

CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH

CIRCUIT COURT SITTING AT INDORE

Original Application No. 208 of 2005

Indore, this the 20th day of April, 2006

Hon'ble Dr. G.C. Srivastava, Vice Chairman
Hon'ble Shri K.B. S. Rajan, Judicial Member

Jagdish Chandra Vyas,
Yard Master,
C/o. Station Manager,
Ratlam Rly. Station.

... Applicant

(By Advocate - Shri A.N. Bhatt alongwith Shri C.P.
Lashkare)

V e r s u s

Union of India & Others :

Represented by :

1. The General Manager,
Western Railway, HQ Office,
Churchgate,
Mumbai - 20.

2. Divisional Rail Manager,
Western Railway,
Divisional Office,
Ratlam (MP).

3. Ravindra Kumar Sharma,
Yard Master under Station
Manager, Railway Station,
Ratlam (MP).

4. M.C. Karnani,
Yard Master under
Station Manager,
W. Rly.,
Railway Station,
Ratlam (MP).

... Respondents

(By Advocate - Shri Y.I. Mehta, Sr. Advocate alongwith
Shri D.S. Patel)

208/05

ORDER**By K.B.S.Rajan, JM:-**

The issue involved in this case is as to whether the applicant whose promotion to the post of Yard Master (pay scale 2000 – 3200 = Rs 6,500 – 10,500) dates back to 1993, against a regular vacancy but stamped as ad hoc is entitled to ~~be~~ regularization in the said post with retrospective effect or not.

In the inter-regnum period, at least two individuals on medical decategorization have been posted as Yard Master

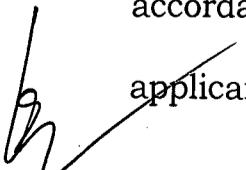
2. A silhouette of the facts of the case with terse sufficiency is as under:-

(a) The applicant was promoted on ad hoc basis against a clear vacancy as Yard Master in the scale of Rs 2,000 – 3,200/- (Rs 6,500 – 10,500) under the office order dated 9/16-11-1993. The said post is a selection post but the department has not conducted the selection though as per the Rules it is required every year. Thus the applicant remained on ad hoc basis till 01-11-2003, when by virtue of restructuring scheme, the applicant was regularized as Yard Master in the scale of Rs 6,500 – 10,500. The applicant's request for regularization from retrospective effect has been rejected by order dated 14-01-2005 and hence this OA challenging the said order.



(b) The grievance of the applicant is two fold – (a) His past twelve years of service on ad hoc basis has not been regularized though he has been eligible for such regularization and (b) non regularization with retrospective effect has resulted in the postponement of his seniority and in the meantime at least two persons (respondents No. 3 and 4) from some other department on medical deategorization have been absorbed as yard masters in the aforesaid pay scale and with the seniority of 2000, which has affected the applicant's prospects of promotion.

3. The respondents have contested the OA. According to them, before 1992, the selection of Yard Master was controlled by Headquarters, Bombay and the applicant failed in two selections in 1989 and 1991. Thereafter, the same was controlled at the Divisional level and the selection was also notified in 1997 but the process could not continue as some disputes were raised by certain employees about their seniority. Again, the selection process was started in 1999 but that too could not be continued and was to be postponed for certain administrative reasons. Thus, the selection could not be made for a few years. The respondents No. 3 and 4 were posted to an equivalent post as per IREM Vol. II, para 3, on their medical deategorization and were assigned the seniority accordingly. Since the seniority accorded to the private respondents was in accordance with the relevant provisions of IREM, and since the applicant's regular appointment as Yard Master took place only



w.e.f. 01-11-2003, the applicant cannot claim seniority above the private respondents.

4. The Private respondents though served, chose neither to file any reply nor to represent their case either in person or through any counsel.

5. Arguments were heard and documents perused. The learned counsel for the applicant submitted that the initial promotion of the applicant was against the clear vacancy and uninterruptedly he had been serving as Yard Master since 1993 in the pay scale of Rs 2,000 – 3,200 and his initial pay was fixed at Rs 2,300/-. In the promotion order, except that he was stamped ad hoc, no other conditions such as that the ad hoc promotion shall not entitle the applicant for regularization, seniority etc. have been spelt out. Since his promotion as early as in 1993 was against a regular vacancy and made by the competent authority and he being the senior most, was fully eligible for such regular promotion and hence, all the requirements of a regular promotion were fully available at the time of adhoc promotion itself. As such, according to the learned counsel for the applicant, his regular promotion should be with retrospective effect from 16-11-1993, the day when he was promoted on ad hoc basis. The learned counsel for the applicant relied upon a number of decisions of the Apex Court and the Tribunal and these are as under:-

(a) Rudra Kumar Sain v. Union of India, (2000) 8 SCC 25

(b) Direct Recruit Class II Engineering Officers' Assn. v. State of Maharashtra, (1990) 2 SCC 715

(c) T. Vijayan v. Divisional Rly. Manager, (2000) 4 SCC 20

(d) ***Niranjan Prasad Sinha v. Union of India, (2001)***
5 SCC 564

(e) ***Roshal Lal Agarwal & Ors vs U.O.I. and another***
(2005) 2 AISLJ 61 (CAT Jodhpur Bench)

6. The Counsel for the respondents relied upon the decision of the Apex Court reported in AIR 1998 SC 2098 and also another case Satish Kumar vs G.R. Chawla.

7. The applicant in para 4.2 of the OA has clearly stated that his promotion to the post of Yard Master was against a clear vacancy. This has not been denied by the respondents, though in the counter they have stated that it being a matter of record, the applicant should support his claim. We are satisfied that the applicant's promotion as early as in 1993 was against a clear vacancy, since, the applicant had also given the details of total number of posts/vacancies of Yard Master, vide para 4.5 of the OA in regard to which also there has been no denial, either explicit or tacit. Further, it is inconceivable that ad hoc promotion would have continued for a period of as long as 12 years without a clear vacancy. Though a feeble attempt has been made by the respondents in adding one sentence in the counter that the applicant was not promoted as Yard Master by a due process of selection, no substantiating document has been produced in this regard and it is inconceivable that a person not appointed by proper selection would have continued for 12 years in the said post. At the earliest opportunity he would have been reverted. Thus, it can be safely held that the promotion of the applicant is made by the competent authority, against a clear vacancy and by due process of law. The



respondents tried to justify their action by referring to the applicant's having failed in two selections in 1989 and 1991. This does not help them in any way to justify their action, for, the claim of the applicant is for regularization w.e.f. 1993 only. Admittedly no selection after 1991 had taken place, whereas the rules filling up of the regular vacancies at regular intervals on regular basis. Para 216 of IREM states as under:-

"216. In regard to selection post, it is essential all the selections are conducted annually in a regular manner. However, where holding of the next selection becomes necessary before a gap of one year on account of the panel getting exhausted, the earlier selection not throwing adequate number for empanelment/promotion, etc, the same may be held after a minimum time gap of six months from the date of approval of the panel finalized as a result of the first selection. This condition of six months restrictions between selections, will not however, apply to general selections which are conducted by calling options from serving employees fulfilling the prescribed eligibility conditions."

8. In so far as fixation of seniority is concerned, Rule 302 of the IREM Vol. 1 reads as under:-

"302 Seniority in initial recruitment grades: Unless specifically stated otherwise, the seniority among the incumbents of a post in a grade is governed by the date of appointment to the grade....."

9. The applicant's promotion on regular basis in 2003 is not based on any positive act of selection but under the restructuring scheme and in all probability his original selection in 1993 had been taken into account and he had been regularized from 01-11-2003.

10. The issue involved before us whether the respondents are justified in regularizing the applicant's promotion as yard master after 12 full years of ad hoc promotion, during which period some other employees on medical decategorization have been posted as yard masters, obviously, without any previous

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experience in the post, much less any selection, and given seniority above the applicant, who was promoted against a clear vacancy, by a competent authority and who had put in as many as 12 years service in the post. This calls for reference to various decided case laws on the subject of ad hoc promotion followed by regular promotion and fixation of seniority. The same are discussed in the succeeding paragraphs.

11. In Direct Recruitment Class II Engineering Officers Association (supra) a Constitution Bench of the Apex Court has laid down the law as under:-

47. To sum up, we hold that:

(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 ad hoc 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.*

(C) *When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.*

(D) *If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.*

(E) *Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.*

(F) *Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption*

should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position."

12. The above judgment was referred to in the case of **T. Vijayan v. Divisional Rly. Manager, (2000) 4 SCC 20** which

in fact deals with the very Railways. The observations of the Apex Court in this case are as under:-

" Now, para 216 of the Railway Establishment Manual provides as under:

"216. A. Ad hoc promotion against selection and non-selection posts.—(i) Ad hoc promotions should be avoided as far as possible both in selection and non-selection posts, and where they are found inescapable and have to be made in the exigency of service, they should be resorted to only sparingly and only for a short duration of 3 to 4 months. The ad hoc promotion should be ordered only from amongst senior most suitable staff. As a rule a junior should not be promoted ignoring his senior.

(ii) The following further guidelines should be adhered to while ordering ad hoc promotions—

(a) In case of non-selection posts which are filled on the basis of seniority-cum-suitability while there is no provision for any lengthy waiting list. The processing involved being not unduly cumbersome or time-consuming the post shall be filled after following the prescribed procedure quickly. When these posts are to be filled by trade test, this should be conducted systematically. Necessity for ad hoc promotion is thus obviated.

(b) In regard to selection posts, it is essential that all the selection should be conducted regularly as per extant instructions. While there is no objection to ad hoc promotions being made in leave vacancy and short

duration vacancy, ad hoc promotion against regular promotion should be made only after obtaining Chief Personnel Officer's approval. Proposal sent to Chief Personnel Officer for ad hoc promotion against regular vacancy should indicate detailed justification as to why regular selection could not be held. Chief Personnel Officer should keep record of having accorded approval to such ad hoc promotion and review the progress made in filling up these posts by selected persons every month. Chief Personnel Officer should also review selection to all posts afresh, whether such posts are controlled either at the Divisional level or at extra-Divisional level. He should also keep the record of the categories where he has to approve ad hoc promotions and these records should be available to the Board's Officer on their visit to Railways.

[Board's Letter No. E(NG) II/81/RC-I/1 dated 1-4-1981]

(c) Notification for ad hoc promotions against selection posts should specifically include a remark to the effect that the person concerned has not been selected for promotion and that his temporary promotion gives him no right for regular promotion and that his promotion is to be treated as provisional. For the purpose of drawing his pay which should not be drawn for more than three months without General Manager specific sanction. The General Manager should issue provisional sanction for periods exceeding six months at a time and these powers should be exercised by the General Managers/Additional General Managers personally or by his senior Dy. General Manager.

[Board's Letter No. E(NG) 1-73-PM-1/222 dated 23-2-1974;

E-55/PM-1/19/3 dated 11-1-1955;

E(NG) I-79-PM 1-105 dated 26-4-1979 &

E(NG) I-77-PM 1-117 dated 17-10-1977]

(iii) In any case no second ad hoc promotion shall be allowed.

[Board's Letter No. E(NG) 1-85/PM/5-III dated 23-8-1985]" (emphasis supplied)

18. The above para indicates that ad hoc promotion is permissible pending regular selection.

19. This Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra has laid down in principles (A) and (B) as under:

"47. (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 ad hoc and not according to rules and made as a stopgap 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."

20. Applying the above principles to the instant case, since Respondents 4 to 143 were promoted on ad hoc basis, and that too in a situation where regular promotion was not immediately possible and since ad hoc promotion was permissible in view of para 216 of the Railway Establishment Manual quoted above, they are clearly entitled to the benefit of ad hoc service rendered by them on the post of Fireman 'A' or "First Fireman" for the purpose of reckoning their seniority vis-à-vis the appellants.

21. It may be stated here that a three-Judge Bench of this Court in State of W.B. v. Aghore Nath Dey considered principles (A) and (B) as set out above and explained as under: (SCC pp. 382-83, paras 22 & 25)

"There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority'. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

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23. In another decision in Ajit Kumar Rath v. State of Orissa⁵ to which one of us (S. Saghir Ahmad, J.) was a party, the entire case-law was reviewed and it was held that if the ad hoc promotion had been made in accordance with the Service Rules, the promotees would be entitled to reckon the period of ad hoc service towards their seniority."

13. In **Suraj Parkash Gupta v. State of J&K**, (2000) 7

SCC 561, a number of cases where promotees' regularization with retrospective effect has been referred to and upheld. The observation of the Apex Court in this case is as under:-

"Cases from other States support promotees' regularisation with retrospective effect

67. Apart from the cases arising from Andhra Pradesh the position appears to be the same as per the cases arising from other States, so far as the promotees' ad hoc service is concerned. In *Baieshwar Dass v. State of U.P.* it was observed that officiating promotees are to be given dates by the Service Commission for counting seniority. In *B.S. Yadav v. State of Haryana* it was said that the promotees have to be confirmed in their quota if found fit and qualified and when vacancies arose in their quotas. In *A. Janardhana v. Union of India* it was observed that the seniority of the promotees was to count from the date of occurrence of vacancy in their quota. In *G.P. Doval v. Chief Secy., Govt. of U.P.* it was held that subsequent approval by the Public Service Commission to the temporary appointments will relate back to the initial dates of appointment for the purpose of seniority on the basis of the rule of continuous officiation and the seniority could not be reckoned only from the date of approval or selection by the Commission. In *Narendra Chadha v. Union of India*³ it was held that the promotees were first to be regularised from the dates of occurrence of vacancies/eligibility. The initial appointment though not according to rules, the said service could not be ignored. In *A.N. Pathak v. Secy. to the Govt.*²⁷ it was held that the promotees had to be inserted at places reserved for them as per quota. In *Delhi Water Supply & Sewage Disposal Committee v. R.K. Kashyap* it was held that once regularisation was made by PSC/DPC, the said service could not be ignored.

As to when post of ad hoc/stopgap service of promotees cannot be regularised — if outside quota or not eligible or suitable

68. In some cases, a distinction is made between two parts of the ad hoc/stopgap service of promotees, one which can be regularised and the other which cannot be regularised. In *Keshav Chandra Joshi v. Union of India* was held that previous promotees would get regularisation from the date of occurrence of vacancy in the promotion quota. Before that, it would be fortuitous. Of course, excess promotees could not claim seniority if the quota rule had not broken down because they occupy the seats of direct recruits. In *Rajbir Singh v. Union of India* the ad hoc promotion was in 1975 and the subsequent regularisation was in 1986 and it was held that the period of ad hoc service could be counted. In *A.N. Sehgal v. Raje Ram Sheoran* it was held that the promotees whose services were regularised could count their earlier service from the date of availability of a post within their quota but the earlier period between the starting point of ad hoc promotion and the date of occurrence of the vacancy could not be counted. In *S.L. Chopra v. State of Haryana* it was held that the promotees' service would count from the date of availability of post within the quota and service before that date would be fortuitous. In *Syed Khalid Rizvi v. Union of India* it was held that the service of promotees would count from the date of allotment to the select list but the period prior thereto would not count. In *Keshav Deo v. State of U.P.* Srinivasan, J. held, on a review of case-law that seniority of promotees would count from the dates fixed within the quota by DPC. (In this case, a good number of judgments which were relied upon before us by direct recruits were distinguished.)

69. *Thus, there is overwhelming authority of this Court to hold that ad hoc, stopgap service could be regularised from an anterior date after consulting the Service Commission from the date of vacancy in the promotee quota, after considering fitness, eligibility, suitability and ACRs.*

14. In **Ram Pal Mallik vs State of Haryana**, the third respondent was promoted to Class II on 22-5-1968 and then to Class I on 18-2-1977 and his representations were pending consideration of the Government to treat the date of his ad hoc promotion to Class II as regular promotion and to determine his seniority on that basis. More than one writ petition was filed by him for vindicating his claims. They bore fruit on 13-8-1986 when the Government of Haryana acceded to his claim and treated 22-5-1968 as the date of regular promotion to Class II.

15. In **Rudra Kumar Sain v. Union of India**, (2000) 8 SCC 25 another Constitution Bench undertook the pain of defining the terms "ad hoc", "stopgap" and "fortuitous" and subsequently held that a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". The discussion on the above lines as contained in the said judgment is extracted below:-

16. *The three terms "ad hoc", "stopgap" and "fortuitous" are in frequent use in service jurisprudence. In the absence of definition of these terms in the Rules in question we have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters. The meaning given to the expression "fortuitous" in Stroud's Judicial Dictionary is "accident or fortuitous casualty". This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period. But an appointment made either under Rule 16 or 17 of the Recruitment Rules, after due consultation with the High*

Court and the appointee possesses the prescribed qualification for such appointment provided in Rule 7 and continues as such for a fairly long period, then the same cannot be held to be "fortuitous". In Black's Law Dictionary, the expression "fortuitous" means "occurring by chance", "a fortuitous event may be highly unfortunate". It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. The expression "ad hoc" in Black's Law Dictionary, means "something which is formed for a particular purpose". The expression "stopgap" as per Oxford Dictionary, means "a temporary way of dealing with a problem or satisfying a need".

17. In Oxford Dictionary, the word "ad hoc" means for a particular purpose; specially. In the same dictionary, the word "fortuitous" means happening by accident or chance rather than design.

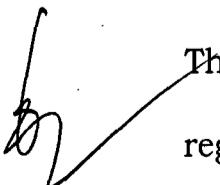
18. In P. Ramanatha Aiyar's Law Lexicon (2nd Edn.) the word "ad hoc" is described as: "For particular purpose. Made, established, acting or concerned with a particular (sic) and or purpose." The meaning of word "fortuitous event" is given as "an event which happens by a cause which we cannot resist; one which is unforeseen and caused by superior force, which it is impossible to resist; a term synonymous with Act of God".

19. The meaning to be assigned to these terms while interpreting provisions of a service rule will depend on the provisions of that rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as "ad hoc" or "stopgap". If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as "fortuitous" in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a "stopgap" arrangement and appointment in the post as "ad hoc" appointment. It is not possible to lay down any strait-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stopgap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the questions of inter se seniority of officers in the cadre.

20. *In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be "fortuitous/ad hoc/stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous."*

16. From the above, it is evident that consistently the Apex Court is of the considered view that on ad hoc appointment or promotion made in accordance with the Rules, if continues for a substantial period, and if followed by regularization, the regularization dates back from the date of initial date of appointment/promotion on ad hoc basis. Telescoping the above rule upon the facts of the case, it is manifestly clear that the applicant who has been promoted as early as 1993 against the clear vacancy and whose regularization has taken place without any positive act of selection is entitled to regularization with retrospective effect from 16-11-1993. Otherwise, the equality clause enshrined in Art. 14 and 16 of the Constitution of India would get frustrated. Also non regularization with retrospective effect would result in some other individuals coming over and above the applicant in seniority, which is not permissible.

17. In view of the above, the OA succeeds. The order dated 14-01-2005 (impugned) is quashed and set aside. It is declared that the applicant is entitled to be regularized as Yard Master in the scale of Rs 2000 – 3200 (6500 – 10500) w.e.f. 16-11-1993.

The respondents are directed to pass suitable orders in this regard and also amend the seniority, if need be, by giving notice

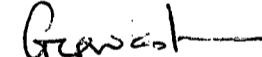
to others, who may be affected and place the seniority position of the applicant w.e.f. 16-11-1993. Needless to mention that if by virtue of this ante-dating of seniority, the applicant becomes eligible for consideration for promotion to any other higher grade, he is entitled to such benefits as well, in regard to which, the respondents shall take suitable action by holding necessary review DPC.

18. The above drill of passing necessary orders for ante-dating the seniority of the applicant w.e.f. 16-11-1993 and revising the seniority list shall be completed within a period of four months from the date of communication of this order and with regard to consequential benefits (such as promotion for which necessary DPC has to be convened), the time calendared is eight months from the date of communication of this order.

19. Under the above circumstances, there shall be no order as to costs.


(K.B.S. RAJAN)

MEMBER (J)


(Dr. G.C. SRIVASTAVA)

VICE CHAIRMAN