantime there was also a letter dtd. 27-7-1988 and which incorporates letter dtd. 21-6-1988/reiterated that eligibility would be determined on the basis of pay as on 1-7-1987.

18. The interpretation, legality and true effect of letters dtd. 22-9/4-2-1979, 26/28-6-82, 21-3/2-4-83, 27-7-88 and 16-3-89 are in question in these cases.

19. The allotment seniority list dtd. 4-1-88 is challenged in both the cases. An earlier list dtd. 5-10-1987 is also challenged in O.A. 366/89; but that was only a tentative list to which objections were invited. The final list is dated 4-1-88 hence the list dtd. 5-8-87 is not material and stands superseded. In O.A. 366/89 the first ground of challenge to list dtd. 4-1-88 is that it is not in conformity with "Allotment of Residences (Defence Pool Accommodation for Civilians in Defence Service) Rules, 1978." The case of the opposite party is ~~is~~ that those rules do not apply to the quarters of Ordnance Factories. The stand of the opposite party is correct; an examination of the rules as a whole with particular reference to the definitions of the expressions "Eligible office" in Rule 2(a), "Allotting Authority" in Rule 2(e) and "Station" in R 2(k) makes this position abundantly clear. Further by letter dtd. 22-9/4-10-1979 and 16-10-1981 it had been made clear that even Delhi Allotment Rules, 1963 containing modifications of the 1978 rules had not been adopted for the purposes of Ordnance Factories and that draft of rules

for the purposes were in process. It is unfortunate that for over a decade the rules have not been finalised which itself has contributed to the present litigation in no less measure. Be that as it may it was explained in letter dtd. 9-10-1979 that the Ordnance Factories followed the pay range system and not the Delhi pattern because "the quarters built in Ordnance Factory Estate are based on pay range so that employees of a particular pay range are available on the Factory Estate."

20. Learned counsel for the applicants in O.A.366/89 urged that even if the 1978 Rules may not be applicable, the principles thereof are sound principles of fairness and may be made applicable to the quarters in question. The contention is some what beyond the scope of the Tribunal. The Tribunal cannot direct the department to frame or adopt any particular type of rule. That is essentially a policy matter to be taken care of by the appropriate rule-making authority or the concerned legislative body. The case of Narinder Chand Hem Raj and others v. Lt.Governor, Administrator, Union Territory H.P. and others, 1971 SC 2399 may be seen in this connection.

21. The second ground of challenge is that having adopted the pay range system of a particular type for the purposes of the eligibility the original system of counting the length of service within that pay range were proper and fair criterion of seniority whereas the opposite parties have arbitrarily and capriciously adopted the practice of counting the total length of regular service. It is urged that on the principle of reasonable classification relevant

to the objective .. sought to be achieved it is unreasonable that a class-III employee like the applicants holding several years seniority in the relevant pay range for Type-II quarter may be pushed down *avis-a-vis* class-IV employees with longer service in consequence of their later entry into the pay range. The injustice allegedly caused to applicant No.2, D.N. Khatavkar, is demonstrated in para 4.5(vi) of the application where it is stated that having been appointed as LDC in the scale of Rs.110-180 on 1-6-1968 he had become eligible to Type-II quarter from 1-6-1968. When the pay range was revised after the IIIrd Pay Commission to Rs.260-499 from 1983, eligibility was fixed from 1-1-1973 when the new scales were enforced and, for that reason, persons junior in the earlier seniority list who became eligible on 1-1-1973 were given allotment while the applicant was not. It is complained that with the revision of pay range after the IVth Pay Commission to Rs.950-1499 with effect from 1-7-1987 he has been pushed down further. It is also stated that the result of the revised criteria is that persons who were seniors and had not been able to get allotment continued to remain deprived while some of even those persons who had the benefit of Type-I quarter became eligible to Type-II quarter.

22. The reply of the opposite party is that the primary basis for allotment is length of service within the pay range, but where the length within the pay range is the same for several employees the total length of service has been adopted which is a reasonable criterion. The effect of the changed criterion on applicant No.2 is not challenged.

23. The petitioners in O.A.No.343/89 have a different reason to challenge the validity of the allotment of seniority list dtd. 4-1-1988. It was pointed out that till the enforcement of revised pay range after the IIIrd Pay Commission the criterion of eligibility, as the date of entry into a particular pay range, had been preserved and preference was given to those who had a longer total regular service whereas among the equals of later class of eligible persons, preference was to be given to the persons senior in age. In consequence ~~xxxx~~ of the IVth Pay Commission's report the circular issued on 7-7-1988 requires eligibility to be determined on the basis of the pay as on 1-7-1987. The petitioners go on to say that a large number of employees came within the revised pay range on 1-7-1987 and the inter-se seniority had to be determined on the basis of length of service within the same pay range. However, prior to the issue of the circular dated 27-7-1988 the criteria as applicable in consequence of the IIIrd Pay Commission as on 1-1-1973 were applied and it was on that basis that list dated 4-1-1988 was prepared. The contention is that the list dtd. 4-1-1988 cannot stand the subsequent directions which require eligibility to be determined as on 1-7-1987 and therefore the list is invalid.

24. The opposite parties in their reply have admitted the cases that on change of pay range in consequence of IIIrd Pay Commission, eligibility was determined on the basis of entry into the range on 1-1-1973 and therefore the list dtd. 4-1-1988 was issued. It is also admitted that when effect was given to the revised pay range in consequence of the IVth Pay Commission the date of eligibility was to be 1-7-1987;

but, according to the opposite parties the new provisions would not be retrospective with the result that list dated 4-1-1988 would continue to remain in force while only henceforward the list would be prepared on the basis of pay as on 1-7-1987. It is said that there is no provision of longevity of a panel and therefore in the absence of a rule, the prevailing practice would serve as the appropriate guidelines and therefore the panels prepared will remain in force till exhausted.

25. List dated 4-1-1988 contains 56 names.

Persons at Sr.No.1 to 43 have 1-1-1973 as date of eligibility being the date on which the IIIrd Pay Commission's recommendations were implemented. The eligibility date of persons at Sr.No.44 to 56 is between 15-1-1973 and 11-12-1973. The list has been arranged in order of seniority and seniority has been arranged with reference to the date of appointment; in cases where dates of appointment are the same the seniority/with reference to the date of birth. It is admitted that by order dated 1-4-1989 allotments have been made to persons at Sr.No.1 to 10 and that till the time these cases came up for hearing allotments had been given to persons upto Sr.No.19.

26. It was also admitted at the Bar by the learned counsel for the opposite parties that the Ordnance Factory Estate had about 600 quarters of Type-I and 200 quarters of Type-II. Although it was not possible for the parties to indicate the total strength of persons who were eligible for Type-I or Type-II quarters either on 1-1-1973 when the IIIrd Pay Commission's report was implemented or on 1-7-1987

when action on implementation of the IVth Pay Commission's report ^{was} taken, the learned counsel for the opposite parties agreed that ^{while} relatively ⁱⁿ the number of claimants for Type-I has fallen the number of claimants for Type-II has increased on account of admissible pay ranges for these two types.

27. There is no dispute about the validity of the criterion of eligibility, namely the date on which an employee enters into the pay range at the minimum stage. The real dispute is as to which of the criteria of seniority adopted from time to time is constitutionally valid ?

28. At this stage, it will be appropriate to appreciate the impact of the pay scales as adopted after the reports of the Pay Commissions vis-a-vis the pay ranges. Prior to letter dated 22-9/4-10-79, the pay range for Type-I was below Rs.110, and for Type-II was from Rs.110 to 200. For a vast majority of Group D employees, the maximum of the pay scale was Rs.110, the minimum being Rs.55. Only a few could have the scale which had a maximum of Rs.128; hence only those few whose pay could be between Rs.110 and Rs.128 could be considered for Type-II, and those quarters could mostly be available to Group C employees. When the implementation of the scales of IIIrd Pay Commission was taken in hand, entitlement for Type-I was raised upto Rs.259 and that of Type-II was placed between 260 and 499. For a vast majority of Group D employees, the maximum of the pay scale was Rs.250, the minimum being Rs.196. Only a few could have the scale with a maximum upto Rs.270; hence only those few

whose pay could be between 260 and 270 could be considered for Type II, and these quarters could mostly be available to group C employees. The upshot is that the relative pay position of Group D and Group C employees qua entitlement for Types-I and II was quite similar in the pay scales of Post and Pre IIIrd pay commission, and on the basis of seniority criteria prevailing prior to the letter dated 22-9/4-10-79 there could be only a nominal 'invasion', if one may use that expression, of Group D employees into Type II quarters.

29. The scales of the IVth Pay Commission, applicable from 1-1-86, were sought to be implemented by letter dated 21-6-88 on the basis of pay as on 1-7-87. The pay range for Type I was raised to Rs.949, i.e. just below 950, and for Type II was placed between Rs.950 and Rs.1499, i.e. just below 1500. Out of the four scales of pay adopted for Group 'D' employees, only one scale had a maximum of Rs.940, the remaining three scales had maxima of Rs.1025, 1150, and 1200 with minima respectively of Rs.775, 800 and 825. It is obvious that a vast majority of Group 'D' employees could reach the pay range of Rs.950 which entitled them for quarters of Type II rubbing shoulders with employees of Group 'C' who had two scales of pay commencing from Rs.950 and going upto Rs.1400 and Rs.1500 respectively. We have already mentioned that there were 600 quarters of Type I and 200 quarters of Type II. It is absolutely clear therefore that as a result of adoption of the criterion of total length of regular service rendered by Group D and C employees for determining seniority, the latter would almost be ousted by the former from quarters of Type-II. That would frustrate the very object of framing schemes for allotment of quarters,

namely an equitable distribution thereof between the entitled employees.

30. It will be remembered that prior to letter dated 22-9/4-10-79, seniority was based length of continuous service within the pay range(vide letter dated 6-11-67), and among persons of such equal seniority it was based on the employees 'higher pay'(vide letter dated 13.11.68). Classification of Govt. servants for differential treatment on the basis of rank and pay has been recognised to/a valid classification within the meaning of Articles 14 and 16 of the Constitution of India: vide M.C.Rajagopal vs. Supdt. of Police, Crime Branch, Madras, AIR 1965 Madras 103.

31. We may refer to a Full Bench decision of the Punjab High Court in the case of Brijlal Goswami vs. State of Punjab & Others, 1965 Punjab 401, which dealt with the effect of bifurcation of posts in the Punjab Educational Service Class II into 2 cadres and the provisions of opportunity of promotion to class I service. The criterion of promotion from class II to class I was seniority. In consequence of orders of bifurcation, promotion to class I was stipulated to be done according to the nature of vacancy irrespective of seniority in class II. The Full Bench held that promotion to class I of persons junior to petitioners in class II service, in the wake of bifurcation, on the sole ground of nature of vacancy in class I violated Article 16 of the Constitution. In the case before us, persons belonging to an entirely junior class of service, namely group D are sought to be given preference to those of a senior class, viz. Group C, in respect of quarters which are primarily meant for Group 'C' only on the basis of length of total service, most of which

that was rendered in Group D; violates the principles of equality under Article 16 by applying a criterion to Group D employees which cannot be applied to Group C as the length of service of the two groups are entirely in different fields. In our opinion, only so much of the length of service rendered by Group D employees could be reasonably taken into account as was rendered by them after entry into the pay range relevant for Type II quarter.

32. Learned counsel for the applicants in O.A.343 of 1989 laid great emphasis upon the fact that after the change of criterion after letter dated 22-9/4-10-79, allotments have been ^{made} on the basis of changed criteria, but no one raised a claim and therefore the adoption of the same criterion for allotments on implementation of the IVth Pay Commission is not open to challenge. He says that the interpretation of the criteria contained in the aforesaid and subsequent letters has been the same, namely the application of criterion of total length of regular service, which interpretation therefore cannot be changed. We are unable to accept the contention. In the first place, no change in the interpretation is sought to be made; the criterion set out in these letters as interpreted by the learned counsel is found to be invalid as in violation of Article 16. It defeats the object of the scheme of allotment, viz. equitable distribution of quarters of Types I and II. In the second place, an error of law creates no estoppel; the error can always be corrected; grant of erroneous benefit to some person does not entitle others to similar benefit: see, *Narain Das vs. Improvement Trust, Amritsar, 1972 SC 865*. In the third place, the number of beneficiaries of invalid criterion till the application thereof after

implementation of IVth Pay Commission recommendations must have been so small, as indicated above, that the harm to affected persons may not have motivated them to raise a claim. In the fourth place, the Directorate itself has admitted in para 5 of the counter in O.A. 366 of 1989 that the primary basis of allotment is length of service within the pay range, and that only where the length of service within the pay range is the same that the total length of regular service has been adopted.

33. The criterion of total length of regular service is claimed by the opposite parties to be reasonable because that saved the interests of the majority of the employees, namely those eligible for Type I and II (vide para 4 of counter in O.A. 366 of 1989). This is putting the cart before the horse. It mixes up the question of 'eligibility' with 'allotment'. There is no quarrel with the criterion of 'eligibility' which is the date of entry at the minimum of the pay range; but actual allotment depends upon seniority. Most of Group D employees would not be entitled to allotment if they were not given seniority of their total length of service. The validity of the criterion of total length of service for purposes of ^{allotment} must first stand the test of equality under Article 16, and of reasonableness under Article 14 before it can be seen as to who are the beneficiaries thereof. Equality and reasonableness will not permit an invalid criterion to be applied simply because it is beneficial for the majority of employees; the law must take care of the harm which is done to others to whom the criterion cannot be fairly applied. If persons in Group C were only those persons who were promoted from Group D, it could be said with some semblance of fairness that since all the employees had served in

Group D, their total length of service in Group C and Group D may be taken into account; but the persons in Group C who had no occasion to work in Group D cannot be judged on the basis of length of service in Group D - they rendered no such service.

34. The classification of quarters in Type-I and Type-II has a purpose. The latter quarters are more spacious and are meant for employees of a higher rank than those concerned with Type I. The scheme of allotment must preserve that purpose, and any criterion which violates that purpose defeats Article 16 of the Constitution. This purpose is sustained by the criterion of length of service within the pay range and the amount of pay drawn by the employees. After all, there are 600 quarters of Type-I and 200 of Type II; and if on account of the criterion of total length of service, a sizeable number of persons who should otherwise have been eligible for Type-I become entitled to an allotment of Type-II quarters, the object of classification of quarters would be frustrated.

35. We are aware of a situation where persons waiting for Type I for a long time may have lost their entitlement therefor on becoming eligible for Type II due to entry into the latter pay range, and may not be able to get Type II on account of the current claimants of that Type. But that is in the nature of things. So long as the number of claimants is more than the number of available quarters, the problem will always be there whatever be the type. The solution lay, perhaps, in making "transitional arrangements" by preserving their claim for Type I quarter as an exceptional measure; for they would be senior in Group D over all persons who enter the service after them both on the basis of length of service and amount of pay. Perhaps an employee entitled for Type II

may exercise an option even for Type I if he is faced with the predicament of losing both; and then he may be ready to take a chance for type-II when his turn may arrive on the basis of length of service in pay range of Type II and the salary drawn by him at that time.

36. Learned counsel for the opposite parties emphasised that the criterion of total length of service is applied only when all other elements are equal amongst the persons eligible. We are clear in our mind that the Directorate must find a criterion within the four corners applicable to all the employees equally within the appropriate pay range; it cannot be permitted to employ a criterion which will apply to only some of the persons in the pay range and not to others like total length of service rendered in different capacities. The Directorate has been adopting the criterion of 'date of birth'; no one has objected thereto.

37. The learned counsel for the applicants in O.A.343 of 1989, and the learned counsel for the opposite party have strenuously urged that the decisions contained in letter dated 22-9/4-10-1979 and 21-3/2-4-83 were arrived ^{at} after J.C.M. and therefore are binding on the employees. The learned counsel for the opposite parties refers to certain provisions of Chapter IV of P.Muthuswamy's "Establishment and Administration" in this connection. It is enough to say that the decisions in JCM cannot be equated to the decisions of the various Fora under the Industrial Disputes Act because the latter are statutory while the former are not, and that no executive decision, rule or law can over-ride the constitutional mandate of Articles 14 and 16.

38. Another ground of challenge to the list is that it is unduly long. It contains 56 names and till now allotments only upto Sr.No.19 have been made. The case of the opposite party is that in the absence of any provision fixing the number of names to be kept on the list, it can be of any dimension and it will continue to be in force till exhausted. The contention sounds so arbitrary that it is repugnant to the sense of justice. Normally lists are prepared in various fields for the number of existing vacancies + contemplated vacancies in the two or three years; or sometime^a rule of thumb is adopted to prepare a list of existing number of vacancies + 25% thereof. However, in the absence of further elaboration of the arguments on the point we express no final opinion except a hope that in future lists may be prepared of reasonable length.

39. The last point is whether in the wake of IVth Pay Commission, the seniority list can be validly made on the basis of emoluments as on 1-7-1987 in terms of letters dated. 21-6-88 and 16-3-89. It will be recalled that when action was taken to implement IIIrd Pay Commission's recommendations, the date of eligibility was taken 1-1-1973 being the date on which the revised scales of pay were enforced. The date of enforcement of the scales recommended by the IVth Pay Commission was 1-1-1986. If action in consequence of IIIrd Pay Commission's recommended scales could be taken as late as 1979 with effect from 1-1-1973, it is difficult to see why in consequence of the scales recommended by the IVth Pay Commission the date of eligibility should also not be 1-1-1986 when those scales were enforced. There has

to be some consistency in the executive acts of the State. The fact that on 1-1-1978, flat rate system was adopted instead of pay percentage system for recovery of rent from the allottees is not material for the purposes of fixing the date of eligibility. The date of 1-7-1987 could only be a date for the convenience of mathematics and not on any principle. It will be appreciated that after the enforcement of the IVth Pay Commission's scales from 1-1-1986 some increments must have been earned by persons by 1-1-1987, and therefore the emoluments on 1-7-1987 may not have been the same as on 1-1-1986.

In view of the accepted criterion of determining eligibility on the date of an employee arriving at the minimum of pay range, there seems to be no reason why the employee must wait till 1-7-1987 for fixation of his eligibility. The appropriate date according to history and the accepted principle should be 1-1-1986. We should hold therefore that the provisions of letters dtd. 21.6.88 and 16.3.89 in so far as they fix the date of 1-7-1987 as the date of relevant emoluments for determining eligibility, are invalid.

40. These are all the points in these cases. The question is what should be the relief and our final orders ? We have found that the decision contained in letters dtd. 22-9/4-10-79 has continued in subsequent letters dtd. 26/28-6-82, 31-3/2-4-83 that in cases of common date of eligibility total length of regular service shall be the basis of the seniority is illegal. Since the seniority list dtd. 4-1-88 was prepared on that basis it must be held to be illegal. But the parties admit that persons from sr.No.1 to 19 of that list have already been given allotment. It will be too harsh to revoke their allotment orders and ask them to quit the quarters. Hence while this list may be quashed the allotment made to persons at Sr.No.1 to 19 may not be

disturbed. The decision contained in letter dtd. 21.6.88 and 16.3.89 that the new seniority list on the basis of pay ranges as revised after the recommendations of the IVth Pay Commission be prepared with reference to 1-7-1987 as date of eligibility is illegal; in its place the appropriate date ought to be 1-1-1986. A new seniority list should be required to be prepared.

41. We may mention that the change of policy of seniority as reflected in various letters from time to time has been described mostly as "modifications" or "clarifications"; there are hardly any which totally "supersede" the earlier criteria. The upshot is that illegality is attached only to criterion of seniority to the limited extent indicated in this judgment, and for that limited illegality it is not necessary to quash any of the letters wholly. Having regard to the well established rule of "severability" of repugnant provisions from the rest, and the principle of "reading down" it will be enough to ignore the illegal portions and give effect to the valid portions: see the cases of All Saints High School v. Govt. of Andhra Pradesh, 1980 SC 1042 (para 111), and Jagdish Pandey vs. Chancellor Bihar University, 1968 SC 353. The criterion of eligibility will continue to be the same criterion, namely the date on which an employee enters at the minimum of the pay range, but seniority for purposes of allotment must be drawn on the criteria contained in the letters referred to above after excluding the criterion of total length of regular service. In other words the seniority should be fixed on the basis of the length of service within the relevant pay range. Where the length of service within the pay range is equal, seniority should be fixed on the basis of higher pay.

In cases of equal seniority despite these factors, seniority may be fixed on other relevant criteria which may be applicable equally to all the persons within the same pay range as may be determined by the Director General of Ordnance Factories; one of such criteria adopted in the past including the impugned list dated 4-1-1988 is the date of priority ~~on~~ ⁿ date of birth.

42. In view of what we have stated above both the applications are disposed of with the direction that the seniority list dtd. 4-1-1988 is quashed but the allotment already made in favour of persons at Sr.No.1 to 19 shall not be disturbed. The opposite party shall prepare a fresh list of allotment of quarters in the light of the observations made in the body of this judgment, particularly those contained in paras 40 and 41. The allotment list shall be finalised within a period of one month from the date of receipt of a copy of this judgment and thereafter orders of allotment shall be issued to the appropriate employees.

43. Parties shall bear their costs of these applications.

M.Y. Priolkar
(M.Y. PRIOLKAR)
Member(A)

K.N. Nath
(KAMLESHWAR NATH)
Vice-Chairman.