

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

OA No-591/2009 with
OA No.2981/2009

Order Reserved on 05.08.2015
Order Pronounced on: 31.05.2016

Hon'ble Mr. Sudhir Kumar, Member (A)
Hon'ble Dr. Brahm Avtar Agrawal, Member (J)

OA-591/2009

1. Shri N.K. Sharma
Working as Joint Director (Vigilance)
Ministry of Railways (Railway Board)
Rail Bhawan, Raisina Road, New Delhi-110001.
R/o 9/715, Lodi Colony, New Delhi-110 003.
2. Shri Parvez,
Working as Joint Director Finance (BC)-II
Ministry of Railways (Railway Board)
Rail Bhawan, Raisina Road, New Delhi-110001.
R/o A-31 Pandara Road, New Delhi-110003.
3. Shri S. Kameshwar,
Working as Under Secretary
Ministry of Railways (Railway Board)
Rail Bhawan, Raisina Road, New Delhi-110001.
R/o 275- Laxmi Bai Nagar, New Delhi-110 023.
4. Smt. Vaidehi Gopal,
Working as Dy. Director (on deputation)
Ministry of Railways (Railway Board)
R/o A-207, Farhruddin Memorial Society,
Plot No.18, Sector 10, Dwarka,
New Delhi-110075.
5. Shri Prabir Roy,
Working as Dy. Director
Ministry of Railways (Railway Board),
Rail Bhawan, Raisina Road, New Delhi-110001.
R/o DG-996, Sarojini Nagar,
New Delhi-110023.

-Applicants

(By Advocate: Shri Abhay N. Das)

Versus

1. Union of India, through
Secretary, Railway Board
Ministry of Railways,
(Railway Board), Rail Bhavan,
Raisina Road, New Delhi-110 001.
2. Joint Secretary (G)
Ministry of Railways,
(Railway Board), Rail Bhavan,
Raisina Road, New Delhi-110 001.
3. Chairman, UPSC
Dholpur House, Shahjehan Road
New Delhi 110 001.
4. Shri Sunil Kumar
Deputy Secretary
Ministry of Railways,
Railway Board, Rail Bhavan,
New Delhi.
5. Shri M.S. Mehra
Joint Secretary
Ministry of Railways,
Railway Board, Rail Bhavan,
New Delhi.
6. Shri Shiv Dan Singh
Ex. Director (on training)
Ministry of Railways,
Railway Board, Rail Bhavan,
New Delhi.
7. Shri B. Majumdar
Director (on training)
Ministry of Railways,
Railway Board, Rail Bhavan,
New Delhi.
8. Shri H. Moharana
Joint Director (Training)
Ministry of Railways,
Railway Board, Rail Bhavan,
New Delhi.

9. Shri S.K. Aggarwal
 Deputy Secretary (O) I
 Ministry of Railways,
 Railway Board, Rail Bhavan,
 New Delhi.
10. Shri Sudhir Kumar
 Deputy Director (on deputation)
 Ministry of Railways,
 Railway Board, Rail Bhavan,
 New Delhi.
11. Shri T. Srinivas
 Section Officer Track III
 Ministry of Railways,
 Railway Board, Rail Bhavan,
 New Delhi.
12. Mr. G. Priya Sudarsini
 Deputy Director
 Ministry of Railways,
 Railway Board, Rail Bhavan,
 New Delhi.
13. Shri Manoj Kumar
 Under Secretary
 Ministry of Railways,
 Railway Board, Rail Bhavan,
 New Delhi.

-Respondents

(By Advocate: Shri Krishna Kumar, for respondents
 Shri Sanjay Kumar, for respondents R-5 to R-13,
 Shri Sunil Kumar R-4 in person)

OA No.2981/2009

1. Shri Manoj Kumar
 Under Secretary [E(O)-II]
 Railway Board, Ministry of Railways,
 Rail Bhavan, Raisina Road,
 New Delhi-110001.
2. Shri Sunil Kumar
 Deputy Secretary (D&A),
 Railway Board, Ministry of Railways,
 Rail Bhavan, Raisina Road,
 New Delhi-110001.

3. Shri B. Majumdar
 Director (Estt./G)
 Railway Board, Ministry of Railways,
 Rail Bhavan, Raisina Road,
 New Delhi-110001.
4. Shri H. Moharana
 Joint Director (Training)
 Railway Board, Ministry of Railways,
 Rail Bhavan, Raisina Road,
 New Delhi-110001.
5. Shri S.K. Aggarwal
 Deputy Secretary [E(O)-I]
 Railway Board, Ministry of Railways,
 Rail Bhavan, Raisina Road,
 New Delhi-110001.
6. Shri Sudhir Kumar
 Asstt. Commissioner (on deputation)
 M.C.D. Karol Bagh Zone,
 Anand Parvat, New Delhi
7. Shri T. Srinivas
 Deputy Director [Track II]
 Railway Board, Ministry of Railways,
 Rail Bhavan, Raisina Road,
 New Delhi-110001.

-Applicants

(By Advocate: Shri Sanjeev Kumar)

Versus

1. Union of India, through
 The Chairman,
 Railway Board, Ministry of Railways,
 Rail Bhavan, Raisina Road,
 New Delhi-110 001.
2. The Member (Staff), Railway Board

Ministry of Railways,
Rail Bhavan, Raisina Road,
New Delhi-110 001.

3. The Secretary, Railway Board
Ministry of Railways,
Rail Bhavan, Raisina Road,
New Delhi-110 001.
4. The Union Public Service Commission,
Through The Secretary,
Dholpur House, Shahjahan Road,
New Delhi-110001.
5. Shri N.K. Sharma
Joint Director [Vigilance (s)],
Railway Board, Ministry of Railways,
Rail Bhawan, Raisina Road,
New Delhi-110001.
6. Shri Parvez,
Joint Director [Finance (BC)-II],
Railway Board, Ministry of Railways,
Rail Bhawan, Raisina Road,
New Delhi-110001.
7. Shri S. Kameshwar,
Under Secretary [Stationery],
Railway Board, Ministry of Railways,
Rail Bhawan, Raisina Road,
New Delhi-110001.
8. Smt. Vaidehi Gopal,
Deputy Director (On deputation)
Railway Board, Ministry of Railways,
Rail Bhawan, Raisina Road,
New Delhi-110001.

9. Shri Prabir Roy,
 Deputy Director [Estt. (GP)],
 Railway Board, Ministry of Railways,
 Rail Bhawan, Raisina Road,
 New Delhi-110001.

-Respondents

(By Advocate: Shri Krishna Kumar and Shri Abhay N. Das)

O R D E R

Per Sudhir Kumar, Member (A):

The Railway Board was created in 1905 as, and is an Attached Office of the Ministry of Railways of the Union of India, though its omnipotent presence now is much more than that of the Ministry itself. Till 1948 the legal position was that the Railway Board was supposed to cease to exist upon the establishment of a Federal Railway Authority, but the amendment brought in 1948 to the Section 4 of the Indian Railway Board Act, 1905 (Act No.4 of 1905) eliminated that option & possibility. Its Chairman, its Financial Commissioner Member, and other Members of this Board, also enjoy the status of being ex-officio Secretaries to the Government of India in that attached office itself. The Ministry of Railways itself does not have any Department or Departments under it, unlike most Ministries of the Government of India, so much so that the Ministry of Railways itself does not even have any appreciable independent existence of its own, without or away from its Attached Office, the Railway Board, which, therefore, virtually performs all functions claiming those functions, to have been performed for and on behalf of the Ministry of Railways of the Union of India. But still, not

being a part of the Central Secretariat, and being only an Attached Office, Railway Board is not a part of the umbrella of the Central Government, and has very few officers posted with it under the Central Staffing Scheme, and no officers from the Central Secretariat Service (CSS, in short). Hence, it has floated its own parallel Service Cadre of Officers. These two connected OAs are in the nature of a petition and its counter petition, which concern the employees of a very small, rather minuscule, Attached Office Service Cadre, called the Railway Board Secretariat Service (RBSS, in short), and are being disposed off through a Common Order in terms of the directions of the Hon'ble High Court dated 17.09.2014 passed in W.P.(C) No.171/2012 with W.P. (C) No.7899/2011, albeit after some delay.

2. The Indian Railways Act, 1890, (Act IX of 1890), had been enacted with the approval of the then Governor General of India on 21.03.1890, and which came into force on 09.05.1890. This Indian Railways Act of 1890 had replaced the earlier Indian Railways Act, 1879.

3. Soon thereafter, a need was felt to constitute a Railway Board, for controlling the Administration of the then numerous Railways in India, and by the Resolution of Govt. of India, approved by the then Governor General of India on 18.02.1905, the Railway Board was constituted.

4. Within one month thereafter, a need was felt to provide for investing that newly constituted Railway Board with certain powers and functions under the Indian Railways Act, 1890. For doing that, the

Indian Railway Board Act, 1905 (Act No. 4 of 1905), which was a very short Act, was enacted as follows:-

“An act to provide for investing the Railway Board with certain powers of functioning under the Indian Railways Act, 1890.

WHEREAS Railway Board has been constituted for controlling the Administration of Railways in India and it is expedient to provide for investing such Board with certain powers or functions under the Indian Railways Act, 1890, it is hereby enacted as follows:-

- (1) This Act may be called the Indian Railway Board Act, 1905; and
- (2) It shall be read with, and taken as part of, the Indian Railways Act, 1890 (Since revised as the Railways Act, 1989).
2. The Central Government may, by notification in the official Gazette, invest the Railway Board, either absolutely or subject to conditions:-
 - (a) with all or any of the powers or functions of the Central Government under the Indian Railways Act, 1890, with respect to all or any Railways, and
 - (b) with the power of the officer referred to in Section 47 of the said Act to make general rules for Railways administered by the Government”.
3. Any notice, determination, direction, requisition, appointment, expression of opinion, approval or sanction, to be given or signified on the part of the Railway Board, for any of the purposes of, or in relation to any powers, or functions with which it may be invested by notification under Section 2, shall be sufficient and binding if in writing signed by the Secretary to the Railway Board, or by any other person authorised by the said Railway Board to act in its behalf in respect of the matters to which such authorisation may relate; and the said Railway Board shall not in any case be bound in respect of any of the matters aforesaid unless by some writing signed in manner aforesaid.
4. **Cessation of Railway Board on establishment of Federal Railway Authority:- [Repealed by A.C.A.O. 1948].”**
5. Through this Indian Railways Board Act, 1905, though it was stated that it was to be read with, and taken as part of, the Indian Railways Act, 1890, it was provided as follows:-

“THE CENTRAL GOVERNMENT MAY, by notification in the Official Gazette

----> invest Railway Board.

----> either absolutely, or subject to conditions (???!!!)

----> (a) with -- all
 OR
 -- any
 -- of the POWERS
 OR
 FUNCTIONS
 OF THE CENTRAL GOVT,

under the Indian Railways Act, 1890,

----> with respect to -- all
 OR
 any
 Railways, and

----> ALSO

----> invest Railway Board,

----> either absolutely, or subject to conditions (???!!!)

----> (b) with the power of the officer referred to in Section 47
 of the said Act

----> to make general rules for Railways administered BY THE
 GOVERNMENT.”

16. Therefore, the following inferences appear to emerge from the above Act:-

(1) Railway Board cannot be the CENTRAL GOVERNMENT;

(2) It can exercise all or any of the powers,

---> OR perform all or any of the functions

--> OF THE CENTRAL GOVERNMENT.....

----> ONLY with respect to the Open-Line and project functions
 of all or any of the (16) Railways (administered by the
 Central Government).

(3) It cannot therefore exercise any powers /or perform any
 functions of THE CENTRAL GOVERNMENT for :-

----> Corporate Railways (like the Konkan Railway Corporation,
 which is not owned exclusively, or administered by
 CENTRAL GOVERNMENT, as it is also partly owned by the
 State Govts. of Maharashtra, Goa, & Karnataka etc., and
 some Private Railway Lines which have been sanctioned
 and are operating as on today).

----> Any of Railway PSUs/PSEs. WHICH ARE NOT AMONG
 ONE OF THE 16 ZONAL RAILWAYS ADMINISTERED BY
 THE CENTRAL GOVERNMENT in respect of their Open-
 Line and Project functions.

----> Any of the six Manufacturing Units connected to Railways, WHICH ARE NOT ONE AMONG THE 16 ZONAL RAILWAYS ADMINISTERED BY THE CENTRAL GOVERNMENT

----> Any of the so called other Attached Offices of the Railway Ministry/RDSO etc. WHICH ARE ALSO NOT ONE AMONG THE 16 ZONAL RAILWAYS ADMINISTERED BY THE CENTRAL GOVERNMENT.

(4) Railway Board's Rule making powers are also very very limited (only in relation to the Open-Line and Project functions of the 16 Zonal Railways which are owned by the Central Government).

----> limited only to the extent of the powers of the officer referred to in Section 47 of the said Indian Railways Act, 1890,

----> and that too only to make general rules (ONLY) FOR THE 16 ZONAL RAILWAYS OWNED AND ADMINISTERED BY THE CENTRAL GOVERNMENT, in respect of their Open Line and Project Functions, and their employees;

AND SINCE RAILWAY BOARD CAN ONLY MAKE RULES FOR THE 16 ZONAL RAILWAYS, IT CANNOT MAKE ANY RULES WHATSOEVER FOR ITS OWN FUNCTIONING.”

7. Therefore, as per the contents of the Indian Railway Board Act, 1905 (Act No. 4 of 1905) itself, it was clear that the Railway Board could exercise and perform all or any of the powers or functions of the Central Government under the Indian Railways Act, 1890, but only with respect to all or any of the Central Government owned Zonal Railways, and their employees, along with the powers of the officer referred to in Section 47 of the said Act, to make general rules for the 16 Central Government owned Zonal Railways administered by the Government, and their employees. However, for providing the Railway Board with a Secretariat for performing its delegated powers and functions, it needed induction of Secretariat level officers also.

8. 99 years after the Indian Railways Act, 1890, was enacted, it was replaced by a new Act, but without bringing any change in the status of the Railway Board as an Attached Office of the Ministry of Railways of the Central Government. We may borrow the following “**Statement of Objects and Reasons**” of the Railways Act, 1989:-

“Statement of Objects and Reasons”

The Indian Railways Act, 1890 was enacted at a time when the railways in India were mostly managed by private companies. The Government of India primarily played the role of a coordinating and regulating authority in various matters, such as inter-railway movement of traffic, fixation of rates, sharing of revenue earnings, apportionment of claims, liability amongst the railways, providing reasonable facilities to passenger and goods traffic etc. This role was accordingly reflected in the Act. But now, except for a very small portion of the railways, the entire railway system has become part of the Government of India. To give effect to the changes in the railway system from time to time, the Act had also been amended a number of times since its enactment in 1890. In addition, as some of the original provisions enacted in 1890 had continued without any change, a need for their replacement by new provisions, more responsive to the needs of the present day was felt. Besides, some other provisions have become redundant. There has also been a demand, both within and outside Parliament, for the re-enactment of the Act so as to reflect the large number of changes that have occurred in the railways. It has, therefore, become necessary to reconsolidate and amend the law relating to railways by a new Railway Act”.

9. From this **Statement of Objects and Reasons**, it is clear that historically, the creation of Railway Board was necessitated even after the Indian Railways Act, 1890, had been enacted, since at that time the Railways in India were mostly managed by private companies. But with the passing of this new Railways Act, 1989, the Indian Railways Act, 1890, stands repealed, through Section-200 of the new Act, which states as follows:-

“200. Repeal and saving.—(1) The Indian Railways Act, 1890 (9 of 1890), is hereby repealed.

(2) Notwithstanding the repeal of the Indian Railways Act, 1890 (9 of 1890) (hereinafter referred to as the repealed Act)—

(a) anything done or any action taken or purported to have been done or taken (including any rule, notification, inspection, order or notice made or issued, or any appointment or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given or any proceedings taken or any penalty or fine imposed) under the repealed Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken tinder the corresponding provisions of this Act;

(b) any complaint made to the Railway Rates Tribunal under sub-section (1) of section 41 of the repealed Act but not disposed of before the commencement of this Act and any complaint that may be made to the said Tribunal against any act or omission of a railway administration under the repealed Act, shall be heard and decided by the Tribunal constituted under this Act in accordance with the provisions of Chapter VII of this Act.

(3) The mention of particular matters in sub-section (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeal”.

10. Unfortunately, neither in Section 200 of the 1989 Act itself, nor in the **“Statement of Objects and Reasons”** submitted while introducing the legislation before the Parliament, and before assent was given to it by the President on 06.03.1989, and it had come into force on 01.07.1990, anybody in the Parliament, or the Executive, seems to have given a thought about the fate and future of the Indian Railway Board Act, 1905, in Clause (2) of which itself, it was stated that “it shall be read with and taken as part of, the Indian Railways Act, 1890”.

11. Therefore, one meaning of the reading of Clause (b) of the Indian Railway Board Act, 1905, with Section 200 of the Railways Act, 1989, can be that along with the repeal of the Indian Railways Act, of 1890, the Indian Railway Board Act, 1905, also stands repealed, which was to be taken as a part of the Indian Railways Act, 1890, since what has been protected under sub-section (2) Clause (a) of Section-200 of the Railways Act, 1989, are only anything done or any action taken or purported to have been done or taken under the repealed Act, in so far as it is not inconsistent with the provisions of this new Act, when it will be deemed to have been done or taken under the provision of this new Act. But this meaning of the joint reading of the Acts concerned has to be discarded as unrealistic, since the Railway Board has been allowed by the Parliament and the Executive to continue to exist even thereafter.

12. But, still, since this new The Railways Act, 1989, has not been accompanied with an equivalent of the Indian Railway Board Act, 1905, and has not made a provision even in a single Section out of the 200 Sections of that Act, it is doubtful whether there is any sound legal basis as on today for the continuation of the Railway Board, as, if, as noted above also, the Indian Railway Board Act, 1905, was to be read with and taken as a part of the Indian Railways Act, 1890, as per the law relating to Interpretation of Statutes, now when the latter stands repealed, its part the Indian Railway Board Act, 1905, also stands repealed. But, however, since Section-200 of the new 1989 Act has not said anything in this regard, we cannot arrive at any definite finding under law on this point. And, moreover, since the Railway Board has continued to function,

as earlier, continuously, even after the enactment of the new 1989 Act, it cannot be held that the intention of the Parliament was otherwise.

13. However, one thing that is clear is that even now, the Railway Board is only an Attached Office, and is certainly not the Central Government, even under the new 1989 Act, and it can only perform all or any of the powers or functions of the Central Government under the Indian Railways Act, 1890, with respect to the 16 Zonal Railways owned and administered by the Central Government, and their Open Line and Project employees. Since the earlier 1890 Act has itself now got repealed, unless and until the Indian Railway Board Act, 1905, is now amended, to provide for delegation of the powers of the Central Government to the Railway Board under the new Railways Act, 1989, which has come into force from 01.07.1990 onwards,, the Railway Board does not have any legal basis whatsoever for its continued existence as on today.

14. Further, even if the Indian Railways Board Act, 1905, is still existing, in spite of it having been enacted to be read with, and taken as a part of the now repealed Indian Railways Act, 1890, it is very clear from Section-2 of the Railways Act, 1890, as reproduced above, that it can only perform all or any of the powers or functions of the Central Government with respect to all or any of the Zonal Railways, which the Central Government may, by Notification in the official Gazette, invest the Railway Board to perform, either absolutely, or subject to conditions. In spite of a thorough search, we have not been able to search out any such Notification having been issued under the new 1989 Act for firstly

continuing the legal existence of the Railway Board, and secondly, for empowering the Railway Board in respect of all or any of the powers or functions of the Central Government, even in respect of the Zonal Railways, in respect of their Open-Line or Project functions, and the employees on the rolls of such Open-Line or Project functions.

15. It is further clear that if, even thereafter, the Railway Board can only perform such functions, after such a Gazette Notification, issued under the new Act of 1989, read with the above Act of 1905, only in respect of the 16 Zonal Railways, it is, therefore, doubtful as to whether, as on Attached Office itself, it has any powers whatsoever to exercise any functions and responsibilities in respect of any of the other Attached Offices, or subordinate offices, or the six Production Units associated with the Railways Ministry, which do not come under the definition of "Railways" as given in the Act No.4 of 1905.

16. Therefore, the first legal conclusion which emanates is that the Railway Board is competent only to perform functions and duties in respect of the Zonal Railways, and not in respect of itself, since it is only an Attached Office of the Central Government. Therefore, there is a doubt in law as to whether the Railway Board could have ever, either earlier under the 1890 Act, since repealed, or even under the new Railways Act, 1989, which has come into force w.e.f. 01.07.1990, constituted a separate service for itself, like the RBSS, which it did. But since none of the parties among the applicants, or the private respondents, have challenged the creation and constitution of the RBSS

itself, therefore, we cannot comment any further on this aspect, or lay down any law in this regard.

17. The RBSS was, however, constituted by the Railway Board on the lines of the Central Secretariat Service (CSS, in short), which is a much larger service Cadre, present in all other Ministries/Departments of Govt. of India, except the Ministry of Railways, and many Attached Offices of the Govt. of India, and is administered by the Department of Personnel & Training of the Ministry of Personnel, Public Grievances and Pensions of the Govt. of India.

18. For deciding this case, we have made attempts to study the structure of the Railway Board from the few Legal commentaries available. We have not been able to lay our hands upon as to what were the Rules governing the RBSS prior to 1969, and nor have they been produced in their pleadings by parties on either side. However, what is available on record is that on the lines of the CSS Rules, 1962, the RBSS Rules, 1969, were drawn up and notified through GSR 2374 dated 11.10.1969. Subsequently, 26 minor amendments to those Rules were notified from 09.01.1970 to 07.02.2000, before the first major wholesale amendment to the said Rules was carried out through the RBSS (Amendment) Rules, 2004, notified through GSR 842 (E), published in the Gazette of India Extra-Ordinary Part-II-Section-3 sub-section (i) No.571 dated 30.12.2004, which has been produced as Annexure R-2 in the paper book file of OA No.591/2009.

19. As already mentioned in the opening paragraph also, there is hardly a Ministry of Railways of the Government of India having a Secretariat of its own. Then, there is its Attached Office, the Railway Board, having a Secretariat of its own. Then, there are 16 Zonal Railways, coming under the control of the Ministry of Railways, through the Railway Board both for their Open-Line and Project functions. The majority of the employees of these Zonal Railways are governed by the Indian Railway Establishment Manual (IREM, in short), framed by the Railway Board, the Rules of which Manual are vintage in character, and constitute a good piece of subordinate legislation, though they themselves require to be revised and re-notified, but that is a separate issue not concerning us in the present case.

20. Under the Transaction of Business Rules of the Govt. of India, the Minister for Railways is a Cabinet rank Minister, and he is assisted in his work by one or more Ministers, who are of the status of Ministers of State or Deputy Ministers. Together, they are required to perform such functions as have been allocated to them by the President of India under the Transaction of Business Rules, but they do not have a Secretariat with a full-fledged Secretary of the Government of India under them, like the other Ministers of the Union of India.

21. Since these Railway Ministers do not have any Secretariat to aid and advise them, beyond their own Personal Sections, that role is performed by the Ministry's Attached Office, the Railway Board, which is both an Administrative and an Executive Body, combining the functions

parallel to the Secretariat of a Ministry or Department of the Union of India, as well as the Executive day today functions including taking administrative and commercial decisions, as are normally performed by all the other Attached Offices also, as well as by the offices of the Public Sector Undertakings and Boards working below the concerned Ministries and Departments, in the case of other Ministries and Departments of the Government of the Union of India. In common parlance, however, it is claimed both in the Parliament, and outside, that the Railway Board is not only an Attached Office in the nature of a Board, but is also the Secretariat of the Ministry of Railways, which it is not so in the strict legal sense.

22. This Railway Board has a 111 year old historical legacy, since it was constituted by a Resolution of the then Govt. of the Dominion of India, under the British Rule, dated 18.02.1905, as discussed above. The Railway Board presently consists of a Chairman, a Financial Commissioner, and five other Members, in charge of Traffic, Staff, Mechanical Engineering, Civil Engineering and Electrical Engineering, and also has Director Generals of the Railway Protection Force, and the Railway Health Services, associated with it, who are not Members of the Railway Board itself. There is also a Secretary of the Railway Board, which post also does not come under the Central Staffing Scheme of the Union of India.

23. Since the Railway Ministry of the Union of India does not have any post of a Secretary to the Govt. of India, the Chairman and the Members

of the Railway Board function only as *ex officio* Secretaries to the Govt. of India. The other Members of the Railway Board, who are the topmost Officers of their own respective Railway Services, do not get to occupy the rank of Secretaries to Government of India, and get only an *ex-officio* rank equivalent to Secretaries, as the Railway Ministry does not consist of separate Departments, unlike the other Ministries of the Govt. of the Union of India. Over the period of time, the Financial Commissioner for Railways, who has also been designated as an *ex officio* Secretary to the Govt. of India in the Ministry of Railways in respect of financial matters, has had his role being broadened, by prescribing for his being required to report to both the Railway Minister, as well as the Union Minister for Finance.

24. Apart from the above named Members of the Railway Board, there are Additional Members, and many Directorates, each Directorate being under an Adviser, and then many other subordinate Attached Offices, Subordinate Offices, and finally the 16 Zonal Railways. The Railway Ministry also has six Industrial Production Establishments/Units in the nature of Factories under its Public Sector Undertakings (PSUs, in short), which also report to the Railway Ministers, but only through the omnipotent Railway Board.

25. For the purpose of running this separate mini empire of theirs, and in order to assert their independence as an Attached Office, the Railway Board has not bothered to either borrow officers from the CSS, or constitute its own Clerical Cadre on the lines of the Ministry-wise Central

Secretariat Clerical Services (CSCS, in short), which have an organic linkage with the CSS. Sometime in the last 111 years since 18.02.1905, the Railway Board created the RBSS, to run its own Secretariat, and for managing the service, the RBSS Rules, 1969, were notified on 11.10.1969. We are concerned with these RBSS Rules, 1969, and their interpretation, and we intend to judicially review and explain our understanding of the working of the RBSS Rules, 1969, and the changes brought about in those Rules through the RBSS (Amendment) Rules, dated 21.12.2004, which were Gazette notified on 30.12.2004.

Previous History of these two OAs.

26. These two OAs have had a chequered history. An OA No.2376/2006 was first filed before this Tribunal, alleging mismanagement in the management of the RBSS, and raising the issues of seniority allegedly wrongly decided by the Railway Board. In the midst of that ongoing *lis*, when this Tribunal was seized of the matter, the Railway Board took it upon itself to issue the first ever Seniority List of the RBSS on 21.04.2008. 09 days later, when that OA No.2376/2006 next came up for hearing before this Tribunal on 01.05.2008, that OA got disposed off, with directions to the respondents to decide the issue of seniority in between the Direct Recruits and Promotees in the RBSS in the light of the judgment in **AFHQ/ISOs SOs (DP) Association and Others vs. Union of India and Ors. (2008) 3 SCC 331**, and leaving the matter to be decided by the official respondents by passing a speaking order.

27. The applicants of that disposed off OA, and others concerned, including those who are the applicants of both these OAs, submitted their representation (s) to the official respondents, drawing the attention of the authorities in the Railway Board to their respective view points. The Secretary, Railway Board, took the unusual step of calling for the comments of the counter-parties on both those representations, by sending to both groups the opposite side's representations.

28. Ultimately, the Secretary of the Railway Board passed a speaking order dated 22.12.2008 on those representations, running into 7 ½ pages, and marked copies of that speaking order to the applicants of that OA No.2376/2006, as well as the private respondents of that OA. Shri Manoj Kumar and Others, who were the private respondents in that OA No.2376/2006, later on filed the present second OA No.2981/2009, challenging that speaking order passed by the Secretary of the Railway Board through Memorandum dated 22.12.2008, and the original applicants of that OA No.2376/2006 filed the first present OA No.591/2009, also seeking the setting aside of the same speaking order, issued by the Secretary, Railway Board, vide Memorandum dated 22.12.2008, and the Seniority List dated 21.04.2008, which had been issued by the Railway Board during the pendency of the said OA before this Tribunal. Therefore, through these two O.As, which are only a petition and counter petition of each other, the applicants of these OAs have in fact assailed the same Memorandum dated 22.12.2008, though on different and diametrically opposite grounds.

29. Later, it so happened that when the two cases came up together for hearing, they were disposed of by a Coordinate Bench of the Principal Bench of this Tribunal through a common order dated 28.03.2011, and both these OAs were dismissed as being barred by limitation, without going into the merits of the two counter cases.

30. The applicants of OA No.2981/2009 then filed the above-mentioned Writ Petition (C) No.171/2012 before the Delhi High Court, which came to be disposed of *in limine*, by a Division Bench of the Delhi High Court, through order dated 28.01.2013, refusing to interfere with the order passed by this Tribunal. However, a Review Petition was filed before the Delhi High Court, and while considering that Review Petition No.288/2013 on 24.05.2013, the Delhi High Court noticed that another Writ Petition, which was registered as W.P. (C) No.7899/2011, had also been filed by the applicants of OA NO.591/2009, because of which the High Court allowed the Review Petition before it, and recalled its *in limine* order dated 28.01.2013, and directed the Writ Petition (C) No.171/2012 to be listed for hearing along with W.P. (C) No.7899/2011.

31. Later on, through its third decision dated 17.09.2014, another Division Bench of the Delhi High Court heard the two Writ Petitions, and the connected Civil Miscellaneous Petition, together, and passed the following order:-

“.....We have considered the submissions of the parties as well as the Seniority List impugned in the proceedings before the CAT. It is nobody’s case that before the publication of the impugned Seniority List, the seniority position of the direct recruits and promotees was ever reflected in a common gradation list. Concededly, none of the officers of either

stream had the occasion to accept or object to their possible seniority positions.

Having regard to these and the further circumstance that the trigger for the Seniority List dated 21.04.2008 appears to have been filing of the previous application, i.e. O.A. No.2370/2006, we are of the opinion that the CAT should have been more circumspect and should have proceeded to consider and adjudicate upon the disputes of the case on merits.

For the foregoing reasons, the impugned order of the CAT is set aside. **The CAT is directed to consider the two applications O.A. No. 591/2009 and O.A. No.2981/2009 before it at its earliest convenience, having regard to the fact that the Seniority List was published six years ago and reflects the inter se seniority of almost two decades ago**, and make its final orders preferably within four months from today. The parties are directed to be present before the CAT for this purpose on 29.09.2014.

Order dasti”.

(Emphasis supplied)

32. Since the matter, thus, stood remanded back for a re-consideration by this Tribunal, both the OAs got revived, and after numerous adjournments, the case was finally heard and reserved for orders on 05.08.2015. The complexity of the issues concerned to be considered and commented upon by us, has resulted in the delay in the pronouncement of this common order thereafter.

Common facts of the two OAs.

33. As stated earlier also, the RBSS has been constituted on the lines of the CSS. However, since there is hardly any separate existence of a Railway Ministry separate from the Railway Board, and since the Railway Board has a fetish for trying to project itself to be a separate Government within the Govt. of the Union of India, it has constituted the RBSS, with the following four grades and classifications, as given in Rule-3 of the

RBSS Rules, which has not undergone any change or amendment through the RBSS (Amendment) Rules, 2004:-

“3. Composition of the service:- Amended vide ERBI/76/16/4 dt. 25.10.77, 20.10.77 and E.770G2/2/RB(D) dt. 7.12.81-

(1) There shall be four grades in the service, classified as follows, namely:-

Grade	Classification
(i) Selection Grade (Deputy Secretary/Joint Director): Such posts in the grade of Joint Director/Deputy Secretary, Railway Board, as may from time to time be held by officers of the Railway Board Secretariat Service.	Railway Board Secretariat Service Group A
(ii) Grade-I (Under Secretary/Deputy Director): Such posts of Deputy Director/Under Secretary, Railway Board, as may from time to time be held by officers of the Railway Board Secretariat Service;	Railway Board Secretariat Service Group A
(iii) Section Officers' Grade	Railway Board Secretariat Service Group B Ministerial.
(iv) Assistants' Grade	Railway Board Secretariat Service Group B (Non-gazetted)-Ministerial

(2) Notwithstanding anything contained in sub-rule (1), Section Officers who were members of Grade II of the service known immediately before the appointed day as Railway Board Secretariat Service in the then existing reorganization and reinforcement scheme and who have elected Group A status in the merged section officers grade constituted with effect from 1st July, 1959 shall continue to retain their existing Group A status.

(3) @The posts in the selection grade, Grade I and the Section Officers' Grade shall be gazetted posts and those in the Assistants' Grade shall be non-gazetted posts”.

34. Rule-4 (1) of the said Rules gives the authorized permanent strength of the four grades of the RBSS service, which has also remained unchanged after the 2004 Amendment Rules (supra). However, sub-

rule-2 and sub-rule-3 of the Rule 4 of the 1969 Rules have certainly undergone a change in 2004, as follows:-

“RBSS Rules, 1969	RBSS (Amendment) Rules, 2004
4(1) –No change	4(1)- No change
(2) After the appointed day, the authorised permanent strength of the various grade shall be such as may, from time to time, be determined by the Central Government in the Ministry of Railways.	(2) The Central Government in the Ministry of Railways may make temporary additions to a grade as found necessary from time to time and such temporary additions to a grade shall be subject to review every year.
(3) The Central Government in the Ministry of Railways may make temporary additions to a grade as found necessary from time to time.	(3) The authorized cadre strength of various grades however shall be such as may be determined from time to time by the Central Government in the Ministry of Railways”.

OA No.591/2009

35. The applicants of OA No.591/2009 are Departmental Promotee Section Officers (DPSOs, in short) who had begun their career in Railway Board as Assistants/Personal Assistants, and were granted regular promotions or accelerated promotions through the LDCE to the grade of Section Officers in different years. Some of them were later further promoted to the grade of Under Secretary, after having put in 8 years of approved service after their respective dates of joining in the grade of Section Officers. Their grievance is that while the Directly Recruited Section Officers (DRSOs, in short) through the UPSC have been promoted to the even higher grades after their completing the eligible service required for grant of such further promotions, the applicants of this OA have either been promoted after considerable delay, or have not been promoted at all till now. They have produced an illustrative statement showing their respective dates of eligibility for grant of promotions from

their perspective, and the actual dates of their promotions in the case of the two categories of incumbents, which was a part of the table reproduced in the earlier order of the Tribunal dated 28.03.2011.

36. The fact remains that some of the DR private respondents of OA No. 591/2009 had even been promoted to the next higher grade of Dy. Secretary in between the period from 1992 to 2006, which had also not been challenged by the DP applicants of this O.A. then, at the appropriate time. However, the DP applicants had challenged the impugned Memorandum passed by the Secretary Railway Board, as, according to them, it had deviated from the settled principles for determination of seniority, and had perpetuated the undue advantage granted by the official respondents already to the DR Private Respondents. The Coordinate Bench had, in the order since set aside by the Hon'ble High Court, held that the DP applicants of this OA No.591/2009 should have challenged the promotions of the DR Private Respondents to the grade of Under Secretary in 1986, 1987, 1998 etc. itself, when such promotions were granted, and having silently acquiesced in such promotions, and the subsequent promotions also which were granted to the DR private respondents to the even higher grade of Deputy Secretary, they cannot now challenge such promotions at such late stage, and the OA No.591/2009 had been dismissed as being barred by limitation. But, as mentioned, that order of the Coordinate Bench since stands set aside by the Hon'ble High Court, while remanding the two connected cases back to this Tribunal for an adjudication on merits.

37. It was further alleged that the official respondents have been wrongly intimating to the UPSC the names of the officers within the “zone of consideration” for holding the DPC meetings for promotions. Therefore, the applicants of OA No.591/2009 had taken the following grounds:-

- a) That the impugned order dated 22.12.2008 passed by the respondent authorities had wrongly assumed that the judgment dated 19.02.2008 of the Hon'ble Supreme Court in the case of **AFHQ/ISOs SOs (DP) Association and Others vs. Union of India and Ors.** (supra) was not applicable to the failure of rota quota in RBSS;
- b) That the official respondents were under an obligation to review the impugned Seniority List in the light of the Supreme Court's judgment, which had not been done by them by arbitrarily stating in the impugned order that the said judgment was not applicable in the present case;
- c) That the official respondents had arbitrarily concluded that it was not possible to recast the Seniority List, as the records are not available from the years 1973 to 1980, which conclusion was unacceptable, because in April 2008, the official respondents did actually issue the impugned consolidated Seniority List of SOs starting from the year 1973;

d,e,f,g,h&i) That the contention of the official respondents that the claim of the applicants is time barred is misplaced, as the impugned Seniority List had been issued for the first time only on 21.4.2008, and that the apprehension that recasting of the seniority list would have led to “**complete administrative mayhem**” was entirely baseless and misleading, and both the impugned Seniority List dated 21.4.2008, and the impugned speaking order dated 22.12.2008, are illegal, unjust, perverse, motivated, and have not followed DoP&T instructions for fixation of *inter-se* seniority, and that the impugned Seniority List has been prepared in violation of the principles laid down by the Supreme Court in **AFHQ case** (supra);

j) That the system of rotation of quota as per the existing vacancies in a particular recruitment year had never been followed in RBSS, clearly signifying the failure of rota-quota system;

k.1.m.

n.,o,&p) That an officer directly recruited cannot be assigned seniority from a year earlier than his recruitment year, in gross violation of Rules, at the cost of the Departmental Promotees, and the official respondents have wrongly carried forward the unfilled slots of Direct Recruits for many years, and then assigned undue seniority to the Direct Recruits from those vacancy year(s), and not from the year of their actual

appointments, which method followed in preparing the impugned Seniority List is without any authority of law, and that seniority cannot be determined on the basis of year-wise vacancies, as has been done, and the entire impugned seniority list has been prepared in violation of DoP&T Notification dated 29.12.1984;

q,r,s) That the practice of assigning ante-dated seniority to Direct Recruits from the date the slot for Direct Recruit vacancy had fallen vacant has been deprecated by the Supreme Court in a catena of cases, as well as by this Tribunal also, and the Supreme Court has further held that where the application of quota and rota results in assigning extremely high notional seniority to one group, as has happened in RBSS, this signifies the failure of rota-quota rule, and such assignment of seniority is wrong;

t,u,v) That the rota-quota rule presupposes regular induction of officers from all the streams in the prescribed quota ratio, and even the DoP&T Notification dated 29.12.1984 stipulates that unfilled vacancies of a particular quota should not be carried forward for more than two years, after which they get transferred to the other mode (quota for recruitment), and even during this period of up to two years, the Direct Recruit incumbents so appointed against the carried forward quota vacancies will be placed at the bottom of the integrated

seniority list for that year, which stipulation had not been followed in RBSS, because the DoP&T Notification, flowing from the cited judgments of the Supreme Court, had not been followed by the official respondents R-1 & R-2 at all;

w,x,y,z) That the rota-quota system had failed in RBSS since not even a single Direct Recruit Section Officer had joined in as many as nine recruitment years, and the official respondents have acted in a *malafide* manner to favour the Direct Recruits, and have even wrongly concluded that when the directly recruited candidates assigned to the Railway Board for joining RBSS did not join the service, it cannot be termed as a failure of the rota-quota Rule in the RBSS, and for it to be held that the rota quota had not failed, the rota Rule should have operated smoothly, which has not happened in RBSS, and has resulted in conferment of undue ante-dated fixation of seniority of Direct Recruits;

aa,bb) That Supreme Court has held that quota Rule is linked up with the seniority Rule, and unless the quota Rule is strictly observed in practice, *inter-se* seniority gets affected, and the erroneous impugned Seniority List issued on 21.04.2008, from 01.07.1973 onwards, can still be re-cast by realigning the seniority of the Direct Recruits with reference to the exact dates of their joining, as per the Supreme Court's judgments,

and the official Respondents had failed to follow the correct principles for fixation of seniority;

cc,dd) That there was no provision in the RBSS Recruitment Rules, 1969, for carrying forward of unfilled vacancies of any quota, much less the vacancy slots of any particular stream;

ee,ff) That the applicants, who were appointed as Section Officers through accelerated promotions through the LDCE stream, could have been counted against the indents for regular/substantive appointments against Direct Recruit vacancies notified through UPSC by the official respondents, and were entitled to have orders issued straightaway appointing them substantively as Section Officers, as was done in the case of the Direct Recruits;

gg,hh,ii) That the official respondents were well aware that the quota Rule had never been followed, yet they had held in the impugned Memorandum dated 22.12.2008 that the quota Rule was in place, and had thereby ordered for re-calculation and re-distribution of total number of yearly vacancies, and had wrongly concluded that the quota Rule had not become inapplicable in the current situation;

jj.kk,ll) That the official respondents had failed to observe that the Supreme Court has held to make the Direct Recruit indents as the reference point for calculation of quota for

Departmental Promotees, and for subsequent assignment of *inter-se seniority* in between them, and the impugned order dated 22.12.2008 had wrongly insisted upon revision of seniority of the Direct Recruits based on the reference point, and thereby starting maintenance of revised seniority from 1973, and had changed the existing seniority, which had stood the test of time;

mm,nn) That it was wrongly concluded in the impugned Memorandum dated 22.12.2008 that since there are only 20 Direct Recruits in the RBSS, and the recruitment of Direct Recruit Section Officers had stopped from the year 2004, therefore, the grievance of the Direct Recruits has already got settled, and that there was no need to undertake an exercise of revision of *inter-se seniority*, and that "**any revision of seniority would lead to complete administrative mayhem;**

oo,pp) That the revision of *inter-se seniority* and undertaking a revision of panels of Under Secretaries/Deputy Directors, in respect of some of whom who have since even retired, would not entail any administrative difficulty;

qq,rr,ss,

tt,uu,vv,

xx,yy,zz) That though the DoP&T Notification dated 29.12.1984 was stated to have been followed by the official respondents, but it was blindly applied, resulting in conferment of extremely high notional seniority to the Direct Recruits, in an illegal and malafide manner, and in order to select them for further

promotions much ahead of their Departmental Promotee counterparts, by falsely submitting information at the time of holding of DPCs to UPSC regarding persons coming within the zone of consideration, and undertaking an exercise, which is ridiculous to the extent that a Direct Recruit Section Officer appointee has been accorded seniority from the year when he was actually 5-6 years of age, and that the official respondents had failed in their duty to be bound by statutory guidelines, to act fairly, justly and reasonably, because their acts are in violation of the rights of the applicants under Articles 14 & 16 of the Constitution, apart from being unjust, unreasonable and without any authority of law, and are against the pronouncements of the law by the Supreme Court.

38. In the result, the DPSO applicants of this OA had prayed for the following reliefs:-

- “i) Set aside the impugned seniority list dated 21.4.2008 and speaking order issued vide Memorandum dated 22.12.2008 as illegal, arbitrary and contrary to law.
- ii) Direct the Respondents to revise the impugned seniority list dated 21.4.2008 by according placements to DR SOs with reference to their date of joining in terms of Hon’ble Supreme Courts judgment dated 19.2.2008 in the case of AFHQ (supra) as also in catena of cases including **Shri H.V. Paradasani & Ors. vs. UOI, AIR 1985 SC 781**, and **A Janardhana vs. U O I & Ors. 1983 (2) SLR 113** and DOP&T vide Notification dated 29.12.1984 which was circulated to all Ministries/Deptts. Including the Ministry of Railways (Railway Board).

- iii) To review the panels for the posts of Under Secretaries/Deputy Directors from the year 1984/1986 onwards on the basis of the revised seniority list so prepared.
- iv) To grant to the applicants all consequential benefits including salary, allowances, due seniority and promotions, etc.
- v) Grant any other relief as may be deemed fit and proper in the circumstances of the case.
- vi) Grant cost of this application to the applicants".

39. The Respondent No.3-UPSC was the first to file a short reply on 20.04.2009, only stating that it holds the DPCs strictly in accordance with the guidelines/instructions issued by the DoP&T though their OM dated 10.04.1989 for holding of such DPCs, and that the issues raised by the DP applicants of this OA regarding their *inter-se* seniority with DR private respondents are administrative matters, with which only official Respondents Nos. 1 & 2 are concerned, and even the challenge has also been laid to only the speaking order passed by Respondent No.1, and that none of the actions of Respondent No.3-UPSC has been challenged, and that UPSC had been unnecessarily impleaded as a party respondent, and it was, therefore, prayed that it may be discharged from the array of parties.

40. The applicants of OA No.591/2009 had chosen to file a rejoinder to that reply of Respondent No.3-UPSC on 13.07.2009, but no new points were made out by the applicants in their rejoinder, other than stating that UPSC cannot escape its liability to any irregularities committed or miscarriage of justice in holding of DPCs on an incorrect premise.

41. The Respondents Nos. 1 & 2 had filed their detailed counter reply later, on 29.07.2009, in effect declaring their independence from DoP&T instructions, and submitting that the amendments carried out by the DoP&T in the CSS Rules on 29.12.1984, and the general Office Memorandum dated 7.2.1986 issued by DoP&T (Annexure R-1) which was applicable to the entire Government of India, had no relevance to the issue of seniority of Section Officers' grade in RBSS, which can only be determined according to the provisions contained in RBSS Rules. It was submitted that the fixation of *inter-se* seniority between the DR and DP Section Officers had been made strictly in accordance with the RBSS Rules, and that the amendments carried out to those Rules through the Notification dated 21.12.2004 Gazetted on 30.12.2004 (Annexure R-2) cannot have retrospective effect, in view of the law as laid down by the Supreme Court in the case of **FCI and others vs. Om Prakash Sharma and Others (1998) 7 SCC 691**, and in the case of **Chairman, Railway Board vs. C.R. Rangadhamaiyah (1997) 6 SCC 623**. It was also submitted that even the Ministry of Law had advised the Respondents 1 & 2 that the amendments carried out through the Notification dated 21.12.2004, Gazetted on 30.12.2004 (Annexure R-2), will govern only the persons appointed to Section Officers' grade on or after 21.12.2004.

42. The official respondents R-1 & R-2 had raised the preliminary objection that the DP applicants of this O.A. had not questioned their seniority positions, and the promotions accordingly granted, at the relevant point of time, and had belatedly approached this Tribunal, without bringing on record as to when the common seniority list of

Section Officers had been first notified. It was submitted that vast number of persons have already served in RBSS, and had even retired since 1986, and, therefore, the OA is barred by limitation, which point we cannot now consider, in view of the specific directions of the Hon'ble High Court issued to this Tribunal to consider and decide these OAs afresh, on their merits alone, without going into the aspect of limitation.

43. It was submitted by R-1 & R-2 that through various judicial pronouncements, the Hon'ble Supreme Court has deprecated the practice of unsettling the already settled seniority, without stating as to when and how the common seniority of DRSOs & DPSOs had ever been settled. It was submitted that rota-quota cannot be termed by the DP applicants to have failed in RBSS just because some of the DR candidates selected by the UPSC in some years for RBSS had not actually joined, and thus some DR quota vacancies had remained unfilled, which has been held to be valid by the Supreme Court in the judgment dated 19.2.2008, without indicating as to which judgment of the Supreme Court was being referred to. It was submitted that no cause of action has accrued in favour of the DP applicants of this O.A, and the OA is misconceived, as the rota-quota system in RBSS has not failed. Again reiterating their declaration of independence from the general DoP&T instructions applicable to the whole of Govt. of India, it was submitted that the DoP&T OM dated 07.02.1986 (Annexure R-1) was not applicable in RBSS for the purpose of fixation of seniority between DRSOs and DPSOs, even while acknowledging that this OM was issued

by the DoP&T in pursuance of the law as laid down by the Supreme Court.

44. It was submitted that duly formed regular panels have been submitted to the UPSC for the purpose of conducting DPCs for promotions from the common cadre of SOs, and it was denied that the official respondents R-1 & R-2 had been furnishing wrong and falsified information to the R-3 UPSC for obtaining their approval on the formation of regular panels. It was submitted that while the DPSOs had submitted their representation dated 26.05.2008, the DRSOs had submitted their representation on 6.6.2008, and it was pointed out that the DPSOs had raised the contentions that the DRSOs should be assigned seniority only from the year of their joining service, and the DPSOs should be assigned seniority from the year of holding their DPC. On the other hand, the DRSOs had raised the contention that only in the year in which the persons included in the DP Select List for promotion to SOs level were within the prescribed quota of substantive DP vacancies in the SO Grade, should be included in the common Seniority List, and, the cases of those SOs, who have been promoted to the even higher grades, even before their being appointed substantively in SOs' grade, within their lawful quota, should be reviewed and revised, and that the system of antedated seniority being granted to the DRSOs may be continued, for determining their *inter se* seniority *vis a vis* the DPSOs.

45. It was submitted that a reference was made by the Railway Board to the Armed Force Hqrs., seeking the details of the methodology adopted

by them while implementing the relevant Supreme Court judgment in **AFHQ/ISOs SOs (DP) Association & Ors.** (supra), and the opinion of the Ministry of Defence had been obtained through their letter dated 30.09.2008 (Annexure R-3). It was, therefore, initially considered in the Railway Board that the same methodology had been adopted by them in RBSS also, but on a detailed examination, after considering the Rule position of AFHQ Service and RBSS, it was observed that there is a stark contrast in the service conditions of AFHQs and RBSS, inasmuch as in AFHQs, there are two segments only, namely DR and DPs, and their ratio is 4:1, while in the RBSS the DP segment has been further divided into two segments, (i) of LDCE accelerated promotees, and (ii) those promoted on the basis of seniority-cum-merit after completing the 8 years' length of service as Assistants. It was further found that the segment of DPs in RBSS also comes from two different cadres, i.e., Assistants and Stenographers. Since these issues had not been considered and addressed in the Supreme Court's judgment in the case of **AFHQ/ISOs SOs (DP) Association and Others** (supra), and it was felt by the Railway Board that the issues raised by both the sides of RBSS SOs are highly belated, and any change in the already prevalent system and practice will result in "**total administrative chaos and mayhem**", the impugned speaking order, detailing each and every reason for rejecting the claims made by both the factions of SOs, i.e., DPs and DRs, was, therefore, issued on 22.12.2008.

46. The posts included in the RBSS were given in a tabular form as follows:-

S.No.	Post/Designation	Scale Pay (pre-revised)	Number of Posts
1.	Adviser (HAG)	Rs. 22400-24500/-	1
2.	Joint Secretary/Executive Director(SAG)	Rs. 18400-22400	5
3.	Director (Sr. Selection Grade)	Rs. 14300-18300/-	12
4.	Deputy Secretary /Joint Director (Selection Grade)	Rs.12000-16500/-	38
5.	Under Secretary/Deputy Director (Grade-I)	Rs. 10000-15200/-	118
6.	Section Officer (Group 'B'/Gazetted)	Rs. 6500-10500/-	276
7.	Assistant (Group 'B' Non-Gazetted)	Rs. 5500-9000/-	450

47. It was submitted that Rule 9(1) of the RBSS Rules had earlier provided for 1/6th of substantive vacancies in the SOs' Grade to be filled up by Direct Recruitments, which were later changed to 1/5th w.e.f. 01.07.1988, through an amendment brought in RBSS Rules dated 24.07.1989. It was further submitted that Regulation-2 of the Schedule to RBSS Rules, relevant to the SOs' Grade, had earlier stated as follows:-

“Regulation 2. Maintenance: I(1) Additions to the Select List for the Section officers Grade shall be made in such manner as the Central Government in the Ministry of Railways may determine, from time to time, keeping in view the existing and anticipated vacancies, in equal proportion from:-

“(a) Officers of the Assistants' Grade who have rendered not less than eight years approved service in that Grade and are within the range of seniority in the order of their seniority, subject to the rejection of the unfit.

(b) Officers of the Assistants' Grade with longest period of continuous service (minimum 22 years) in that Grade and assessed by a Selection Committee to be set up by the

Ministry of Railways on the basis of merit as suitable for inclusion in the Select List for the Section Officers Grade.

(c) Persons selected on the results of the Limited Departmental Competitive Examination held by the Commission from time to time, in the order of their merit.

The persons referred to in clauses (a), (b) and (c) shall be included in the Select List in the order of one person from those referred to in clause (a), one person from those referred to in clause (b) and one person from those referred to clause (c) and so on. (After deletion of Cl.(b) w.e.f. 01.07.1988, Select List will contain in order of one person from Cl. (a) and one person from Cl. (c) only)".

48. However, it was pointed out that the Clause (b) of the above Regulation-2 was deleted with effect from 01.07.1988, through the amendment dated 24.07.1989, when the DR quota was increased from being 1/6th to being 1/5th of the SOs' grade.

49. Accordingly, the position in regard to the ratio for filling up substantive vacancies in SOs' Grade, were indicated in a tabular form, which we are presenting in a slightly modified broken-up form manner:-

Prior to 01.07.1988		With effect from 01.07.1988	
DR	1/6 th	DR	1/5 th
Asstts (8 Yrs)	5/18 th	Asstts. (8 Yrs)	4/10 th
Assts (22 Yrs)	5/18 th	Asstts. (22 years)	Deleted
LDCE	5/18 th	LDCE	4/10 th

50. However, consequent to the cadre re-structuring exercise of RBSS held in 2005, Direct Recruitment to SOs' Grade through the U.P.S.C. had been stopped from the recruitment year 2004-2005.

51. While admitting that the system of assigning *inter-se* seniority when recruitment to a cadre is made from various sources is called the rota quota system, wherein the seniority slots are rotated as per the quota fixed for each mode of recruitment, it was submitted by the official respondents R-1 & R-2 that unfortunately the RBSS Rules are silent on the aspect as to what happens when the vacancies earmarked for a particular quota stream remain vacant. It was submitted that in the absence of any clear cut Rules as to how to deal with the unfilled vacancies of DRSOs in RBSS, when the U.P.S.C. selected persons, earmarked for RBSS and assigned to the Railway Board, did not join, **the DR vacancies in SOs' Grade were then carried forward to the next/subsequent recruitment years, as additional vacancies, again to be filled through direct recruitment only, and no limit had been kept/maintained on the number of years/period of such carry forward.** As a result, since the DR vacancy slots of the past several years had remained intact, and had been so carried forward (endlessly !!!), the Direct Recruits recruited by the UPSC during the subsequent years, when they joined RBBS, they were assigned seniority against the unfilled carried forward DR vacancy slots, in order to try to maintain the rota quota Rule, and, thus, DRs had been placed above the requisite number of DPs, which had resulted in DRs being interpolated with DPSOs who were so promoted many years earlier!!!

52. It was further submitted that the terms "**substantive vacancies**" and "**substantive appointment**" have also not been defined in RBSS

Rules, and, as a result, an officer used to get promoted to the higher grade, but the substantive appointment of such Promotee Officers still remained pending, and they were assigned and confirmed against such substantive DP vacancies many years after their actual promotion. However, when through the revised policy contained in DoP&T's OM dated 28.03.1988, confirmation was made possible from the date of availability of the permanent vacancy, and promotion and simultaneous substantive occupation of the post concerned was made a one time affair in the service of an employee, this time they decided to follow the DoP&T instructions, and this revised policy was adopted by the Railway Board for all Non-Gazetted and Gazetted Open Line and Project Railway employees w.e.f. 1.1.1989, which was later *mutatis-mutandis* made applicable for all Gazetted Officers of all other Railway Services also by the Railway Board's Circular dated 25.05.1990, effective from 01.01.1989. Thereafter only, the practice of a separate order of confirmation of RBSS officers, on their promotion to SOs' Grade, being issued separately was completely discontinued, and, later, while amending the RBSS Rules, various provisions were omitted, inserted and substituted, and the word "**substantive appointment**", wherever appearing earlier in the Rules was substituted with the word "**regular**".

53. It was further submitted that the amendments now made to the RBSS Rules, 1969, through Notification dated 21.12.2004, cannot be given effect to in such a manner, which would be disadvantageous to the persons already appointed prior to that date, and taking away their

vested rights, and it was well settled that such amended Rules were only meant to operate prospectively, and not retrospectively, as advised by the DoP&T also.

54. It was submitted that in accordance with the provisions contained in Rule 8 (3) of RBSS Rules, “**a rolling list**” of SOs was maintained within the Railway Board, with the DRs being assigned *inter-se* seniority with the DPs in the prescribed ratio, as per rota-quota system, which “**rolling list**” alone was used for sending DPC proposals to UPSC for further promotions also. It was submitted that in the absence of any final combined Seniority List of SOs in RBSS, framing of regular panels on the basis of circulation of the zone of consideration was the only way out, in order to provide the benefit of timely promotion to the eligible candidates, which methodology had been accepted by the UPSC.

55. The official respondents R-1 & R-2 had thereafter defended the creation of the posts equivalent to Additional Secretary and Joint Secretary level in the Govt. of India also in RBSS, without any authority from the Cabinet of Union of India having been obtained for doing so, outside the Central Staffing Scheme pattern, and had explained the cases of a few individual officers who had been so promoted, in the para-wise counter reply submitted by them. It was submitted that even though no consolidated Seniority List of SOs was ever published earlier, but an “**integrated list**” (different from the “**rolling list**”) was, however, maintained, which was used by the Railway Board for determining the eligible officers falling in the zone of consideration, before sending DPC

proposals to UPSC for promotions from the grade of SOs, and the zone of consideration was carved out from that “**list**” (“**Integrated**” or “**rolling**” not having been specified).

56. It was submitted that the DP applicants of OA No.591/2009 have chosen to challenge the present system being followed under the RBSS only after securing their second promotion to the JAG Grade of RBSS, and after having grabbed their promotions for ensuring their further career progression, they were now trying to stall the much awaited promotions of other (DR) officers in the RBSS cadre, which was highly capricious.

57. In their reply to the grounds also, the official respondents R-1&R-2 had taken a similar stand, and had denied that the year of 1984 cannot be taken as the base year for recasting the Seniority List of SOs of RBSS, as the amendments which were carried out by the DoP&T in the CSS Rules in the year 1984, were adopted for the RBSS only in the year 2004. It was also pointed out that DR vs. DP quotas were not the same in RBSS SOs’ Grade, as in the case of DoP&T Notification in respect of CSS. It was submitted that the principles of the Supreme Court’s judgment in **AFHQ case** (supra), as well as the DoP&T Notification dated 29.12.1984 in respect of CSS, had been fully adopted while making amendments to the RBSS Rules in 2004. They had further defended their speaking order, assailed in both these OAs, and had, therefore, prayed that the OA No.591/2009 may be dismissed with costs.

58. This reply was combined with the reply to the MA filed by the applicants for joining together, and was signed "for and on behalf of the Union of India", by an officer on 28.07.2009, with the seal below stating as follows:-

"Mrs. Suman Sharma
Deputy Secretary,
Ministry of Railways,
Railway Board,
New Delhi"

The verification was also signed by that officer only.

59. The Private Respondent No.R-4 of this O.A. had, appearing in person, filed his own separate counter reply on 07.09.2009. The Private Respondents R-7 to R-11 & R-13 had also filed their separate counter reply, also on 07.09.2009. Rejoinder of the applicants to the counter reply filed on behalf of official respondents R-1 & R-2 was filed on 15.07.2009. A separate rejoinder to the counter reply filed by Private Respondent No.R-4 was filed by the applicants on 17.11.2009, and another rejoinder to the counter reply filed on behalf of Private Respondents R-7 to R-11 & R-13 was also filed on 17.11.2009. The official respondents chose to file a sur-rejoinder also, by way of reply to the rejoinder on 13.01.2010, verified "**on behalf of the respondents-Union of India**" by one Shri Shiv Dan Singh, "**Joint Secretary (Gazetted), Ministry of Railways, Railway Board, New Delhi**," as per the seal affixed below the reply, and the verification dated 12.01.2010.

60. The applicants of OA No.591/2009 had filed a written synopsis way back on 24.03.2011, and written arguments had also been filed on behalf

of Private Respondents R-7 to R-11 & R-13. Another written synopsis was filed by the applicants on 10.03.2015, and the respondents also filed a further short reply and an Index of papers on 21.04.2015.

61. The private Respondent R-4 had raised a number of contentions in his counter reply dated 07.09.2009, most of which were summarized by him in his written submissions, submitted after his oral arguments. The very well drafted issues as framed in the written submission dated 11.08.2015 submitted by him may be reproduced here, which may provide some of the rough pegs for arriving at our findings on the points of law involved in the present two OAs:-

“(i) In terms of the RBSS Rules, 1969 (Annexure A-3) framed by the President under Article 309 of the Constitution of India, **there is a quota Rule [Rule 9(1) for recruitment to Section Officers’ Grade [Rule 9 (1)] and there is a rota quota rule for relative seniority between Direct Recruits and Promotees [Regulation 3 (3) of the Schedule to the said Rules read with Rule 14 (3) (II) (i)(d)].**

(ii) Simplifying the quota rule for recruitment to Section Officers’ Grade, if there are 10 vacancies in a recruitment year (commencing on 1st July of a year and extending upto 30th June of the next year) then 02 vacancies (i.e.20%) has to be indented on UPSC for Direct Recruitment through Civil Services Examination and 08 (80%) has to be filled from the Select List for the Section Officers’ Grade. Except for the said 08 persons, not a single additional person from the Select List for the Section Officers’ grade can be treated as an appointee to the Section Officers’ Grade in the said Recruitment year. All persons, in excess of the aforesaid 08 persons, even though officiating as Section Officer in the said Recruitment year has to be treated as ad hoc and such a person can be treated as an appointee to the Section Officers’ Grade only in a subsequent recruitment year as and when vacancies within the aforesaid 80% quota become available to them. Therefore, **the persons who are to be treated as the appointees to the Section Officers’ Grade in the said Recruitment Year shall be the Direct Recruits**

who have become available out of the aforesaid 02 (20%) indents and the said 08 persons from the Select List for the Section Officers' Grade. There is a third category which is to be added to this list which is a Direct Recruit who has been appointed against a backlog vacancy of an earlier Recruitment Year, for the reason that his addition is not, in any way altering the vacancy position of the said current Recruitment Year as it has already been counted in the said earlier Recruitment Year on the basis of which the 80% quota of the other category of Promotees of that Recruitment Year was already decided and filled. **Such backlog vacancies need to be filled with the first available candidates in the merit list so as to meet the Quota Rule and to avoid further carrying forward.**

(iii) **Simplifying the rota quota rule, it is only the aforesaid 08 persons who can be assigned seniority with the Direct Recruits who have been appointed on the basis of the aforesaid 02 indents placed on UPSC, in the said recruitment year. As regards the other category of the Direct Recruit who has been appointed in the said current Recruitment Year against a backlog vacancy of the said earlier Recruitment year, and who is over and above the aforesaid 02 (20%) indents of the said current year, he is not to be interpolated with the Direct Recruits [appointed against the said 02 (20%) vacancies] and the 08 Promotees of the said current Recruitment Year. He can also not to be interpolated with the Direct Recruits and Promotees of the said earlier Recruitment Year in which the backlog arose, for, he, being a selectee of a later Recruitment Year, may not be even completing the eligibility age in the said earlier Recruitment Year's Examination. Such a candidate, therefore, has to be placed in the Seniority List of the said Current Recruitment Year but not to be interpolated as per the quota ratio of the vacancies of Direct Recruits and Promotees of the said current Recruitment Year.**

(iv) **As regards the Promotees officiating in excess of the aforesaid 08 quota vacancies in the said current Recruitment Year, they shall be treated as ad hoc appointees of the year and shall not be assigned seniority in the said Recruitment Year.** Since the Select List for a Grade is a Standing List such that "... an officer included in the Select List for a Grade shall continue to remain included in the Select List till he is substantively appointed to

that Grade" [Regulation 5 (1) of the schedule to the RBSS Rules, 1968], **such Promotees shall be treated as appointees to the Section Officers' Grade in subsequent Recruitment Years in which quota vacancies shall become available to them and they shall be interpolated with the Direct Recruits of such subsequent Recruitment Years.**

(v) **The above mechanism ensures that persons from both the categories – Direct Recruits as well as Promotees – of a given Recruitment Year complete their eligibility service for promotion to next Grade on the same day i.e. the 30th June and are accorded promotion in terms of the seniority assigned to them. It also ensures that no Promotee who is in excess of the quota of his category gets an undue benefit of seniority and eligibility service on the basis of his ad hoc officiating beyond the quota. Similarly, it ensures that no Direct Recruit who has been appointed on the basis of a Civil Services Examination for a later Recruitment Year gets an undue benefit of Seniority of an earlier Recruitment Year merely because he was appointed against a backlog vacancy of the said earlier Recruitment Year".**

(Emphasis supplied)

62. Thus, the Private Respondent R-4 had tried to make a distinction between "**Permanent Section Officers**" in the case of SOs substantively appointed within their prescribed quota as per Rule 9(1), and had chosen to call as "**Temporary Section Officers**" those who had been appointed as SOs under Rule 9(2), or under Rule-9(2) read with Rule 10, in excess of the prescribed DP SOs' quota. It was not as if he had coined these two phrases on his own, but it is seen that these words flowed from the wording of the relevant RBSS Rules themselves, as these Rules had existed earlier, and must have been in vogue in the Railway Board. According to him, the relative seniority of "**Permanent Section Officers**" had to be determined in accordance with Rule-14 (3) (II) (i) of RBSS

Rules, and the determination of seniority of “**Temporary Section Officers**” had to be made as prescribed in Rule-14 (3) (II) (ii) thereof. It was his submission that even in the impugned speaking order, the official respondents R-1 & R-2 have acknowledged this Rule position.

63. The Private Respondent R-4 had tried to place reliance upon the DoP&T OM dated 07.02.1986, annexed by him as Annexure CR-1 to his reply, which had laid down the General Principles for determining the seniority of various categories of persons employed in Central Services, under the Central Government, which OM unfortunately the Railway Board had never followed for being applied to RBSS. His grievance was that though the official respondents R-1 & R-2 had, in the impugned speaking order dated 22.12.2008, agreed with the lawful contentions raised in the representation dated 06.06.2008, and the comments thereupon submitted by the DRSOs, enclosed through Annexure CR-3 of his reply, which was a part of the pleadings of the earlier OA No.2370/2006 also, but that, thereafter, in the impugned speaking order, the official respondents R-1 & R-2 had most unlawfully refused to implement those lawful contentions, on the flimsy ground that “**its implementation would cause unmitigated hardship and embarrassment to the DPSOs, as their seniority shall receive a precipitate fall.**”

64. In the counter reply filed on behalf of Private Respondents R-7 to R-11 & R-13 on the same date on 07.09.2009, it was argued that the legal principles laid down by the Supreme Court in **AFHQ case** (supra) are

already enshrined in the RBSS Rules, 1969, and, therefore, the DPSOs who had been appointed in excess of the prescribed quota in any year, shall have to be treated as ad hoc, in accordance with DoP&T OM dated 07.02.1986, which position, they submitted, has been duly admitted by the official respondents R-1 & R-2 also in Para-2 of the impugned speaking order dated 22.12.2008. It was submitted that the fact that the DPSOs had been appointed far in excess of their quota is abundantly clear even from a perusal of the concerned impugned Seniority List itself, which is the bone of contention in this case. They had, thereafter, cited some individual cases, and submitted that the applicants of this OA No.591/2009, who were DPSOs are, in the garb of questioning the antedation of seniority in the case of DRSOs, in fact seeking antedation of their own substantive/regular appointments as SOs, thus, seeking regularization of the period of their working on an ad-hoc status, which is not only against the settled law, but is also against the RBSS Rules, as well as the clarification issued by the DoP&T.

65. It was further submitted that since the number of DRSOs in RBSS is merely 20, and the DPSOs are much in excess of that, even though the official respondents R-1&R-2 are fully aware of the law on the issue of excess promotees, yet they have most unlawfully refused to implement the law properly in the case of RBSS, by implementing the aforesaid **AFHQ case** (supra) judgment, in the light of which the earlier OA No.2370/2006 had been disposed of by this Tribunal. It was, therefore, prayed by these Private Respondents R-7 to R-11 & R-13 that this Tribunal may now issue clear cut directions to the official respondents R-

1 & R-2 to accept the prayers made by the DRSOs in their representation dated 06.06.2008 (Annexure A-10 of the OA), in a time-bound manner. They had thereafter repeated almost the same points and grounds in their Para-Wise reply to the OA.

66. They had also submitted that LDCE is held for addition of names to the Select List for the SOs' Grade, and not for direct appointment to the SOs' Grade, and that in the OA No.591/2009 as filed, the applicants have mischievously misrepresented their position in a manner which is against the Rules. It was submitted that any service rendered on *ad-hoc* basis, while having been appointed in excess of the prescribed DP quota, cannot be counted as part of "**approved service**", as the Rules permit only the period or periods of "**regular service**", which is rendered while holding the posts concerned on regular or substantive basis, to be counted as part of "**approved service**". It was submitted that even though the DP applicants of this OA have claimed to have completed 8 years of "**approved service**" in the SOs' Grade, but for most of the claimed period they were not even regularly/substantively appointed as SOs against 80% quota of the DPs under Rule-9(1) of the RBSS Rules, 1969.

67. It was further submitted by R-7 to R-11 & R-13 that seniority and eligibility are two sides of the same coin, and that the official Respondents R-1 & R-2 have been unlawfully favouring the DPSOs, by treating them as regular appointees, even in respect of the period while they were only ad-hoc appointees, having been appointed in excess of the

prescribed lawful quota of DPSOs. It was submitted that it would be completely *de hors* the Rules to treat the *ad-hoc* SOs as regular DPSO appointees, and then to accord further promotions to them, through which favouritism is writ large on the face of the impugned speaking order. They had sought to place reliance on Regulation 5 of the Schedule to the RBSS Rules, 1969, which, according to them, prescribes that the Select List SO Promotees shall continue to remain in the Select List till they are substantively appointed as SOs in accordance with Rule 9(1) of the RBSS Rules, within the prescribed quota of the DPSOs. It was further submitted that filling up of 100% of the regular vacancies by promotion method is in derogation of the Rules framed.

68. The Private Respondents R-7 to R-11 & R-13 had thereafter sought shelter behind the judgment in **H.V. Pardasani** (supra). It was submitted that they came to know about the appointment of promotee SOs in excess of the DPSOs' quota only during the pendency of the OA No.2370/2006, when they were provided with a truncated break-up of year-wise Direct Recruitment indents by the Official Respondents after great reluctance, and after stiff opposition by the DPSO applicants of that earlier OA.

69. It was further submitted that the official respondents R-1 & R-2 had misled even the Respondent No.3 UPSC on many occasions by concealing the *ad-hoc* status of the DPSOs all along, and for their being ineligible to be included in the zone of consideration, since such lists sent to UPSC for holding DPCs also contained the names of *ad-hoc*

DPSOs also, who were yet to be appointed “**regularly**” as Section Officers under Rule 9 (1) of the RBSS Rules, 1969. It was, thereafter, submitted that the official respondents R-1&R-2 were under an obligation to review the impugned Seniority List of SOs in the light of the Supreme Court’s judgment in **AFHQ case** (supra) dated 19.02.2008, which necessarily implies that the final *inter-se* seniority should have been determined only after reverting the excess DPSOs, i.e., the promotee SOs appointed in excess of the prescribed DPSOs’ quota, and interpolation of DR and DPSOs should then have been done on the basis of the rota quota principle, which has been held as valid in that judgment. They had also explained the procedure by which interpolation of DRs in the seniority list of SOs had been made by official respondents R-1 & R-2, stating that injustice has been perpetrated by the official respondents even in doing that. It was submitted that an appointment made in derogation of Rules cannot become lawful with retrospective effect, only for the reasons that it has somehow continued. As a result, it was submitted by these Private Respondents R-7 to R-11 & R-13 that since the applicants of this OA No. 591/2009 were DPSOs promoted in excess of their quota, therefore, they were liable to be reverted, and could be treated as regular SOs only from the recruitment year in which they could fill up a DPSO quota vacancy, falling within the prescribed quota system.

70. The further averment of the applicants of OA No.591/2009 was that the rota quota Rule had collapsed in RBSS, as not even a single Direct Recruit Section Officer selected by the UPSC, and assigned to the

Railway Board for joining RBSS, had joined in as many as 9 recruitment years (1972, 1973, 1974, 1976, 1980, 1983, 1984, 2000 and 2003), which fact has remained uncontroverted by either the official respondents, or by the DRSO private respondents of that OA, who are the applicants of the second OA. The contention of DPSO applicants of this OA was that it was mandatory for the respondent-authorities to adopt the length of continuous service as the only criteria to determine eligibility for assigning *inter-se* seniority, as laid down by the Supreme Court in a catena of cases, which have been since followed by the DoP&T in the instructions issued by it. They had, therefore, assailed the practice followed by the respondent-authorities in the DRSOs being given antedated seniority of several years, over the DPSOs, who were having much longer regular service, which incorrect principle had also been followed by R-1 & R-2 while preparing the impugned consolidated Seniority List of Section Officers filed before the Tribunal on 21.04.2008, rendering it illegal.

71. During the pendency of their earlier OA No.2376/2006, the applicants of this OA No. 591/2009 had alleged the respondent-authorities having misread the Regulation 3 (3) in the Schedule attached to RBSS Rules, 1969, which states as follows:-

“3(3) Direct recruits to a Grade and persons substantively appointed to the Grade from the Select List for the grade shall be assigned seniority *inter-se* according to the quota of substantive vacancies in the Grade reserved for direct recruitment and the appointment of persons included in the Select List respectively”.

72. According to the DPSO applicants of this O.A, this misreading led to the residual vacancies of DRSOs' quota being filled up much later in a year in the subsequent years, by the DRSOs, with their being even given antedated seniority of many previous years, and their names being interpolated in the seniority list with the DPSOs accordingly, though not as per the Rules, because the official respondents R-1 & R-2 had failed to recognize that the rota quota system had completely collapsed. It was submitted that the official respondents R-1 & R-2 were bound to integrate the seniority between DRSOs & DPSOs only in terms of the DoP&T's Notification dated 29.12.1984, which had been issued in pursuance of the law as laid down by the Hon'ble Supreme Court in **H.V. Paradasani & Ors. vs. Union of India, AIR 1985 SC 791**, and **A. Janardhana Vs. Union of India & Ors. 1983 (2) SLR 113.**

73. The contention of the applicants of this OA No. 591/2009 is that the ratio in these two above mentioned judgments of the Supreme Court was that in the event of failure of quota rule, the rota system becomes inapplicable, and that the official respondents R-1 & R-2 had wrongly continued to persist with the impugned rota practice, despite failure of the quota system year after year, when no direct recruitments had taken place. It was submitted that the official respondents R-1&R-2 have been unlawfully favouring DRSOs, by promoting them much ahead of similarly placed DPSOs, in an illegal, arbitrary, unjust and unreasonable manner. As a result, the DRSOs have been empanelled as Under Secretary/Dy. Director immediately on completion of their qualifying service from the year of their ante-dated allotment of seniority, whereas those from the

DPSOs category have been kept waiting for years. They had also cited individual cases in order to buttress their point.

74. It was also pointed out that direct recruitment to the posts of SOs had been stopped by the UPSC from the year 2004 onwards, and, as a result, the last DRSO to join RBSS is one Shri H.B. Pandey, and the date of his approved service should count from 1.7.2003. However, the official respondents had antedated his placement by 20 years, by which he finds a place above the DPSOs of the year 1983, which would, in fact, mean that after 1983, no further appointment of DRSOs had taken place, while the factual position is otherwise. Since DRSOs have intermittently joined even after the year 1983, till the year 2003, according to the DPSO applicants of this O.A., this wrong placement suggests that from the year 1983 onwards, the recruitment to the posts of SOs stands reduced to only the stream of promotees, which goes to further substantially prove the claim of the applicants that the rota quota system had in fact completely failed.

OA No.2981/2009

75. The second OA No.2981/2009 had been filed by the UPSC selected DRSOs, canvassing exactly the opposite points, and still, at the same time, assailing the very same impugned Memorandum dated 22.12.2008 passed by the Secretary, Railway Board, by saying that it rather seeks to protect the unlawful and unconstitutional benefits accorded to the DPSOs, who had been promoted in excess of the prescribed quota, thereby denying their rightful claims for further promotions, and, as a

result, attendant consequential benefits have been denied to the DRSO applicants of OA No.2981/2009, and that such excess promotions were in contravention and derogation of not only the RBSS Rules, 1969, but also the law as laid down by the Hon'ble Supreme Court in its Constitution Bench judgments in **S.G. Jaisinghania vs. Union of India and Others, AIR 1967 SC 1427, State of Punjab vs. Jagdip Singh & Ors 1964 (4) SCR 964, Secretary, State of Karnataka & Ors. vs. Uma Devi & Ors. 2006 (4) SCC 1**, as well as the Full Bench judgment in **AFHQ case** (supra). The Coordinate Bench had earlier found this second OA No.2981/2009 also to be barred by limitation and had dismissed that also, but the Hon'ble High Court had set that order also aside.

76. The DRSO applicants of the second OA No.2981/2009 had taken entirely contrary grounds in order to make out their case. As per Para 4.2 of their OA, they had relied upon Rule-9 (1) of the RBSS Rules, 1969, to submit that the Rule position was as follows:-

“One-fifth of the substantive vacancies in the Section Officers’ Grade shall be filled by direct recruitment on the results of competitive examinations held by the commission for this purpose from time to time for recruitment to the Central Services Class-I and Class-II. The remaining vacancies shall be filled by the substantive appointment of person included in the Select List for the Section Officers’ Grade. Such appointment shall be made in the order of seniority in the Select List except when, for reasons to be recorded in writing, a person is not considered fit for such appointment in his turn”.

77. It was, therefore, submitted that the statutory Rules as applicable to RBSS thus provided now for a fixed, rigid and inflexible quota of-

- i) $1/5^{\text{th}}$ of substantive vacancies for the **Direct Recruits** and
- ii) $4/5^{\text{th}}$ of substantive vacancies for the Departmental Promotees, i.e., "**Persons included in the Select List for the Section Officers' Grade**".

78. They had also pointed out that upto 01.08.1988, the aforesaid quota ratio was "1/6 DRs:5/6th DPs", which was changed to "1/5th DRs: 4/5th DPs" with effect from 01.08.1988, by way of a statutory amendment of the aforesaid RBSS Rules, 1969. It was thereafter submitted that while the direct recruitment of SOs was conducted only for filling up the substantive vacancies in the DR quota of SOs' grade, the other category, i.e., the category of "**persons included in the Select List for the SOs' Grade**" was utilized for filling up both the substantive vacancies of the DPSOs' quota, as well as any unfilled "**temporary vacancies**" in the SOs' Grade, on account of administrative exigencies. They justified this distinction on the basis of Rule-9 (2) of RBSS Rules, 1969, which defines and provides for "**temporary vacancies**" as a separate class by itself as follows:-

"(2) Temporary vacancies in the Section Officers' Grade shall be filled by the persons included in the Select List for the Section Officers' Grade".

79. The DRSO applicants of this OA had thereafter made a distinction that while the persons appointed in the substantive capacity against the DPSOs' quota could be allowed to retain their lien against such promotions, the other "**persons included in the Select List for the**

Section Officers' Grade", who had filled up only the "**temporary vacancies**", in administrative exigencies, were liable to be reverted, while in fact they continued to remain included in the Select List till they could get appointed against any "**substantive vacancies**" falling within their prescribed DPSOs' quota under Rule 9 (1). It was pointed out that Regulation-5 of the Schedule to the RBSS Rules, 1969, clearly provides for this aspect of the fate of those "**persons included in the Select List for the SOs' grade**" who were in excess, and were only occupying "**temporary vacancies**", by stating that "**an officer included in the Select List for a Grade shall continue to be included in the Select List till he is substantively appointed to that Grade**".

80. The applicants of this OA then had explained that the situations of under-utilization of "**Substantive Vacancies**" of SOs reserved for DR quota, and had submitted that some of such DRSO vacancies remaining unfilled had also been duly foreseen by the framers of the RBSS Rules, by providing in the RBSS Rule-10 as follows:-

"10. Power to make temporary appointments against substantive vacancies:- A substantive vacancy may be filled temporarily in accordance with the provisions governing appointments to temporary vacancies in the relevant Grade, until it is filled in accordance with the provisions governing substantive appointments".

81. They had, therefore, submitted that since the term used in Rule-10 was "**until**", and since in the RBSS Rules there was no specified time limit for filling up the "**unfilled substantive vacancies**", in accordance with the provisions governing substantive appointments, when "**such unfilled substantive vacancies**" were later filled-up in accordance with

the provisions governing substantive appointments, the temporary appointees, who were temporarily filling and occupying such substantive vacancies, automatically stood reverted back as Assistants.

82. It was, therefore, the submission of the DRSO applicants of this O.A. that since the “**unfilled substantive vacancies**” of DR quota were also “**temporarily**” filled-up by the DPs included in the Select List, as per the procedure laid down by the Rule-9 (2), this temporary arrangement could have continued only until the same DR quota vacancy was filled by DRs selected through the UPSC in the subsequent recruitment years. It was submitted that such unfilled DR quota vacancies have, therefore, to be deemed to have been carried forward, and added to the actual number of “**substantive vacancies reserved for DR quota**” for the next recruitment years, year after year, and when such “**unfilled substantive vacancies of DR quota**” were filled-up by Direct Recruit applicants, the DPs temporarily occupying/filling-up such vacancies stood reverted automatically.

83. In order to further buttress this interpretation of the RBSS Rules by them, the applicants of this OA had submitted that the DPs appointed in excess of their quota prescribed under the RBSS Rule 9(1) (supra), whether against “**temporary vacancies**” in terms of the Rule-9(2) (supra), or against “**unfilled DR quota substantive vacancies**” in terms of Rule-10 (supra) read with Rule 9 (2), were all only temporary or *ad-hoc* appointees, who were liable to be reverted, at least for the period till they came to occupy substantive vacancies of SOs falling within their

prescribed DP quota, and thereby become “Permanent Officers” of the SOs’ Grade, as defined under Rule 2 (j) of the aforesaid RBSS Rules, 1968, which provides as follows:-

“2(j) “Permanent officer” in relation to any grade means a person who has been substantively appointed to a substantive vacancy in that grade”.

84. It was further submitted that as regards seniority in SOs’ Grade was concerned, Regulation 3 (3) of the Schedule to the RBSS Rules, 1969, clearly provides that only those DPs, who have been substantively promoted to the SOs’ Grade, from out of the Select List prepared for promotions for the SOs’ Grade in a particular year, shall be interpolated with the DRs in the seniority list, as per the rota quota principle, since that Regulation prescribes as follows:-

“3.(3) Direct recruits to a Grade and persons substantively appointed to the Grade from the Select List for the grade shall be assigned seniority inter-se according to the quotas of substantive vacancies in the Grade reserved for direct recruitment and the appointment of persons included in the Select List respectively”.

85. They had further sought to fortify their arguments by citing that Rule-14 (4) of the RBSS Rules, 1969 provides as under:-

“(4) All officers substantively appointed to any Grade shall rank senior to those holding temporary or officiating appointments in that Grade”.

86. It was submitted that on the aspect of further promotions from the grade of SOs to the next higher RBSS grade, i.e., to Grade I of RBSS, Rule-8 (3) of the RBSS Rules, 1968, provides that vacancies in Grade-I shall be filled by promotion of only **“Permanent Officers of the Section Officers’ Grade”**. Therefore, their contention was that only those DPs,

who have been promoted within their prescribed quota of substantive appointments under Rule-9 (1) (supra), and had thus attained the status of being "**Permanent Officers of the Section Officers' Grade**", had a claim for consideration for promotion to the next higher grade, and the DPs appointed in excess of their prescribed quota, who were included in the Select List, and were even holding charge as Section Officers, but who were waiting for their turn to become "**Permanent Officers of the Section Officers' Grade**", did not obviously have any claims for their being considered for promotion to the next higher RBSS grade, i.e., Grade-I. It was submitted that RBSS Rules, 1969, clearly provided for that DPs promoted in excess of their prescribed quota, and included in the Select List, and even placed In-charge of SOs' Grade posts, were merely waiting to become part of "**Permanent Officers of the Section Officers' Grade**", whose claims for further promotion to Grade-I can accrue to them only after they first get promoted against substantive vacancies of SOs, falling within their prescribed DP quota.

87. It was further submitted that unless the distinction between "**the DPs appointed under Rule 9 (1) within their prescribed quota**", and "**the DPs promoted in excess of their prescribed quota either against the temporary vacancies or against unfilled substantive vacancies of DR quota**" is explicitly manifested and regularly reiterated, the latter can be easily shown and presented as the former, by way of hiding/concealing/not publishing the number of indents notified for DR quota in the respective recruitment years. It was submitted that this is not a mere apprehension, but is a fact duly acknowledged by the Govt. of

India while issuing a clarification through OM dated 07.02.1986, Para-5 of which O.M. was reproduced by the applicants in the OA as follows:-

“With a view to curbing any tendency of under-reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that **promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure notified for direct recruitment would be treated only as ad hoc promotees.**”

(Emphasis supplied)

88. It was, therefore, submitted by the applicants that in the RBSS, a fraud had been played by the vested interests through the Official Respondents on the basis of “**the records are missing**” declarations, which justification has been used by the official respondents in the impugned speaking order also for not operating the rota-quota rule, as prescribed by RBSS Rules. It was submitted that this has led to denial of the rightful promotions and the attendant benefits to the DR applicants of this second O.A., and in the Table containing the impugned Seniority List dated 21.04.2008, which, therefore, has an unnecessary Column, i.e., Column No.6, which had been introduced with the heading “**approved service as SO counts from**”, and in that the DPs were shown to have entered in the approved service from 1st July of the year in which they had been included in the Select List, rather than the 1st of July of the year in which the said DPs were appointed against the substantive vacancies of SOs' Grade, against the prescribed quota for the DPs. It was submitted that the applicants of this second OA had made a

representation dated 25.04.2008 to the official respondents requesting to either delete the said 6th Column, or to issue a clarification that the approved service mentioned in the said 6th Column shall not include periods of service rendered by the DPs when they were only included in the Select List, but were in excess of the prescribed quota for DPs, and were, therefore, only in temporary/ad hoc/officiating appointments as SOs. However, no action was taken by the official respondents on such representation of theirs.

89. The applicants of this second O.A. had, thereafter, reproduced the order dated 01.05.2008 passed by the Tribunal in OA No. 2370/2006

Shri N.K. Sharma & Ors. vs. Union of India & Ors., which was the first round of this very litigation, and had pointed out the representation dated 26.05.2008 given by the DPs (applicants of the said OA and of the first O.A. of this common order), and the representation dated 06.06.2008 given by the DR Officers (Private Respondents of the said OA No. 2370/2006, and of the first O.A., and applicants of the second O.A. of this common order), both of which had raised issues and conclusions flowing in their favour from the Supreme Court's judgment in **AFHQ case** (Supra).

90. It was alleged that the official respondents had thereafter resorted to the strange practice of requiring the parties of both the sides to furnish comments on each other's representations, through Memorandum dated 11.06.2008, which comments were also submitted by the parties of both the sides, but the DR applicants of this second OA

are aggrieved that their comments have not been taken into account by the official respondents properly. The applicants of this second O.A. further pointed out that they had even framed a chart to show to the official respondents that the DPs had since been even accorded further promotions to Grade-I and above, much before they were even lawfully appointed in substantive capacities as SOs, within their rightful DP quota, and, as a result, such DPs have been illegally allowed to score a march over the DR applicants of this second OA. It was submitted that even though the official respondents had consulted the Ministry of Defence regarding as to what was done by them acting for the Union of India in following the judgment of the **AFHQ case** (supra), and such a reply had also been received, yet, while passing the impugned Memorandum dated 22.12.2008, the official respondents had reversed their decision to follow the law as laid down by the Supreme Court on the ground that following the law as laid down in the **AFHQ case** (supra) will cause "**unmitigated hardship and embarrassment to the DPs**", and shall lead to what was mentioned as "**complete administrative mayhem**".

91. It was alleged that the decision to reverse the earlier decision of the official respondents to follow the **AFHQ case** (supra), as clarified by the Ministry of Defence also, was taken under pressure from the numerically stronger DPs' lobby, on whom the prospect of reversions was looming large, if the law as laid down by the Supreme Court had been implemented, and that the impugned order was passed by the official respondents disregarding their undertaking given to this Tribunal in the

previous OA No.2370/2006 to follow the principles of law as laid down by the Supreme Court while passing the impugned speaking order. They had, therefore, pointed out that while in Para-3 of the impugned speaking order, the Respondent No.1 had conceded that the contentions of the applicants of this OA arise out of the Supreme Court's judgment itself, however, in Para-4, he had made an about turn, and refused to take the implementation of the RBSS Rules and the Law as laid down by the Supreme Court to its lawful conclusion, merely on the ground that the same shall cause "**complete administrative mayhem**", as also "**unmitigated hardship and embarrassment to the DPs**".

92. It was further submitted that thus, while passing the impugned speaking order, the official respondents have deliberately sought to maintain and continue a position which they themselves knew to be not only in contravention of the RBSS Rules, 1969, but also unlawful and unconstitutional, and against the law as laid down by the Supreme Court in the **AFHQ case** (supra). It was further submitted that, at the same time, the Railway Board Circular dated 20.01.1989 (Annexure A-13) has clarified correctly the law as it should be applied, and has stated that it was only the appointments made on regular basis which would come within the purview of these instructions.

93. It was, therefore, submitted that by not implementing the **AFHQ case** (supra), as had been directed by this Tribunal while disposing of the earlier OA No.2370/2006, the official respondents had tried to over-reach this Tribunal, and had even gone back on the undertaking earlier given

before this Tribunal that they will implement the methodology as has been laid down by the Supreme Court. It was, therefore, further submitted that the unlawful and unconstitutional speaking order of Respondent No.1 had not only jeopardized the due career progression of the DR applicants of the second OA, but had also allowed DPs, who had been promoted in excess of their lawful quota, to continue scoring a march over the lawfully appointed DR Officers, which also amounted to a financial irregularity of the worst kind.

94. They had, therefore, taken the ground that the impugned speaking order is unconstitutional, illegal, contrary to law, and in complete derogation of the law as laid down by the Supreme Court in **AFHQ case** (supra), as well as the order passed by this Tribunal in OA No.2370/2006, based upon the Supreme Court's order. They had further taken the ground that the impugned speaking order is in complete derogation of the RBSS Rules, 1969, whereby the DR applicants of this second O.A. are being unlawfully and unconstitutionally required to work in a lower grade than the DPs, whose substantive appointments within the lawful quota of the promotees itself were much later than the appointments of DR applicants.

95. They had further taken the ground that while the law as laid down by the Hon'ble Supreme Court required that the DPs promoted in excess of their prescribed quota deserve to be treated only as *ad-hoc* appointees, and the date of their continuous officiation has to be treated only from the date the concerned DP substantively occupies his rightful share in

substantive capacity within his quota, the official respondents have knowingly and wilfully refused to withdraw the illegal and unlawful even further promotions accorded by them to such DPs, thereby denying lawful consequential promotions, and promotional benefits, to the DR applicants of the present second OA.

96. They had further repeated the ground that the impugned speaking order has itself taken cognizance of the fact that if the law as laid down by the Supreme Court is implemented, the seniority of a majority of DPs shall suffer a precipitate fall, yet the official respondents have knowingly and deliberately allowed such DPs to continue to reap the benefits of their illegal status. They had further taken the ground that merely because following the law and the Rules will cause "**embarrassment**", "**unmitigated hardships**", and "**complete administrative mayhem etc.**", these cannot be valid grounds to militate against the RBSS Rules as framed, and the law as laid down by the Supreme Court, and thereby deny the rightful claims of the DR applicants of the present second OA.

97. The applicants had further taken the ground that after their having given an undertaking before this Tribunal to follow the Supreme Court judgment in **AFHQ case** (supra), the official respondents had no authority to reverse their stand, and to take a decision contrary to the one taken by the Union of India through Defence Ministry in compliance of the Full Bench judgment of the Supreme Court in **AFHQ case** (supra). They had further taken the ground that the official respondents had used the ruse of the fact that since DPs, who had been promoted in excess of

their share, even through the LDCE, were included, in the facts of the instant case, the Supreme Court's judgment in the **AFHQ case** (supra), could not be made applicable in RBSS, because of the presence of the LDCE DP segment, which was done only with *mala fide* intention, in order to protect the unlawful and illegal interests of DPs, and to deny the lawful claims of the consequential promotions and associated benefits of rank etc. of the DR applicants.

98. It was further submitted that official respondents have ignored the law as laid down by the Hon'ble Supreme Court that where a Government servant has no right to a post, or to a particular status, even though an authority under the Government, acting beyond its competence, may have purported to give that person a status which it was not entitled to give, such person will not be deemed to have been validly appointed to the post, or having been given the particular status under law.

99. Lastly, they had taken the ground that by holding in the impugned speaking order that they shall not revert the DPs promoted in excess of their prescribed quota, in spite of the clear mandate in both the RBSS Rules, as well as in the law as laid down by the Supreme Court, the official respondents had disobeyed, contravened and violated various provisions of the Constitution.

100. In the result, the applicants of the second O.A. of this common order had prayed for the following reliefs:-

“a) quash and set aside the impugned “Speaking Order” contained in Memorandum No. ERB-1/2006/14/32 dated 22.12.2008 issued by the Respondent No. 1 to 3 to the extent that it seeks to protect the unlawful and unconstitutional benefits accorded to DPs promoted in excess of the prescribed quota and thereby denying the rightful claims of further promotions and attendant consequential benefits to the DR Applicants, in contravention and derogation of not only the RBSS Rules, 1969 framed under article 309 of the Constitution of India but also of the law laid down by the Apex Court in Constitution Bench judgments of **S.G. Jaisinghania vs. Union of India & Ors.** [AIR 1967 SC 1427], **State of Punjab vs. Jagdip Singh & Ors.** [1964 (4) SCR 964] and **Secretary, State of Karnataka & Ors. vs. Uma Devi & Ors.** [2006 (4) SCC 1] etc. as well as the full bench judgment in **AFHQ Officers Association vs. Union of India & Ors.** [CA No. 1384/2008 decided on 19.02.2008] in the light of which earlier OA No. 2370/2006 was adjudicated as “stands disposed of” by this Hon’ble Tribunal.

(b) Direct the Official Respondents to reveal and specify in the case of each and every DP the recruitment year in which he/she was appointed within the prescribed quota of substantive vacancies in the Section Officers’ Grade in accordance with Rule 9(1) of the RBSS Rules, 1969 (Annexure A-2) read with the clarification issued vide para 5 of DOP&T’s OM No. 35014/2/80-Estt. (D) dated 07.02.1986 (Annexure A-3) by creating a specific column in the consolidated Seniority list, and to implement thereby their own decision recorded vide para 3 of the impugned Speaking Order dated 22.12.2008 (Annexure A-1) to the effect that “*As for the first request, I may state that there is substance in this contention as the same arises out of the Apex Court’s judgment itself.*”

(c) direct the Official Respondents to treat all the DPs so found to have been promoted in excess of the quota in each recruitment year as mere ad hoc promotees and to nullify further promotions illegally accorded to them, and to implement thereby their own decision recorded vide para 2 of the impugned Speaking Order dated 22.12.2008 (**Annexure A-1**) to the effect that “*if seen in the context of the Apex Court’s judgment and also the RBSS Recruitment Rules, any DP in excess of the prescribed quota is to be treated as ad hoc till he occupies a post falling to his quota. Therefore, the date of continuous officiation has to be treated from the date the DP occupies his rightful share in his quota. This obviously means that all those DPs who have been promoted in excess of their share, even through LDCE, will have to be pushed down till they come to occupy their share in the prescribed quota.*”

(d) direct the Official Respondents to grant all consequential benefits of further promotions, salary, allowances etc. to the applicants with retrospective effect which have been illegally denied to them owing to the higher promotional posts illegally allowed by the Official Respondents to be occupied by such DPs;

(e) pass any other or further order as may be deemed fit and proper in the facts and circumstances of this case;

(f) grant cost of this application to the applicants".

101. On 26.10.2009, the learned counsel for the applicants had filed another list of dates, events and synopsis, on the same lines, which need not be recounted here once again, because their case has already been discussed in great detail above.

102. The official respondents filed their counter reply on 14.01.2010, more or less taking the same stand as they had taken in their counter reply to the first OA No.591/2009, and even the affidavit was sworn to by the same officer, Shri Shiv Dan Singh, working as Joint Secretary (Gaz.), and the seal below his verification showed him to be Joint Secretary (Gaz.), Ministry of Railways (Railway Board), New Delhi. The Private Respondents, the DP Respondents No. 5 to 9, who had been named in their representative capacity on behalf of all DPs, filed their counter reply on 16.02.2010. In this they had recounted the facts as already described in OA No. 591/2009, and they had even tried to make certain allegations against the said Officer, Shri Shiv Dan Singh, who had sworn the affidavit on behalf of the official respondents R-1 & R-2, but without praying for making him a party in the proceedings, to enable him to defend his actions in the individual capacity also. They had in their

detailed reply to the OA even opposed the MA filed by the seven DR applicants for joining together in filing this second OA, even though the said Shri Shiv Dan Singh was not one among the seven applicants, nor one among the five private respondents. A preliminary objection was also taken that when the first OA No.591/2009 regarding the same subject was pending, the second OA does not survive, since the issues and even the parties in the two cases are almost identical.

103. It was submitted in reply that while raking up the issue of DPs having been promoted in excess of their quota, the applicants of the second OA No.2981/2009 have conveniently concealed the material facts that they had been given undue antedated seniority, which pre-dated their actual date of appointment to RBSS service, through which wrongful benefits had been derived by them, and that, therefore, their OA does not deserve any indulgence by this Tribunal. It was further submitted by the Private Respondents that the issue of appointments of answering respondents R-5 to R-9 as SOs was never in question, even when they had earlier filed OA No.2370/2006, and were the applicants in the connected first OA No.591/2009. They had reiterated that since the rota-quota Rule had failed and broken down in the RBSS, therefore the *inter-se* seniority of officers could have been decided only by taking into consideration the date of continuous officiation as the criteria, which had been done while preparing the impugned Seniority List dated 21.04.2008.

104. It was further submitted that this second OA had been filed by the DRs in contravention of the well settled principle of law that a Court shall not proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit, between the same parties, or between the parties under whom they or any of them claim litigation under the same title, where such suit is pending in the same or any other Court in India, having jurisdiction to grant the relief claimed, and, therefore, the pendency of OA No.591/2009 precluded the applicants of OA No.2981/2009 from any right to file this OA itself.

105. Thereafter, repeating their contentions as made out in their OA, as already discussed above, it was submitted in this counter reply of the DP Private Respondents that the applicants of this second OA have been given antedated seniority ranging from 5 years to 20 years, based on the on-going practice of the official respondents of slotting DRs against the year of occurrence of the vacancy, instead of from the year/date of joining the RBSS, which itself was in derogation of the RBSS Rules. They had further submitted that the Respondent Administration has failed to recognize the collapse of Quota Rule in RBSS, leading to inapplicability of the Rota Rule for assignment of *inter-se* seniority, and that the applicants of the present OA have filed this OA No.2981/2009 with the sole consideration to somehow protect their unlawfully gained ante-dated seniority and consequential benefits, even though the earlier OA No.591/2009 was already pending adjudication on the same issue.

106. It was submitted that availability of a duly published Seniority List is a mandatory requirement in a public office for effecting promotions to higher grades, but the respondent Railway Board Administration has never maintained any proper Seniority List of RBSS Officers, and has always promoted DRs in an arbitrary, discriminatory, surreptitious and unlawful manner, to the gross detriment of DPs, which is evident on bare perusal of the impugned Seniority List, and that the motive of the official respondents behind not bringing out a Seniority List of SOs over all these years was evidently only to hide the undue ante-dated seniority and consequential benefits being given to DRs.

107. It was further reiterated, as mentioned in their main (first) OA in this common order also, that the official respondents had all along been fraudulently obtaining UPSC's concurrence to the promotional panels by furnishing wrong/falsified certificates regarding availability of a proper Seniority List, though no such proper seniority list had been prepared and notified earlier.

108. It was submitted that a Seniority List cannot be substituted arbitrarily by any other document, and that the official respondents have tried to mislead this Tribunal by claiming to have, in the meanwhile, maintained some lists, described by them variously as "**rolling list**"/ "**integrated list**"/ "**zone of consideration**" etc., which are *non est*, and which terms themselves do not find mention anywhere in the RBSS Rules, and such lists cannot take the place of a proper seniority list.

109. It was further submitted that the DRs, who were the applicants of OA No.2981/2009, had never in the past represented against the official respondents' failure to publish and circulate the Seniority List. The DP Private respondents had thereafter emphasized upon their contention regarding the total collapse of Rota-Quota system in RBSS, and submitted that under law, in the event of failure of Quota Rule, the Rota Rule becomes inoperative/inapplicable, as has been held by the Hon'ble Supreme Court in a number of cases, like **S.G. Jaisinghania vs. Union of India and Others** (supra).

110. It was submitted that the official respondents have admitted that there had not been any intake whatsoever of DRs in as many as 09 recruitment years (1972, 1973, 1974, 1976, 1980, 1983, 1984, 2000 and 2003), which clearly goes to show the failure of the Rota-Quota Rule. However, with a view to extending undue advantage in seniority to the DRs, the Railway Board had continued to apply the Rota Rule, despite failure of the Quota Rule, and had resorted to mechanical application of the Rota Rule, whereby a DR recruited as SO in the year 2003 had been interpolated above a DP of 1983, by giving him 20 years' antedated seniority. They had, therefore, assailed that the impugned Seniority List has been prepared and issued in utter violation of the various judgments of the Hon'ble Supreme Court in regard to Rota Quota Rule, and also in violation of DoP&T's Notification dated 29.12.1984.

111. They had also alleged that the official respondents had selectively implemented some of the instructions of DoP&T issued through its

Notifications, while not implementing the following instructions in the DoP&T Notification dated 29.12.1984:-

- “i) **That unfilled vacancies of any stream should not be carried forward for more than two years;**
- ii) Promotion of SC/ST officers to the next higher grade on completion of 4 years service as against 8 years in case any of their juniors was considered for promotion; and
- iii) The integrated seniority should commence with DP followed by DR as per prescribed ratio”.

(Emphasis supplied)

112. It was further submitted that the provisions relating to SC/ST officers, as mentioned in Para-(ii) of the DoP&T Notification cited above, was meant to be implemented by the Ministry of Railways Notification dated 06.12.1985, which was to come into force on the date of its publication in the Official Gazette, but the official respondents failed to Gazette notify it, whereby letting the Notification itself become *non-est* and null and void.

113. They had thereafter given various examples of selective implementation of the DoP&T Notification dated 29.12.1984 in terms of the Railway Board Notification dated 06.12.1985 (supra). They had assailed the action of the official respondents in continuing to unlawfully assign undue ante-dated seniority to DRs, against unfilled slots carried over from past many years, upto 20 years in some cases, which was in utter violation of DoP&T's Notification dated 29.12.1984, though the respondent-Railway Board has claimed to have implemented that DoP&T Notification of 1984 in the year 2004, which was done only after the

direct recruitment to SOs' level through UPSC had been discontinued by the Government in the year 2003.

114. They had assailed the carry forward of the unfilled vacancies and slots of DRs without any limit of number of years of such carry-forward, and assignment of ante-dated seniority, which was even contrary to the stand taken by the official respondents in the counter reply to the previous OA No.2370/2006, leading to a mechanical application of the Rota Rule, despite failure of the Quota Rule in RBSS. They had assailed the official respondents Railway Board not having followed the Clarificatory Notification dated 29.12.1984 (supra), in complete violation of administrative propriety.

115. Like the DR applicants of this second OA, the DP private respondents had also assailed the actions of the official respondents, but for the different reason of their not having upheld the sanctity of the Select Lists of DPs as held by the Hon'ble Supreme Court in **AFHQ case** (supra), and, drawing sustenance from that judgment, it was submitted by these DP private respondents that when there was no recruitment against DR Quota for Nine years, there could be no concept of following the interpolation/rotation of DRs with DPs, in the prescribed ratio, in terms of the very same judgment of the Hon'ble Supreme Court.

116. They had further drawn sustenance from the same judgment to submit that for such interpolation, and the integration of seniority of

DRs and DPs, the reference point for DRs would have to be the date of their joining, and for DPs, the year of DPC. But they had assailed the impugned speaking order in having arbitrarily held that the two cases, that in **AFHQ case** (supra), and in the instant case of RBSS, are not alike, merely because it was discovered that there was no LDCE stream in the AFHQ Department. They had further pointed out that in the facts of the case in **AFHQ case** (supra), the Quota Rule had not broken down, but had only got distorted, whereas in the RBSS, the Quota Rule had never been adhered to, and, therefore, while implementing the said **AFHQ** judgment (supra), in the cases of the RBSS, there can be no relevance whatsoever to without limit carry forward of the substantive vacancies and then allocation of those vacancies many years later, in the prescribed quota.

117. It was further pointed out by the DP Private Respondents that actually there is no provision in RBSS Rules, 1969, for carrying forward of unfilled slots in respect of any mode of recruitment, and such a provision has, for the first time, been incorporated only in the Amendment Notification dated 21.12.2004 (Gazette notified on 30.12.2004) prescribing for carrying forward of a quota of vacancies for a period not exceeding two years, subject to certain conditions. The stand of the official respondents that this amendment, notified by them on 21.12.2004, and Gazette notified on 30.12.2004, limiting the carry forward of a quota only up to two years cannot have retrospective effect, in spite of the clear-cut provisions contained in DoP&T OM dated

29.12.1984, had been assailed by the DP private respondents as an uncouth attempt by the official respondents to justify their wrongful previous actions of having carried forward unfilled DR vacancies with slots for unlimited number of years. The DP private respondents had thereafter relied upon various Rulings of the Hon'ble Apex Court, in respect of seniority between DRs and DPs, by stating as follows:-

- “* Where DRs are assigned high seniority, it presents failure of Rota-Quota system and is violative of Article 14 & 16 of the Constitution- (**H.V. Pardasani- vs. UOI, AIR 1985 SC 791; P.S. Mahal and Ors.- vs. UOI -AIR 1884 SC 1294**);
- * “a later Direct Recruit cannot claim seniority from a date before his birth in the service or when he was in school or college” (**A. Janardana vs. UOI (1983) 2 SCR 936: (AIR 1983 SC 769 : 1983 Lab IC 849)**);
- * “that in service jurisprudence, a Direct Recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service. This principle is well settled” (**N.K. Chauhan vs. State of Gujarat** (1977 1 SCC 308). In this case Justice Krishna Iyer stated: “Later Direct Recruit cannot claim deemed dates of appointment for seniority w.e.f. the time when the Direct Recruitment vacancy arose. Seniority will depend upon length of service”;
- * “Slots cannot be kept reserved for the Direct Recruits for retrospective appointment”- (**A.N. Pathak vs. Secretary to the Government**, 1987 Suppl. SCC 763, SCC (at p. 767) : (AIR 1987 SC- 716 at p. 718: 1987 Lab IC 638- at p. 651);
- * The Constitution Bench of the Hon'ble Supreme Court has held that “The Quota Rule is linked up with the Seniority Rule and unless the Quota Rule is strictly observed in practice, it will be difficult to hold that the Seniority Rule is not unreasonable and does not offend Article 16 of the Constitution- **SG Jaisinghania-vs. UOI** (AIR 1967 SC 1427);
- * In **Suraj Prakash Gupta vs. State of J&K**, AIR 2000 SC 2386- it was argued on behalf of DRs- “That if Promotees occupied DR Quota, they had to be pushed down. Thereafter, even if the DR came later, he should be placed in the Direct Recruit slot from the date of occurrence of vacancy”. The

Hon'ble Apex Court citing their earlier judgment in **N.K. Chauhan's case** (supra), out rightly rejected this contention;

- * While determining seniority, slots of the vacancies left unfilled by the DR Quota shall not be carried forward. Further, splitting of DPs Select List prepared in the past has been forbidden-Hon'ble CAT/PB in **Ammi Rajan & Ors. vs. Union of India**- OA No.1356/1997. This judgment has been endorsed by Hon'ble Supreme Court in the case of **AFHQ/ACSOs/SOs (DP) Association & Ors. vs. UOI & Ors.** (CA No. 1384 of 2008 (Arising out of SLP (C) No. 4545 of 2007 and CA No. 1385 of 2008 (Arising out of SLP (C) No. 5953 of 2007); and
- * While relying on an earlier judgment in the case of **Suraj Prakash Gupta vs. State of J&K**, AIR 2000 SC 2386, the Hon'ble Supreme Court has held that- "Direct Recruit cannot claim appointment from date of vacancy in Quota before their selection.....in service jurisprudence a DR can claim seniority only from the date of his regular appointment, he cannot claim seniority from a date when he was not born in service", - (Hon'ble Supreme Court in CA No. 1801 of 2009- **State of Jammu & Kashmir & Ors. vs. Javed Iqbal Balwan & Ors**)".

118. The DP Private Respondents had, therefore, denied the contention of the DR applicants of this second OA No.2981/2009, for enforcement of quotas as being irrelevant, misplaced and against the rulings of the Hon'ble Supreme Court. The same contentions were thereafter once again repeated in the para-wise reply to the OA, and need not be repeated by us here once again.

119. However, only one point worth noting is that the Private Respondents had, in reply to Para 4.24 of this O.A., pointed out regarding the Court craft adopted in respect of Shri Shiv Dan Singh, inasmuch as that the said Shri Shiv Dan Singh, a DR, who had sworn the affidavit on behalf of the official respondents R-1&R-2, had been named as Private Respondent No.6 in OA No.591/2009, and was a party

in the earlier proceedings also. But, he had dropped out as a petitioner in the Contempt Petition filed after the order in OA No. 2370/2006, and it was assailed that the very fact that the official respondents' reply has been filed by the same Shri Shiv Dan Singh, is a travesty of justice, to say the least. It was further alleged that even the Legal Adviser of Ministry of Railways had been bypassed, and that the Ministry of Law & Justice and DoP&T had also not been consulted/ignored by the official respondents, in filing their replies. The DP private respondents had, therefore, prayed that the DR applicants of OA No.2981/2009 are not entitled to any relief, and had prayed for this second OA to be dismissed.

120. The DR applicants of this second O.A. filed two rejoinders. In the rejoinder to the counter reply filed on behalf of official Respondents on 05.03.2010, they had more or less reiterated their submissions as already made out in the OA. As regards the contention of the official respondents of not disturbing the settled seniority and the selections earlier made, it was submitted that the process of reversion of DPs shall not lead to disturbing the selections already made by DPC earlier, as the order of the Select List for the SOs' Grade, from which the substantive appointments to SOs' Grade had been made in the case of the DPs shall remain the same, and they shall occupy the DP vacancies falling within their prescribed quota in the subsequent years, in the very same order of their inclusion in the Select List. It was further submitted that if the official respondents still have problems in effecting reversions of DPs, they should at least place the DR applicants in the same positions which are being occupied by their senior-most junior DPs.

121. It was further submitted that the Hon'ble Supreme Court has time and again held that the Rule of Law is the basic structure of the Constitution, and that rule of men is against the Rule of Law, and no public authority can be permitted to run a dispensation involving public servants in derogation of the Rules framed under Article 309 of the Constitution. They had pointed out the photocopies of the 43 pages of the entire Note Sheet of the file of the Official Respondents, which had been filed as a part of the pleadings, and which had led to the passing of the impugned speaking order, which pages were annexed as Annexure R-1. It was further submitted that the DR applicants do not have any intention to ignore any of the provisions of the RBSS Rules, 1969, and rather place reliance upon the same. It was submitted that the very fact that the official respondents themselves have come to the conclusion that the seniority of a majority of DP Officers shall suffer a precipitate fall is, by itself, a clear admission of the fact that a fraud has been perpetrated by the vested interests, that too consciously, and to the detriment of the numerically weak DRs, who were merely 20 in numbers. It was, therefore, prayed that their OA No.2981/2009 deserves to be allowed, in the interest of justice.

122. The applicants filed another rejoinder on the same date to the counter reply of DP private respondents No.R-5 to R-9, and submitted that the DP private respondents are indulging in a deliberate double-speak, that on the one hand their OA No.591/2009 deserves to be allowed on merits, and on the other hand they are opposing the OA

No.2981/2009 to be decided on merits. It was, therefore, submitted that the DP private respondents do not have any ground to oppose the second OA also being decided on merits.

123. It was further submitted that from the averments of the DP private respondents in their counter reply, it is apparent that the DP private respondents have actually unambiguously and unequivocally admitted that the OA No.2981/2009 deserves to be allowed on merits, and that they have also failed to make out any serious rebuttal of that OA, and the reliefs sought therein.

124. It was submitted that even though the DP private respondents have submitted that the Quota Rule had failed, or broken down, but on the one hand they are claiming to have been appointed as per the Rules applicable for substantive appointments, and on the other hand they are making allegations that the concept of issuance of separate orders for making substantive appointments itself had become redundant, and thus it is clear that their reply is self-contradictory. It was submitted that substantive appointment is a statutory concept and provision, and any claim that it has become redundant amounts to militating against not only the Rules, but also against the Constitution.

125. It was further pointed out that Para-5 of the Railway Board's Circular dated 20.01.1989 (Annexure A-13 of the OA) very clearly provides that the revised procedure for confirmation does not apply to the *ad-hoc* appointees, and all the DPs appointed in excess of the quota in the concerned year were actually *ad-hoc* appointees, and that the DP

private respondents have failed to comprehend the import of the revised procedure of confirmation prescribed through this Railway Board OM.

126. It was further submitted that it stood confirmed that in all the years both current and backlog vacancies for direct recruitment were duly indented to the UPSC, in strict adherence of the quota rule. It was submitted that on the one hand the DP private respondents are stating that DPs were promoted after the Rules having been meticulously followed, with the approval of UPSC, by considering candidates from among the eligible candidates within the zone of consideration permissible, and on the other hand, in the same breath, they are alleging that the Rota Quota Rule had failed. In the result, the DR applicants of the second O.A. had debunked the counter reply filed by the DP private respondents, and had prayed for their OA No. 2981/2009 to be allowed, rather than the first one, OA No.591/2009, filed by the DPs.

127. Heard. After the arguments had been completed, the learned counsel for the applicants of OA No.591/2009 and OA No.2981/2009, and of the Official Respondents, had also submitted their written arguments/synopsis. According to them, the legal issues involved, in these two OAs, which arise for our arriving at our findings of law, are as follows:-

- i) Failure of rota-quota in RBSS;
- ii) Illegal carrying forwards of vacancies/slots of direct recruits;
- iii) The official respondents not having followed the law as laid down by Supreme Court in the case of **AFHQ/ISOs SOs (DP) Association and Others vs. Union of India and Ors.** (supra);

- iv) The official respondents not having followed the DoP&T Notification dated 29.12.1984 on the aspect of integration of seniority between the departmental promotes and direct recruit Section Officers;
- v) Implications/impact of direct recruitments if seniority is not corrected;
- vi) Implications if impugned Seniority List is allowed to stand;
- vii) Application and validity of the RBSS (Amendment) Notification dated 30.12.2004.

128. The applicants of OA No.2981/2009 had further summarized their objections and legal stand point in Paragraphs 12 & 13 of their written submissions as follows:-

“12. That if the Official Respondents were so much concerned about the hardship to be caused to the Promotees, nothing stopped them from moving the Senior Directs and bringing them at least at par with their senior-most junior promotee, for, it is trite in law that seniority in service must be respected and a senior must be at par with his junior, if not at a superior post. The Official Respondents, however, did not take this action also over-ruling the settled principles of service jurisprudence.

13. That the position that thus emerges is that the Official Respondents have not only refused to re-organize the promotions made in violation of the Seniority List dated 21.04.2008 published by themselves, but are also continuing to effect promotions in violation of the said Seniority List. As a result, the seniors are forced to work in lower grades while the juniors are enjoying pay, prestige and attendant benefits of the higher grades”.

129. On the other hand, in their written submissions the official respondents had stuck to their defence that they have scrupulously followed the Recruitment Rules *vis-a-vis* the practice as had been prevalent in the Railway Board for the last more than 40 years, and had relied upon the Hon’ble Supreme Court’s judgment in the case of **Union of India & Ors. vs. Alok Kumar & Ors. AISLJ 2010 (3) 1 SC**, to seek

shelter behind the law as laid down that “**a practice adopted for a considerable time, which is not violative of the Constitution or otherwise bad in law or against public policy can be termed good in law as well**”. They had further sought shelter behind the Hon’ble Supreme Court’s judgment in **State of Jammu & Kashmir & Ors. vs. Javed Iqbal Balwan & Ors. AISLJ 2010 (2) 401 SC**, in which it was held that it is not in public interest to upset the settled position of seniority.

130. Debunking the pleas of all the other sides, i.e. the applicants of both the OAs, as well as the private respondents in the OAs, the official respondents had further sought shelter behind the Hon’ble Supreme Court’s judgment in **P.S. Gopinathan vs. State of Kerala & Ors. AISLJ 2008 (3) 268 SC**, to state that one who sleeps over his rights is deemed to have waived the right, and one who has knowledge of some infringement of his right, if he raises no objection, acquiesces to the infringement. They had, therefore, opposed both the OAs, and the pleas of both the sides of DPs and DRs, and submitted that both these OAs deserve to be dismissed, with heavy cost in favour of the official respondents.

Conclusions

131. We have given our anxious consideration to the facts and the law related to both these OAs. The structuring of RBSS had been made by the Railway Board on the lines of the CSS, but it is the smallness of the cadre of RBSS as a service, which has created all the problems, leading

to these two cases before us. The lowest rung of the RBSS is the non-gazetted Ministerial Assistants' Grade, which falls in RBSS Group B category, and is one of the feeder cadres for promotions to the next higher Group B grade of Section Officers of RBSS.

132. However, the problem gets confounded at the level of this Group 'B' SOs' grade, which has had three routes for induction of people into that level. Firstly, under Rule 2(1)(a) Assistants' Grade persons get promotions to that level by way of seniority-cum-merit, after having put in the required number of years of service, which is 8 years, in the feeder cadre as Assistants. Secondly, under Rule 2(1)(c) Assistants' Grade persons qualify to be appointed as SOs because of their having been successful in the process of accelerated promotions granted to them, through the conduct of the Limited Departmental Competitive Examination (LDCE, in short) through the Respondent No.3 UPSC, by which they are able to jump the queue of seniority-cum-merit promotions, and become SOs earlier, before completion of 8 years of service in the feeder Assistants' Cadre. Thirdly, the entrants through the third stream are the DRSOs, who were taken by the Railway Board from the UPSC Section Officers' Direct Recruitment Examination, in which, apart from the CSS, and some other Services, RBSS was also included as one of the services for which direct recruitments were made by UPSC for SO level till 2003.

133. The recruitment of the Group 'B' SOs and Assistants' Grade of RBSS are governed by Rule-9 of the RBSS Rules, 1969. This at present

prescribes for a ratio of 1/5th of the substantive vacancies in the SOs' Grade to be filled by direct recruitment, on the basis of the results of the competitive examination held by the UPSC. Earlier the aforesaid DR quota ratio was only 1/6th for the DRs till 30.06.1988, and 5/6th for the promotees, but the DR quota was enhanced to 1/5th, with the DP quota being limited to 4/5th, as already discussed above also, w.e.f. 01.07.1988.

134. The sub-rule-3 of the Rule-9 also provided for a 4th method for recruitment to the SOs' Grade, when it states that two posts in the SOs' Grade shall be kept reserved for the officers of Grade-I of the Railway Board Stenographers' Service, who are selected on the basis of merit by a Departmental Promotion Committee for such appointment as SOs by promotions.

135. Thus, Rule-2 (1) (a) of the Schedule-A to the RBSS Rules, 1969, relating to SOs' Grade, provides for consideration of Assistants' Grade incumbents, who have rendered not less than 8 years' approved service in that Grade, and are within the seniority level, to be eligible for promotion on the basis of seniority-sum-merit in the order of their seniority, subject to rejection of the unfit. Rule-2(1) (c) of the Schedule-A to the RBSS Rules, 1969, provides for 15% of the additions to the Select List of Section Officers' Grade to be made through accelerated promotions as SOs granted to persons selected on the basis of the results of the LDCE, held by the UPSC from time to time, in the order of their merit in that LDCE.

136. The same Rule further provides that the persons referred to in the clauses (a) and (c) of sub-Rule (1) of Rule 2 shall be included in the SOs' Select List in the order of first one of the persons from those referred to in the clause (a), followed by one person from those referred to in the clause (c), and so on, in that order, and in case adequate number of officers are not available for Select List empanelment as SOs under any of the clauses (a) or (c) in any particular year, the shortfall can be made good that year itself, by increasing the intake in equal number through the alternative clause (a) or (c). Though the Schedule does not anywhere correctly and clearly states so, it is obvious that this prescription would apply only to the 4/5th of the DPs, or 80% of all the SOs' level posts w.e.f. 01.07.1988, till 2003. After that, the DR stream of SOs has got closed/given up, when the UPSC itself stopped direct recruitment of SOs for any wing of the Government of India.

137. Therefore, from a combined reading of Rule-9 of the RBSS Rules, 1969, with the Schedule-A to those Rules, the following pattern of appointment of Section Officers emerges:-

Out of the authorized permanent strength of the RBSS SOs' Grade, two posts in the SOs' Grade were always reserved for appointment of officers of Grade-I of the Railway Board Stenographers' Service. Since the sanctioned cadre strength for RBSS SOs' Grade as per Rule-4(1) is 91, that would leave 89 vacancies to be filled otherwise, through the process of Direct Recruitment, and the regular & LDCE promotions of RBSS Assistant appointees. The first 1/5th out of 89 vacancies (in the sanctioned cadre strength of 91) for SOs' Grade are required to be filled up through direct recruitment,

under Rule-9 (1) of the RBSS Rules, 1969. Thereafter, 4/5th of the remaining 89 vacancies are supposed to be filled up under Rule-2 (1) (a) and Rule-2 (a) (c) of the Schedule to the RBSS Rules, 1969 on 50:50 basis. This position has been further clarified now through the RBSS (Amendment) Rules, 2004, by which the sub-Rule (1) of the said Rule-9 has been substituted to state as follows:-

“RBSS Rules, 1969	RBSS (Amendment) Rules, 2004
<p>(9). Recruitment to the Sections Officers' and the Assistants' Grades:- (1) Subject to the Provisions of sub-rule (3) recruitment to the substantive vacancies in the Section Officers' Grade shall be made on the following basis, namely:-</p> <p>One-Fifth of the substantive vacancies in the Section Officers' Grade shall be filled by direct recruitment on the results of competitive examinations held by the commission for this purpose from time to time for recruitment to the Central Services Class I and Class II. The remaining vacancies shall be filled by the substantive appointment of person included in the Select List for the Section Officers' Grade. Such appointment shall be made in the order of seniority in the Select List except when, for reasons to be recorded in writing, a person is not considered fit for such appointment in his turn.</p> <p>(2) Temporary vacancies in the Section officers' Grade shall be filled by the appointment of persons included in the Select List for Section Officers' Grade. Any vacancies remaining unfilled thereafter shall be filled by the temporary promotion on the basis of seniority, subject to rejection of the unfit, of officers of the Assistants' grade who have rendered not less than eight years' of approved service in the grade. Such promotion shall be</p>	<p>(9) (i) for sub-rule (1), the following sub-rule shall be substituted, namely:-</p> <p>“(1) Regular vacancies in the Section Officers' Grade shall be filled on the following basis, namely:-</p> <p>(a) Twenty percent of the regular vacancies in the Section Officers' Grade shall be filled by direct recruitment on the basis of the result of a competitive examination held by the Commission for this purpose from time to time.</p> <p>(b) Eighty percent of vacancies shall be filled by appointment of persons included in the Select List for the Section Officers' Grade and such appointment shall be made in the order of seniority in the Select List except when for reasons to be recorded in writing, a person is not considered fit for such appointment on his turn;</p> <p>Provided that if sufficient number of candidates are not available for filling up of the vacancies in any recruitment year, either by direct recruitment or by appointment of persons included in the Select List for Section Officers' Grade, the vacancies shall be carried forward and added to the number of vacancies of the same mode of recruitment to be filled in the subsequent recruitment year;</p> <p>Provided further that no such vacancies shall be carried forward for more than two recruitment years, beyond the year to which the recruitment relates, where after the vacancies, if any, belonging to one mode of recruitment shall be transferred as additional vacancies for the other mode of recruitment.”</p>

terminated when persons included in the Select List for Section Officers' Grade become available to fill up the vacancies. Proviso..... .	(ii) the proviso to sub-rule (2) shall be omitted; (iii) sub-rule (3) shall be omitted; (iv & v) xxxxxxxx (Not reproduced here). (a) - Omitted (3)- Omitted
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138. These Amendment Rules, 2004, are themselves erroneous and defective, inasmuch as even after the abolition of the SOs' examination itself by the UPSC, Rule-9(1)(a) still talks about that. Earlier there were four different ways of promotions to the cadre of Section Officers, which have now been reduced to only two after 2003, both by way of promotions only. Firstly the provision for two posts having been exclusively reserved for the Railway Board Stenographers' Cadre under sub-rule-3 of Rule 9, had been abolished with the Amendment Rules, 2004, and then, secondly direct recruitment of SOs through UPSC had been abolished. Therefore, as on today there are now only two routes both only for promotions to the cadre of SOs w.e.f. 30.12.2004, the date of the amendment Rules, 2004, coming into being. One portion of the promotions to SOs' level have to be granted through the seniority-cum-merit process, and the other portion through accelerated promotions, through LDCE, when the eligibility to appear at the LDCE accrues to an incumbent after four years of substantive service in the cadre of Assistants. The RBSS Amendment Rules, 2004, therefore, themselves need to be amended now, to delete Rule 9 (1)(a) altogether, and amend 9(1)(b).

139. Therefore, in respect of SOs appointed from 2004 onwards, there is no problem, since the matter regarding *inter-se* seniority of accelerated

promotions granted through LDCE, and promotions granted through seniority-cum-merit, after completion of 8 years, was decided once and for all by the Hon'ble Supreme Court in the case of **Central Provident Fund Commissioner vs. N. Ravindran (1995) Supp4 SCC 654= 1995(8) SLR 826=(1996) SCC (L&S) 220**, in which a three Judges' Bench of the Hon'ble Supreme Court had laid to rest the confusion regarding the nature of LDCE accelerated promotions, in the following words, and we may take the liberty to reproduce that judgment in full, as follows:-

"1. These appeals arise out of the order of the central Administrative Tribunal, Ernakulam bench dated 11/2/1992 whereby **the tribunal gave certain directions in regard to the Fixation of seniority of those promoted to the next higher post by virtue of seniority-cum-fitness and those promoted out of turn by virtue of their having passed a prescribed examination. A quota of 75 : 25 was prescribed; 75% for the former and 25% for the latter. The tribunal came to the conclusion that both those categories must be treated as belonging to one single class of promotees and, therefore, they must be promoted to the next higher post by first satisfying the 75% quota of those entitled to promotion by virtue of the seniority-cum-fitness rule and the 25% quota of those who become entitled to promotion by virtue of having passed the prescribed examination must take their position below the said 75%**. Mr Mahajan, the learned counsel for the appellants, however, drew our attention to the observations of this court in *Regional Provident Fund Commissioner v. Ashok Mehta* arising out of the judgment of the Central Administrative Tribunal, New Delhi, wherein this court while dismissing the special leave petition to the following effect stated:

"We see no reason to entertain this special leave petition. One ground in support of this petition was that there is a 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.**"

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Mr Mahajan submitted that in the instant case the tribunal has departed from this rule which was approved by this court and has,

therefore, fallen into an error. We do not think so. What the tribunal has said is virtually the same thing in different words. It is stated that **both the category of employees shall belong to the single class of promotees and will be promoted to the next higher post in the order of their inter se seniority in the lower cadre.** That would naturally take care of the length of service of those incumbents. The tribunal has also pointed out that the **recruitment rules or the promotion policy do not provide that the examinees will be given seniority over normal promotees. Ordinarily, the examinees would rank below those who would be entitled to promotion on seniority-cum-fitness principle because of their placement in the seniority list in the lower cadre. In order to get accelerated promotion they may appear at the prescribed examination and pass it. The basic idea of providing this incentive is to strengthen the upper cadre by induction of young meritorious persons.** Mr Mahajan, however, submitted that there could be a case wherein an incumbent has passed the examination but by the time the promotion opens for him he becomes eligible for promotion on the basis of seniority-cum-fitness test but the Tribunal's order would slide him down below the 75%. We do not think that the apprehension of Mr Mahajan is well-founded. **If he becomes entitled to promotion by virtue of mere seniority-cum-fitness test, he will become entitled to be promoted in normal course in the 75% of quota and merely because he has the additional qualification of having passed the examination, he will not be slided down in seniority.** We are, therefore, not impressed by the apprehension of Mr Mahajan assuming such freak cases do present themselves. On the whole, therefore, we think that the view taken by the tribunal is just and fair and does not call for interference at our hands. The appeals are dismissed with no order as to costs.”

(Emphasis supplied).

140. But, in the case of RBSS Rules, 1969, as well as its Amendment Rules, 2004, even this aspect had been provided for in an incorrect manner. The RBSS Rules, 1969, clearly provided that the Select List of promotions to SOs' Grade would be prepared by first picking up one person from out of those to be promoted under Rule 2 (1) (a), followed by one person from those to be promoted under Rule 2(1)(c), and so on, in that order, and any shortfall in any one of the two categories can be made good that year itself, by increasing the intake through the alternative clause (a) or (c). That rule position would have prevailed, but for the fact

that it is against the law of the land as laid down by the Hon'ble Supreme Court, and even the *inter-se* seniority in between the two categories of promotees, through seniority-cum-merit, and the LDCE, would have to be in such a manner that, as held by the Hon'ble Supreme Court, “**both the category of employees shall belong to the single class of promotees, and will be promoted to the next higher post** (the posts of SOs here) **in the order of their *inter-se* seniority in the lower** (here Assistants') **Cadre.**” The RBSS Rules shall, therefore, have to be amended further, to follow this law of the land, as settled by the Hon'ble Supreme Court.

141. Also, it is settled law that Direct Recruits can only get seniority from the date of their joining in the cadre, and that they cannot get any antedated seniority, depending upon the supposed carry forward of any unfilled posts/vacancies of DR Quota. This aspect of the law has been laid down by the Hon'ble Supreme Court in the following cases, among others:-

- “1) **Uttaranchal Forest Rangers' Assn. (Direct Recruits) & Ors. v. State of U.P. & Ors., : 2007 (2) SLJ 133 (SC) = (2006) 10 SCC 346,**
- 2) **State of Uttaranchal & Anr. v. Dinesh Kumar Sharma: 2007 (3) SLJ 242 SC = (2007) 1 SCC 683”.**

142. We need not go into the details of the ratio independently arrived at by the Hon'ble Apex Court in the above two cases, and a few others, like the cases of **Shri H.V. Paradasani & Ors.** (supra) and **A. Janardhana** (supra) cited in the pleadings before us. The net effect of all the cases is the same, that the seniority of the DRs accrues only from the date of their

actually joining the service, and not from any other date. The Rules in this case, RBSS, 1969, had provided for that the DRs will have seniority with respect to the 30th June of the year in which the LDCE was notified, and that the seniority-cum-merit basis promotions on completion of 8 years of service in the cadre of Assistants would have their seniority pegged to the 30th June of the year in which the DPC is held for undertaking all promotions. We find no merit in any of these provisions of the RBSS Rules, as they are abhorrent to the law as laid down by the Supreme Court, and, therefore, all such stipulations of the RBSS Rules are set aside.

143. The Coordinate Bench, which had decided these connected OAs earlier on 28.03.2011, had found nothing wrong with the order dated 22.12.2008 passed by the first respondent. That finding has since been set aside by the Hon'ble High Court. We also respectfully beg to disagree with that finding of the Coordinate Bench, since set aside. On the one hand, in his order dated 22.12.2008, the Respondent No.1 had refused to accept the prescription in DoP&T Notification dated 29.12.1984, laying down the procedure for fixing of seniority in between DRs and DPs, stating that the instructions of DoP&T are not applicable in the Ministry of Railways, as they have to be specifically adopted by the Railway Board to be made applicable, which in itself is an illegal statement, as neither the Ministry of Railways, nor its Attached Office the Railway Board, is outside the pale of the Central Government, and the DoP&T being the nodal Department of Union of India for issuing such clarifications, each and every one of its Notifications automatically becomes applicable to all

Ministries and Departments, and their Attached Offices, including the Ministry of Railways.

144. For good measure, it may be emphasized here that only in respect of the employees of the Open Line and Project operations of the Zonal Railways, to whom the Indian Railways' Establishment Manual Parts I & II, and its associated Medical and other Rules apply, that the Railway Board can apply its collective mind and can issue its own instructions regarding the Cadre Management of the Zonal Railway Cadres, both on the Open-Line operations side, and the Projects' employees, which are covered by the Indian Railways' Establishment Manuals, Part I & II, which are recognized as good subordinate legislation in themselves. Surprisingly, it is seen that in other portions of his order, the Respondent No.1 had himself taken the instructions of the DoP&T as a gospel truth, without even stating as to why and in what manner they were required to be adopted, and were so actually adopted!!! It is once again clarified that all the orders and instructions issued by the DoP&T from time to time shall automatically become applicable, from the date of their issuance itself, to all the Attached Offices and PSUs of the Ministry of Railways, including the Railway Board, RDSO, and the numerous PSUs, and that the Railway Board, which is by itself an Attached Office of the Union of India/Central Government, cannot attempt to display the audacity to try to function as another independent Government within the Central Government.

145. On the one hand, the Respondent No.1 had said in his impugned order that the records in respect of information regarding indents placed with the UPSC for seeking DRSOs during the period from 1973 to 1980 were not available, and it was available only from the year 1981 onwards. On the other hand, in the same impugned order, he came to the conclusion himself that he was convinced from the records made available to him that there has not been a collapse of the rota quota system, as contended by the DPs. Since regular indents for direct recruitments to RBSS had been placed by the Railway Board with the UPSC, and the Respondent UPSC had also recommended candidates against those indents, right from the year 1973 onwards, therefore, we find no merit in the impugned order passed on 22.12.2008 by the Respondent No.1, and the same is set aside, as has been prayed for by the applicants of both the OAs, who are also the respective private respondents in each other's O.A., in both these connected OAs.

146. That leaves us to determine as to what is the correct legal position in respect of the other legal issues raised by all the sides in their pleadings, and then to decide as to what further relief can or ought to be provided to the applicants and private respondents of both these OAs, which are counter OAs of each other, after we have set aside the impugned Order as above.

147. The case of **Union of India & Ors. vs. N.R. Parmar & Others (and the four related cases): (2012) 13 SCC 340=JT 2012(12) SC 99**, was decided by a two Judges' Bench of the Supreme Court, and had laid

down the law in regard to DRs vs. DPs in respect of situations where the Rota Quota has not broken down. Also, as it is obvious, that judgment could not have over-ruled in any manner the point of law decided already by a three Judges' Bench in **Central Provident Fund Commissioner vs. N. Ramachandran** (supra) in respect of the promotees from two categories, (i) through seniority-cum-merit, and (ii) through LDCE. The issues which were discussed by the Hon'ble Supreme Court in **N.R. Parmar** (supra) had been examined by a Coordinate Bench of this Tribunal, in which one of us [Member (A) Shri Sudhir Kumar] was one of the Members, in its orders dated 27.09.2012 in OA No.248/2012 **Pankaj Kumar Mishra & Ors. vs. Union of India & Ors.**, and orders dated 05.09.2013 in OA No.3596/2011 with connected cases **Shri Birendra Kumar Mishra & Ors. vs. Union of India & Ors.**, and the following paragraphs may be cited from those two orders as follows:-

OA No.248/2012 [Order pronounced on 27.09.2012, two months prior to the Supreme Court's judgment dated 27.11.2012 in **N.R. Parmar** (supra)]

"130. Selection and promotion are two entirely different things in Administrative Law. Promotion can only be in the line of a promotional hierarchy, and not to an ex-cadre post. While selection, by its very definition, is to an ex-cadre post, or to a new post, on which the person concerned could not have claimed movement by way of seniority-cum-merit, or through passage of time in his own existing service. Whenever the candidates face a process of selection, and after passing such process of selection or examination etc., their appointment is in a new/fresh service, like the appointment of GDS as Postmen, or of Postmen as Postal Assistants, such selection cannot be called a promotion, as it was not that they could have come into that new Cadre or service merely in the course of natural progression through passage of time, and attaining seniority within their earlier Cadre or Service. Any advancement in Service career, which is based upon a process of selection, especially undertaken for that purpose, and which results in movement to a different cadre or service altogether, cannot be called as a promotion. A promotion, by its very definition, has to be only to a higher category in the same service

or cadre, or through a prescribed avenue or channel of promotion, with or without any essential element of an efficiency bar, or a process of selection, through tests or examinations etc. where any test or examination (like the LDCE in the instant case) only results in speeding up (by three years) the process of promotion as UDCs, with the bar of "Good" ACR/APAR having been removed, it cannot be called a selection for Direct Recruitment.

131. The meaning of the word "promotion" was considered by the Hon'ble Apex Court in the case of **Director General, Rice Research Institute, Cuttack & anr v Khetra Mohan Das, 1994 (5) SLR 728**, and it was held as follows:-

"A promotion is different from fitment by way of rationalisation and initial adjustment. Promotion, as is generally understood, means; the appointment of a person of any category or grade of a service or a class of service to a higher category or Grade of such service or class. In C.C. Padmanabhan v. Director of Public Instructions, 1980 (Supp) SCC 668: (AIR 1981 SC 64) this Court observed that "Promotion" as understood in ordinary parlance and also as a term frequently used in cases involving service laws means that a person already holding a position would have a promotion if he is appointed to another post which satisfies either of the two conditions namely that the new post is in a higher category of the same service or that the new post carries higher grade in the same service or class".

132. Further, in the case of **State of Rajasthan v. Fatehchand Soni, (1996) 1 SCC 562, at p.567: 1995 (7) Scale 168: 1995 (9) JT 523: 1996 SCC (L&S) 340: 1996 (1) SLR 1.**, the Hon'ble Apex Court findings can be paraphrased and summarized as follows:-

"In the literal sense the word "promote" means to advise to a higher position, grade, or honour". So also "promotion" means "advancement or preferment in honour, dignity, rank, or grade". (See : Webster's Comprehensive Dictionary, International Edn., P. 1009) 'Promotion' thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression 'promotion' has been understood in the wider sense and it has been held that "promotion can be either to a higher pay scale or to a higher post".

133.xxxxxxxxxxxxxx(Not reproduced here).

134. In the case of **Pawan Pratap Singh & Ors. vs. Reevan Singh & Ors. , (2011) 3 SCC 267**, the Hon'ble Apex Court has very aptly summarized the principles regarding determination of seniority in such cases & has held as follows:-

“30. From the above, the legal position with regard to determination of seniority in service can be summarized as follows:

- (i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.
- (ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.
- (iii) Ordinarily, notional seniority may not be granted from the back date and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.
- (iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even born in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime”.

135. In **Uttaranchal Forest Rangers' Assn. (Direct Recruits) & Ors. v. State of U.P. & Ors., : 2007 (2) SLJ 133 (SC) = (2006) 10 SCC 346**, the Hon'ble Apex Court has stated as follows:-

“37. We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely appointed validly in the meantime, as

decided by this court in the case of K.C. Joshi & others vs. Union of India, 1992 Suppl (1) SCC 272 held that when promotion is outside the quota, 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, it 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 Articles 14 and 16(1) of the Constitution.

"38. This Court has consistently held that no retrospective promotion can be granted nor any seniority can be given on retrospective basis from a date when an employee has not even borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime. In, State of Bihar & Ors v. Akhouri Sachidananda Nath & Ors, 1991 Suppl. (1) SCC 334, this court observed that,

"12. In the instant case, the promotee respondents 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when the respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over the respondents 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter-se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondents 6 to 23 cannot be

made senior to the respondents 1 to 5 by the impugned Government orders as they entered into the said Service by promotion after the respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned Government orders made in annexures, 8, 9 and 10 is unexceptionable."

136. Further, in a case very close to the present case, in **State of Uttarakhand & Anr. v. Dinesh Kumar Sharma: 2007 (3) SLJ 242 SC = (2007) 1 SCC 683**, the Hon'ble Apex Court had observed as follows:-

"28. It is clear from the above that a person appointed on promotion shall not get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Therefore, in the present fact situation the respondent cannot claim promotion from the date of occurrence of the vacancy which is 1995-96 but can only get promotion and seniority from the time he has been substantively appointed i.e. from 1999. Likewise, the seniority also will be counted against the promotion/appointment in the cadre from the date of issuance of order of substantive appointment in the said cadre, i.e. from 19.11.1999.

29-33. xxxxxx

34. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in the case of **Jagdish Ch. Patnaik & Ors. vs. State of Orissa & Ors. 1998(4) SCC 456.**"

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"218. The issue No.14 framed by us overlaps the Issue No.11/above, as to whether any of the instructions of the Govt. of India DoP&T, or any case law, as applicable to the cases of direct recruits vs. promotees, can apply to the cases of DPC

promotees vs. accelerated promotees through the LDCE route. The obvious answer as already provided above is 'No'. Unfortunately, the DoP&T had displayed clarity in their thoughts and perception only up to the issuance of their above cited OM dated 24.06.1978 (reproduced in para 147/above), which clarity was existing in the previous consolidated instructions dated 22.11.1959 (also reproduced extensively above), issued by the respondents, Govt. of India. At the cost of repetition it must be stated by us that most parts of that OM dated 22.12.1959 issued by the DoP&T when it was under the Ministry of Home Affairs, still stand valid and applicable as on today also, unamended, which has been referred to in Para-18 & 19 of the Hon'ble Apex Court's latest judgment in **Union of India & ors. vs. N.R. Parmar & Ors.** (supra) also. Only a portion of that O.M. dated 22.12.1959, particularly para-6 thereof, has been amended since then, many times over. Since the Hon'ble Apex Court was in the case of "**N.R. Parmar**" (supra) dealing with the issues concerning only direct recruits vs. promotees, in the subsequent paragraphs of its judgment it went on to discuss and decide the said case only on the basis of the subsequent OMs of the Union of India, dated 07.02.1986 and 03.07.1986 and onwards, which had been issued in the context of the emerging case-law on the subject of fixation of *inter-se* seniority in between the Direct Recruits and Promotees. But the very fact that these two OMs dated 07.02.1986 and 03.07.1986, and the subsequent OM dated 03.03.2008 were all issued to only partially modify the para 6 of the Annexure to the original instructions dated 22.12.1959, in so far as it concerned the subject of the relative seniority of direct recruits and promotees, was fully reflected by the Hon'ble Apex Court also in "**N.R. Parmar**" (supra), which is apparent from the fact that OM dated 07.02.1986 was cited by the Hon'ble Apex Court as follows:-

"18. General principles for determining seniority in Central services are shown to have been laid down in an annexure to an office memorandum dated 22.11(sic.12).1959 issued by the Government of India, Ministry of Home Affairs (hereinafter referred to as "the OM dated 22.11 (sic 12).1959"). **Paragraph 6 of the annexure**, referred to above, **laid down the manner of determining inter se seniority between direct recruits and promotees.** Paragraph 6 is being extracted hereunder:

“6. Relative seniority of Direct Recruits and Promotees.

The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Department Rules."

18.1. It is apparent from the **above extract of the OM dated 22.11(sic 12).1959**, that the "quota" between

promotees and direct recruits was to be read into the seniority rule. The OM also provided for a definite rotation of seniority points ("rota") between promotees and direct recruits. The rotation provided for was founded on the concept of rotation of quotas between promotees and direct recruits. It is therefore apparent, that under the OM dated 22.11(sic 12).1959 inter se seniority between the promotees and direct recruits was based on the "quota" and "rota" principle. The same has been meaningfully described as "rotation of quotas" in some of these instruments.

19. The aforesaid prescription of the manner of determining inter se seniority between the direct recruits and promotees, determined through the OM dated 22.11(sic 12).1959, was modified by an office memorandum dated 7.2.1986, issued by the Government of India, Department of Personnel and Training (hereinafter referred to as, "the OM dated 7.2.1986"). The modification introduced through the OM dated 7.2.1986 was to redress a situation wherein, vacancies of one of the sources were kept (or remained) unfilled during the process of selection, and the unfilled vacancies, had to be filled up through "later" examinations or selections. **For the determination of seniority, in the contingency wherein the process of recruitment resulted in filling the vacancies earmarked for the two sources of recruitment, the manner of determining inter se seniority between promotees and direct recruits, expressed in the OM dated 22.11(sic 12).1959 remained unaltered.** But where the vacancies could not be filled up, and unfilled vacancies had to be filled up "later" through a subsequent process of selection, the manner of determining inter se seniority between promotees and direct recruits, was modified".

(Emphasis supplied).

219. It is clear that this OM dated 07.02.1986 was only an amendment of the Para 6 of the Annexure to the OM dated 22.12.1959, and that the rest of the instructions contained in the OM dated 22.12.1959, which did not deal with the matter of fixation of seniority between the direct recruits vs. promotees, have all through since continued to be applicable, as was further re-affirmed by Para-8 of the said OM dated 07.02.1986 which stated as follows:-

“8. Ministry of Finance etc. are requested to bring these instructions to the notice of all the Attached/Subordinate Offices under them to whom the General Principles of Seniority contained in O.M. dated 22.12.1959 are applicable within 2 week as these orders will be effective from the next month”.

220. In **Union of India & ors. vs. N.R. Parmar & Ors.** (supra), the Hon’ble Apex Court has appreciated this partial modification in sub-paragraphs a,b,c & h of Para-20 of its judgment, and arrived its conclusions as follows:-

“(a) Paragraph 2 of the OM dated 7.2.1986 first records the existing manner of determining inter se seniority between direct recruits and promotees (i.e., as contemplated by the OM dated 22.11(sic 12).1959), namely, “...the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees become available through later examinations or selections, such persons occupied the vacant slots, (and) thereby became senior to persons who were already working in the grade on regular basis. In some cases, where there was shortfall in direct recruitment in two or more consecutive years, this resulted in direct recruits of later years taking seniority over some of the promotees with fairly long years of regular service to their credit....”. The words, “when direct recruits or promotees become available through later examination or selections”, clearly connotes, that the situation contemplated is one where, there has been an earlier examination or selection, and is then followed by a “later” examination or selection. It is implicit, that in the earlier examination or selection there was a shortfall, in as much as, the available vacancies for the concerned recruitment year could not all be filled up, whereupon, further examination(s) or selection(s) had to be conducted to make up for the shortfall. In the instant situation, the earlier OM dated 22.11(sic 12).1959 contemplated/provided, that slots allotted to a prescribed source of recruitment which remained vacant, would be filled up only from the source for which the vacancy was reserved, irrespective of the fact that a candidate from the source in question became available in the next process of examination or selection, or even thereafter. In other words **the “rotation of quotas” principle was given effect to in letter and spirit under the OM dated 22.11(sic 12).1959, without any scope of relaxation.**

b).....It is therefore apparent, that the OM dated 7.2.1986 partially modified the “rotation of quotas” principle in the determination of inter se seniority originally expressed in the OM dated 22.11(sic 12).1959. The OM dated 7.2.1986, provided that the “rota” (rotation of quotas) would be adhered to “...only to the extent of available direct recruits and promotees...”, i.e., for promotee and direct recruit vacancies which could be filled up through the original/first process of examination or selection conducted for the recruitment year in which the vacancies had arisen.

(c) For the vacancies remaining unfilled when the same were originally/first sought to be filled up, the slots available under the “rota” principle under the OM dated 22.11(sic 12).1959, would be lost to the extent of the shortfall. In other words, the “rotation of quotas” principle would stop operating after, “...the last position upto which it is (was) possible to determine seniority on the basis of rotation of quotas...”, for the concerned recruitment year.

(d to g) xxxxxxxxxxxxxxxxxxxxxxx (Not reproduced here).

(h) In paragraph 6 of the OM dated 7.2.1986 it was asserted, that the general principles for determining seniority in the OM dated 22.11(sic 12).1959 were being “modified” to the extent expressed (in the OM dated 7.2.1986). The extent of modification contemplated by the OM dated 7.2.1986 has already been delineated in the foregoing sub-paragraphs. Para 6 therefore leaves no room for any doubt, that the OM dated 22.11(sic 12).1959 stood “amended” by the OM dated 7.2.1986 on the issue of determination of inter se seniority between direct recruits and promotees, to the extent mentioned in the preceding sub-paragraphs. The said amendment was consciously carried out by the Department of Personnel and Training, with the object of remedying the inappropriateness of direct recruits of “later” examination(s) or selection(s) becoming senior to promotees with long years of service, in terms of the OM dated 22.11(sic 12).1959”.

(Emphasis supplied).

221. Therefore, it is clear that even after the judgment in **Union of India & ors. vs. N.R. Parmar & Ors.** (supra), apart from the changes brought about in respect of the subject of the relative seniority of direct recruits vs. promotees through the issuance of the DoP&T OM dated 07.02.1986, 03.07.1986 and 03.03.2008, even as on today, the rest of the instructions which were contained in the consolidated General Principles for determining

seniority in Central Services as laid down in the OM dated 22.12.1959 have continued to be applicable, in respect of all other matters and fact situations requiring the determination of *inter-se* seniority, other than the situations between the Direct Recruits and Promotees, which we can reiterate on the strength of that very judgment of the Hon'ble Apex Court in "**N.R. Parmar**" (supra), as cited above."

148. From the law as laid down so far through numerous Supreme Court judgments, it is clear that if anybody has been placed in-charge or in current duty charge of a vacant post of SO within the sanctioned strength of the SOs' Grade of RBSS, after his having been properly selected and placed in the Select Panel for such promotion as SO, through (a) either a DPC on the basis of seniority-cum-merit, after 8 years of service as an Assistant, or (b) on the basis of result of the LDCE, he can be granted benefit of seniority from such date, on the basis of continuous officiation/occupation on that post of SO, in respect of such In-charge or officiation arrangement, since that charge had been assigned to him after his having become eligible to occupy that post, in accordance with law, as has also been laid down by the Hon'ble Apex Court in the case of **Chief of Naval Staff and Anr. vs. G.Gopalakrishna Pillai & Ors., (1996) 1 SCC 521**. The converse of the same proposition of law had been laid down by the Hon'ble Apex Court in **State of West Bengal vs. Aghore Nath Dey: (1993) 3 SCC 371**, stating that where the initial appointment is only *ad-hoc*, and not according to rules, and has been made only as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. This principle was later cited, with approval, by a three Judges' Full Bench of

the Hon'ble Apex Court in **S.K. Saha vs. Prem Prakash Agarwal & Ors.**

with **State of M.P. & Anr. vs. Prem Prakash & Ors.: (1994) 1 SCC**

431= AIR 1994 SC 745. Therefore, if somebody is placed in charge in the higher post without having become eligible to occupy that higher post, and without his having been selected for promotion to that higher post, he cannot derive any benefit in respect of such officiation without eligibility. But an eligible, or already selected person, cannot be denied the benefit of counting even such *ad-hoc* or temporary, or in charge arrangement, where substantive appointment is just the only formality remaining to be fulfilled.

149. Although the law as laid down provides that a quota once assigned cannot be changed, and, as a model employer, the Government, and its Attached Office the Railway Board here in the instant case, was fully obliged to follow the rota quota system, but if in respect of some of the years, either some of the DRSOs' vacancies, indented to be filled up through selection by the UPSC, have remained unfilled, due to either UPSC not recommending sufficient number of indented DR candidates, or the candidates assigned against the indent for RBSS SOs placed with the UPSC not joining the service, such positions can only be carried forward upto two years, as per the DoP&T instructions in this regard, and filled in those two years, in order to restore the balance of DRs vs. DPs. But the law as laid down by the Supreme Court is very clear that the persons selected in later years, against such carried forward vacancies, cannot at all be assigned any retrospective seniority whatsoever, relating back to the year to which the concerned vacancy

belonged, as such carried forward vacancies do not carry a birth-mark year, and certainly not for 20 years, as has been done by the official respondents.

150. As has been rightly contended in the pleadings in one case and the counter pleadings in its counter case by one of the parties, the law is well settled that no direct recruit can claim antedated seniority prior to the date of his actually joining the Service, the date he is born in that Service, after his proper selection for appointment in that Service, either through UPSC, or otherwise. Any grant of antedated seniority, purporting to relate back to the year to which the vacancy concerned, would lead to an absurd situation, in which a person could even get seniority from a year in which he might not have been even eligible to even apply for that Service/post, due to lack of educational qualifications and/or age, and he might even have been in a school or college, studying, in order to be able to compete for appointment to that Service through the UPSC Examination, or in any other prescribed manner. But, in the facts of the two cases before us, it has actually so happened, which is illogical and cannot be countenanced under law. It could so happen only because the Attached Office Railway Board refused to follow the instructions and guidelines of DoP&T, and perhaps never consulted DoP&T before framing the RBSS Rules.

151. Among the 80% Departmental Promotees, in respect of the period from 01.07.1988 to 2004, when the DR quota itself got abolished, the LDCE selectees out of them would obviously be entitled to

accelerated promotion as SOs from the date they are so selected through the LDCE, and would be placed below the last Direct Recruit appointee in the RBSS cadre, without any ante-dated seniority whatsoever, as on the date of declaration of the result of the LDCE. In a similar manner, the remaining promotees under the seniority-cum-merit quota, pertaining to 60 out of 87 posts till the Amendment Rules, 2004, were brought into effect, and all of 89 posts after the Amendment Rules, 2004, were brought into effect, along with the abolition of the DR quota (of 17 posts) due to scrapping of the U.P.S.C. Examination for direct entry at S.O. level, would all get their seniority from the date they had actually joined as Section Officers, after the minutes of the DPC meeting held for undertaking the screening of their cases for promotion on seniority-cum-merit basis had been approved. As per the law as settled as on today, no separate orders for their substantive promotion need to be issued thereafter. The same thing would apply to the two posts of promotees from the Stenographers' cadre, till the date of the Amendment, 2004, after which their reserved two Section officers' vacancies were abolished by the 2004 Amendment.

152. It is immaterial for the purpose of rota quota system if a person dies, or leaves the service in between. The vacancy concerning his relevant quota gets consumed the day when he joins as such. Therefore, merely because such an Officer has thereafter left the service, or has expired, the vacancy of that relevant quota does not get revived with the birthmark of the quota in which that person was originally appointed, as that vacancy had already been consumed earlier. Therefore, such

resignations and deaths etc. will not affect the fixation of the seniority under the rota quota system at all.

153. In **Bishan Sarup Gupta vs. Union of India: (1973) 3 SCC 1= AIR 1972 SC 2627= 1975 Supp SCR 491** it was held by the Hon'ble Supreme Court that so long as the quotas remain, one group cannot claim the quota fixed for another group, either on the ground that the quotas are not filled up, or on the ground that because there has been a number in excess of the quota, the same should be absorbed, depriving the other group of the quota. Further, in **V.B. Badami vs. State of Mysore: AIR 1980 SC 1561=(1976) 2 SCC 901=1976(1)SCR 815=1975 (2) LLJ 466**, it was held by the Hon'ble Supreme Court that when Rules having statutory force fix quotas for the promotion of employees recruited from different sources, the quotas so fixed are unalterable according to the exigencies of the situation; and that they can be altered only by fresh determination of quotas under the relevant Rules. But both these judgments relate to the position and situation where the quota system is being regularly followed, and, except occasional under-utilization or over utilization of those quotas, more or less the quotas have been rotated, so that the Rota-Quota principles and system have not seen a complete break-down. In the case of a complete break-down of the Rota-Quota system, obviously the ratio of the two above cited judgments would not apply.

154. We cannot accept the contention of the official respondents that since the indents sent to UPSC in respect of the years from 1973 to 1980

are not available, they cannot decide upon the rota quota system. It is trite law that it is not the number of vacancies which were indented that are important, but the number of vacancies which came to be filled up and occupied later, by the selectees (by the UPSC in these cases) in full or partial fulfilment of the indent, which number is the only number important for deciding the matter of *inter-se* seniority, and the operation of the rota quota system. Further, the official respondents cannot also be allowed to state that they do not have the service records in respect of the persons who had joined as Direct Recruit Section Officers from 1973 onwards, because the service records of all such employees are permanent records, and would still be available with the respondents.

155. We are also not at all convinced with the arguments advanced by the Respondent No.1 in the impugned Memorandum dated 22.12.2008, for his refusing to follow the Supreme Court's judgment upholding the orders of this Tribunal in the case of **M.G. Bansal** (supra), to assign seniority to the Direct Recruits only with reference to their dates of actually joining their service in RBSS, and then interpolating them in between the Promotee Officers, in accordance with rota-quota system. While he had adopted a portion of the law as laid down in that judgment of the Supreme Court that in the case of DPs, any persons promoted in an excess of the prescribed Promotee quota will have to be treated as *ad-hoc*, till they come to occupy a post falling to their quota, in substantive capacity, but then he had, without any authority of law, Rules or Regulations, gone on to state that the DoP&T Notification dated 29.12.1984, laying down the principles of fixation of *inter-se* seniority

between the Direct Recruits and Departmental Promotees will not automatically become applicable to Ministry of Railways, though it had been adopted by the Railway Board in two parts, in 1985 and in 2004. It is once again reiterated that the Railway Board, as an Attached Office of the Union of India, is bound by every instruction and circular of the DoP&T from the very date that instruction or circular is issued, as its own powers, under the Railway Board Act, 1905, extend only to the Zonal Railways, and to the employees to whom the IREM Parts I & II apply.

156. The Respondent No.1 has also totally misunderstood and misapplied the basic concepts of Administrative Law in stating that the concept of substantive or regular appointment had got extinct from the year 1989 onwards, with the adoption of the system of one time conferment of appointment in the entry grade. Thus, the Respondent No.1, Secretary, Railway Board, had totally misunderstood and misapplied the implications of the distinction between conferment of designation, and substantive/regular appointments, which are two different concepts altogether. Conferment of designation at the time of initial appointment is a process by which a new appointee to the Governmental system gets into the queue to acquire a lien against a post within the Government, after his confirmation. But his lien can later get moved up, and he can come to occupy a lien against his promotional post, only when he is substantively/regularly appointed to that promotional post, and not when he has been put only in an *ad-hoc* charge, or temporary charge, or additional charge, or current duty charge etc. of that higher post. In that sense, substantive/regular appointment

to a post is an important concept, to be applied at every stage of movement of an incumbent Government Servant upwards, when the incumbent concerned gets to occupy the lien against a higher post, and then gives up his lien against his earlier lower feeder post.

157. The official respondent R-1 had also misdirected himself in arriving at a conclusion that the **AFHQs case** (supra) was not at all relevant for determining the aspect of seniority in RBSS, simply because in the case of AFHQ service there was no stream of Departmental Promotees to occupy higher posts in an accelerated manner, through the mechanism of a LDCE, which was the case in the case of RBSS. He also totally misdirected himself in concluding that even though for the first time the combined Seniority List was prepared now, since the need had arisen in 1986, it was not necessary for the Railway Board Administration to re-determine the seniority of all the concerned incumbents of RBSS correctly, on the basis of the correct principles, and grant them revised seniority.

158. He had no business whatsoever to decline to follow the methodology as per the law laid down by the Supreme Court for fixing seniority between the Direct Recruits and Departmental Promotees, just because the seniority levels of both categories would be disturbed, and get affected upwards and downwards. The manner in which he has wished away the law of the land as laid down by the Supreme Court in the impugned Memorandum is astounding and shocking.

159. Therefore, in the conclusion which was arrived at by the Respondent No.1 in the impugned Memorandum, because of all these reasons of his erroneous reasoning, he found no justification in undertaking an exercise for revising the impugned Seniority List of Section Officers of RBSS, as according to him, it would have led to "**complete administration mayhem**", was also illogical and illegal, and against the very principle stated by him in the very next sentence that settled seniority cannot be unsettled. In the instant case, the seniority of RBSS at SOs' level has never actually been settled properly, and was being prayed for being settled for the first time. Therefore, we have no hesitation in setting aside the entire impugned Memorandum dated 22.12.2008.

160. Except for the stated difference from the **AFHQs case** (supra), that there were no LDCE based promotions in AFHQ, but about which we are not very sure from a reading of that judgment, the rest of the law as laid down by the three Judges' Bench of the Supreme Court in that case would have squarely applied to the present case of RBSS also, in the case the Rota-Quota system had sustained in RBSS. In that case, after discussing the law and the facts in great detail, the Supreme Court had upheld the following principles, which had been actually laid down by this Tribunal in the case of **M.G. Bansal** (supra) by an order dated 20.11.1992, and in the case of **Ammini Rajan** (supra) by an order dated 01.04.2002 in OA No.1356/1997, and we may borrow the summarizing of these orders from the Supreme Court's judgment itself, as follows:-

"11. It appears from the record that on 8th November 1989, the Union of India and some DR Officers filed two Special Leave Petitions before this Court against the order of the Tribunal dated 2nd June 1989. This Court by its order dated 20th July 1991 held that the CAT had decided the controversy without adverting to the Rules applicable to the service, particularly Note (2) in the Third Schedule and the matter must, therefore, be decided afresh. Pursuant to the order of this Court, the CAT again decided M.G. Bansal's case (supra) by an order dated 20th November 1992 in the following manner:-

- "(a) It is held that Rule 16(7) and Schedule Third so far as it relates to appointment of the promotees and Direct Recruits in their respective quota and determination of seniority on the basis of quota and rota is held valid and these are not ultra vires of Articles 14 and 16 of the Constitution of India.
- (b) Seniority between Direct Recruits and Promotees regularly appointed/promoted within their respective quota should be determined by the length of the continuous officiation in the grade of ACSO from their respective appointment to the substantive vacancies under Schedule II within their quota, i.e., in the case of promotee ACSOs the length of continuous officiation in the grade will be reckoned from the date when they are promoted in substantive vacancies.
- (c) To elucidate further, in the case of temporarily appointed promotee ACSOs under Note (2) of Schedule III of the rules in the direct recruit quota w.e.f. 1969 onwards till 1977 and also thereafter their seniority will be reckoned from the date when they get a berth in the substantive vacancies of their 75% quota as envisaged under Schedule III of the Rules.
- (d) The incumbents belonging to one source in excess of their own quota and utilising the quota of the incumbents belonging to another source will only officiate in the promoted post. It is made clear that the direct recruits when inducted as nominees of the UPSC, the promotees in the quota of the direct recruits on the basis of Note (2) of the Rules of Schedule III will either be reverted or will be absorbed in the vacancies within their quota of subsequent year. The period of officiation outside their quota of either of their incumbents from other source will not count for their seniority. If an officer has been promoted within his quota, then it would be date of confirmation which would be relevant for the officer's seniority.
- (e) When the promotions are made from either of the sources, by direct recruitment or by departmental promotion there shall be due compliance of the various instructions and office memorandum issued by the Department of Personnel and Training on the reservation of vacancies for SC/ST and categories in the proportion directed in the said instruction. The reservation, however, shall remain only at the time of

appointment and not in the seniority inter so of the Direct Recruits and promotees which shall be fixed as laid down in Rule 16(7) read with Schedule III and as directed in the preceding sub-paras above.

(f) It is further directed that each quota, as referred to in Schedule 3 of the Rules has to be worked out independently on its own force. [Direct recruit quota of ACSO which is confined to substantive vacancies in the grade can be filled by temporarily appointed Assistants by promotion in the grade of ACSO, but without giving them any right of seniority on the basis of continuous officiation on the vacancies earmarked for Direct Recruits and indent for which has been sent to the UPSC for nomination from the civil services examination of a particular year. The hopes and aspirations of the promotees aforesaid cannot be related to availability of Direct Recruits filling their quota in that particular year and only it can be when there is total collapse and break down of the quota for a number of years.

(g) None of the parties including the official respondents have given relevant data as to when the actual promotion of Assistants were made to the temporary cadre of ACSO in the direct recruit quota under Note (2) of Schedule 3 the official respondents on the other hand have taken the stand in the chart quoted in the body of the judgment that if such vacancies in the direct recruit quota were left unfilled and have been filled temporarily by the Assistants by making departmental promotions and since the exact number is not coming for the and also the position whether such departmental promotees were absorbed in the subsequent vacancies within their quota of 75% direct is issued to revise the impugned seniority list in the light of the observations made in the above sub-paras which shall be made final after hearing the objections on the same and the petitioners, who have since retired, shall be entitled to any consequential benefits occasioned on account of the revision of the seniority list. The impugned seniority list of 1977 shall stand quashed to that extent. In the circumstances, the parties shall bear their own costs."

5. The Tribunal, on consideration of the entire material on record, disposed of O.A. No. 1356 of 1997 (Smt. Ammini Rajan's case) with the following directions:-

(i) Impugned orders Annexure-A-1 and A-2 are quashed. The respondents are directed to determine the seniority between the direct recruits and promotees regularly appointed/promoted within their respective quota by counting the length of continuous officiation in the grade of ACSO from their respective appointment to the substantive vacancies within their quota in accordance with the Rule 16(7) of the AFHQ Rules and Schedule III of the Rules. In the case of promotees ACSO, the length of continuous officiation in the

grade will be determined from the date when they are promoted in substantive vacancies in their lawful quota. In case of direct recruits ACSO, their seniority shall be determined from the year in which they joined the service. While determining seniority, respondents are directed to adhere to the DPC year in case of promotee officer and to retain as 1st October to 30th of September of the following year as provided in the rules/ regulations.

- (ii) Respondents are further directed to prepare single Select List in a year for the ACSO grade and they cannot report to two separate lists for the purpose of merely identifying the Note (2) Schedule III vacancies as the rules do not envisage the same.
- (iii) Respondents are further directed that the vacancies of DR quota may be carried forward but while determining the seniority the slots of the vacancies left unfilled by the DR quota shall not be carried forward for the purpose of determining seniority.
- (iv) It is further directed that after finalizing the seniority list, the department shall prepare eligibility lists for the purpose of promotion to the next higher grade
- (v) These directions may be implemented within a period of 6 months from the date of receipt of a copy of this order. No costs”.

161. In regard to the submissions regarding distinction between the Hon'ble Supreme Court judgment in **AFHQ case** (supra) from the facts of the present case concerning RBSS, we are unable to accept the submissions and hold that the judgment of the Hon'ble Supreme Court in **AFHQ case** (supra) would be fully applicable, because if at all there was an issue that there was no LDCE prescription in AFHQ Service, that can only affect the quota of the accelerated promotions through LDCE, and regular promotions through seniority-cum-merit, and it would not affect the DR quota, as well as the rota-quota principle to be applied in between DPs and DRs, if it is possible. But that judgment of the Hon'ble Supreme Court would still have limited applicability in the instant case, because

the rota-quota had not broken down in AFHQ, while it has broken down here.

162. As regards the issue of unlimited carry forward of DR quota vacancies, we have already held it to be unconstitutional and irregular. In saying so, we are supported by the Hon'ble Apex Court's judgment in the case of **Pawan Pratap Singh & Ors.** (supra), Para-30 of which has been reproduced above, in para-147 of this order.

163. Even when the unfilled DR vacancies slots are carried forward (for the period of two years), since the RBSS Rules never expressly provided for retrospective grant of seniority even for two years from the date of occurrence of the vacancy, even this carry forward of DR vacancies for two years would not entitle the concerned incumbents for grant of any retrospective seniority, even for those two years, in view of Para-30 (iv) of the Supreme Court's judgment in **Pawan Pratap Singh & Ors.** (supra), Para-38 of the Supreme Court's judgment in **Uttaranchal Forest Rangers' Assn. (Direct Recruits) & Ors.** (supra), Para-12 of the Supreme Court's judgment in **State of Bihar & Ors v. Akhouri Sachidananda Nath & Ors** (supra), Para-28 of the Supreme Court's judgment in **State of Uttaranchal & Anr. v. Dinesh Kumar Sharma** (supra), and as per the law laid down in **Jagdish Ch. Patnaik & Ors. vs. State of Orissa & Ors.** (supra) in all of which it has been held that retrospective seniority cannot be given on the basis of any retrospective promotion from a date when an employee had not even been born in the cadre, so as to adversely affect all those incumbents who had been

appointed validly in the meantime, and it is not a requirement of maintenance of Rota-Quota Rule for antedated seniority to be assigned in any manner, in violation of the law of the land. Further, as we have held in this order, the Rota-Quota Rule had broken down in the case of RBSS due to non-recruitment of any DRs for as many as nine years.

164. As regards the issue concerning DoP&T's OM dated 28.03.1988, through which confirmation was made possible automatically from the date of availability of the permanent vacancy, and promotion and simultaneous substantive occupation of the post concerned became a one time affair in the service of an employee, this proposition cannot be accepted without some riders, in the light of the law as laid down by the Supreme Court in **Uttaranchal Forest Rangers' Assn. (Direct Recruits) & Ors.** (supra), in which it had been held that when promotions are made in excess of the quota, like had happened in the case of a few years in respect of the Select Lists of SOs under the quota of DPs in the instant cases, their seniority in the SOs' cadre would, however, be reckoned only from the date when any vacancy within the DP quota became available for their substantive appointment as SO against that vacancy, rendering their previous service as SO, by whatever name called, as only fortuitous. As was held by the Supreme Court in that case the previous promotion by virtue of inclusion in the Select List would thus be regular only from the date of the vacancy within the quota being available, and seniority shall be counted from that date, and not from the date of his earlier promotion, or inclusion in the select list, or even subsequent confirmation, if such confirmation order was issued without reference to

quota vacancy being available. The situation would not change even by applying the DoP&T OM dated 28.03.1988 in respect of the persons promoted and included in the select list for such promotions over and above the DP quota, in view of the law as laid down by the Hon'ble Supreme Court.

165. The Service Law or Administrative Law does not recognize the concept of any list other than notified and finalized Seniority List to be used for the purpose of accordin further promotions to higher posts. Therefore any "**integrated list**"/"**rolling list**", or any other list, by whatever name it was called by the Railway Board, cannot be claimed by the official respondents R-1 & R-2 to be a substitute to a finalized Seniority List. This would cover the cases of *ad-hoc* appointments made on the basis of the inclusion in the Select List.

166. There is no single universally acceptable concept of interpolation in Service Law or Administrative Law. As has been held by the Hon'ble Supreme Court in the case of **Central Provident Fund Commissioner vs. N. Ravindran** (supra), within the promotees, both the LDCE promotees and the promotees on the basis of seniority-cum-merit, have to be fixed within the DP quota only in the order of their relative seniority in the lower cadre, and a new DR can only come and occupy his post at a position lower than the last substantive appointee to that post, under either the DR quota, or the DP quota, whichever may be the case. Therefore, any interpolation by trying to give antedated seniority or seniority above the persons who are already in the saddle in the SOs

cadre is not permissible under law, and all such interpolations carried out by Railway Board in violation of the settled principles of law are declared to be illegal.

167. As regards the pleadings trying to make out a distinction between “**approved service**”, and “**regular service**”, it is clear that under law only the service rendered on the basis of substantive appointment can ever be called “**approved service**”, or “**regular service**”, and any previous service against the post, by whatever name it may be called *ad-hoc*, or temporary, or in-charge etc. would entitle the incumbents to the associated salary and allowances, but would still remain fortuitous, and as all such previous service in that Cadre/Grade outside or over and above the quota would always be fortuitous, as was held by the Hon’ble Supreme Court in Para-37 of **Uttaranchal Forest Rangers’ Assn. (Direct Recruits) & Ors.** (supra), nobody can claim any such fortuitous service as “**approved service**”, or “**regular service**”, for the purpose of antedating their seniority.

168. In regard to the ground taken that it has been held in a catena of cases that where the application of quota and rota results in assigning extremely high notional seniority to one group, as has been done by the Railway Board in the case of RBSS, this signifies the failure of rota-quota rule, and such assignment of ante-dated seniority is wrong, we are in agreement with this pleading. In the instant case, from the very fact that in respect of 9 years, as mentioned earlier, the DR candidates selected by the UPSC for RBSS, on the basis of indents placed by Railway

Board with UPSC, had not joined RBSS at all, since those selected persons did not join, it cannot be said that they had actually consumed the concerned vacancies of the DR quota, which could have been said even if such selected candidates had joined the RBSS as a DR candidate even for one day after such selection, when the DR quota post could have been held to have been consumed. However, the contention that just because the UPSC selected DR candidates did not join the RBSS in a particular year, the DR post concerned can be carried forward to the next year, and to the further next years, endlessly, thereby accruing an extremely high notional seniority to the very next UPSC selected DR candidate, who happens to join after his selection in UPSC, is not acceptable, and is held to be against the law as laid down in this regard. This clearly shows that the rota-quota had failed in the RBSS, as the basic principle of rota-quota is that the posts of the respective quotas should be filled year after year to the extent of availability of candidates, and then only the balance posts, if any, of the respective quota, can be carried forward, to a reasonable number of years.

169. No general instructions of DoP&T exist as to the repercussions and implications of the failure of the rota-quota system. Also, no judgment of the Supreme Court has so far prescribed any such implications and repercussions of the situations when rota quota system fails. The DoP&T Notification dated 29.12.1984, cited by the applicants of OA No.591/2009 in the grounds taken by them, stating that the unfilled vacancies of a particular quota should not be carried forward for more than two years, after which they would get automatically transferred to the other mode

(quota for recruitment), and that even during this period of up to two years, the Direct Recruit incumbents so appointed against the carried forward quota vacancies would still be placed at the bottom of the integrated seniority list for that year, had been issued only in the context of CSS, and was not a general instruction issued for the entire Govt. of India. But the RBSS was floated as a service modelled on the CSS only, and the principles enunciated in this Notification dated 29.12.1984 amending the CSS Rules being based upon a sound logical footing, it is hereby held that these very same principles will apply to the RBSS in particular, from the very inception of RBSS as an independent service, and would be read into the RBSS 1969 Rules. This principle deserves to be applied to all the service cadres under control of the Central Government, especially so since this DoP&T Notification had been issued in the wake of the Supreme Court's judgments in the cases of **A. Janardhana** (supra), **P.S. Mahal and Ors.** (supra), and **H.V. Pardasani** (supra). Therefore it is held that this prescription is all the more important to be applied to the RBSS in view of the fact that the RBSS RRs 1969 themselves did not provide anywhere for the carrying forward of unfilled vacancy of any quota, that too for an unlimited number of years, as had been wrongly and illegally done by the Railway Board.

170. When once the principle of limiting the carrying forward the vacancies of a quota to not more than two years is applied, beyond which period the quota of vacancies, if any still remaining unfilled belonging to one mode of recruitment shall be transferred to any other mode of

recruitment has to be followed, then the DPSOs of RBSS, who had been included in the select list for a particular year in excess of the DP quota for that year, would have to be automatically adjusted against such transferred additional vacancies from the DR quota mode of recruitment.

171. The totally illogical result which had been produced by the respondents by according seniority to DRSOs from the calendar year of the vacancy, which in one case was when he was actually only 5-6 years of age, was totally irrational and illegal, and is stuck down in particular. The same would apply to all other DRs who had been accorded antedated seniority also. As a result, while the un-filled DR quota vacancies can be carried forward for upto two years, seniority cannot be so carried forward.

172. The issue raised by the DR applicants of OA No.2981/2009 that persons included in the DP select list for SOs' grade, who were in excess, could have only occupied temporary vacancies, till they could get appointed against any substantive vacancies falling within the prescribed DPSO quota, has already been settled by the Hon'ble Supreme Court's judgment in the case of **Uttaranchal Forest Rangers' Assn. (Direct Recruits) & Ors.** (supra) and **State of Uttarakhand & Anr. v. Dinesh Kumar Sharma** (supra), as has been discussed above.

173. The DRSO applicants of OA No.2981/2009 had sought shelter behind Rule-10 of the RBSS Rules to try to explain that it takes care of the situations of under-utilization of "**Substantive Vacancies**" of SOs reserved for DR quota. However, it is seen that the Rule-10 of the RBSS

Rules itself clearly states that a “**Substantive Vacancy**” may be filled temporarily in accordance with the provisions governing appointments to temporary vacancies in the relevant Grade, until it is filled in accordance with the provisions governing substantive appointments. Since all direct recruits are only candidates till they are selected by the UPSC, and they are assigned to a particular Service, no DR quota vacancies can ever be filled by anybody temporarily at all, and all DR quota appointments are straightforward in substantive capacity, on the basis of the nominations sent by UPSC of the selected candidates concerned, and, therefore, the applicability of Rule-10 of RBSS, Rules, 1969, cannot at all be brought into the picture in the instant case to explain away under utilization of DR quota.

174. The points of law as submitted by the DP private respondents of OA No.2981/2009 based upon various judgments of the Hon'ble Supreme Court and of this Tribunal, which have been reproduced by us in Para-117 (supra), would obviously hold the field, and the law of the land as stated in those judgments is binding upon us, as well as the official respondents, who would have to follow those principles of law scrupulously.

175. It was submitted before us that Rule of Law is the basic structure of Constitution, and that rule of men is against the Rule of Law, and no public authority can be permitted to run a dispensation involving public servants in derogation of the Rules framed under Article 309 of the Constitution. In this context, it may be stated that even the Patna Bench

of this Tribunal has, in its order dated 03.05.2016 in OA No.050/00460/2015 **R.K. Kushwaha vs. Union of India & Ors.** adversely commented upon the tendency of the Railway Board not to follow the instructions issued by the Govt. of India, and has held in Para 2.7 of that judgment that the DoP&T Circular dated 22.12.1959 regarding fixation of *inter-se* seniority between DRs and DPs, along with its subsequent amendments, would fully apply, and that if any Ministry has to follow a separate rule, which is different from the principles laid down in that DoP&T OM dated 22.12.1959, and its subsequent clarifications, they have to make a reference to the DoP&T for making such deviations from such principles. We also agree with those observations of the Patna Bench.

176. It is further held that all DPs included in the select list of SOs during the particular year in excess of the DP quota for that year would certainly be *ad-hoc* or temporary appointees, but they can be regularized in the order of their seniority in the select list against the unfilled vacancies out of the quota of DRs when it gets transferred to the DP quota, after such vacancies having been carried forward for upto two years. The distinction or requirement of issuing a separate order of confirmation would not then be applicable in such cases, since the incumbents concerned would already be in fortuitous occupation of posts in the same Cadre and Grade.

177. The official respondents had relied upon the judgment in the case of **Union of India & Ors. vs. Alok Kumar & Ors.** (supra), and had

submitted that a practice adopted for a considerable time, which is not violative of the Constitution, or otherwise bad in law, or against public policy, can be held to be good in law as well. Rejecting this contention of theirs, it is held that the practice adopted by the Railway Board of carrying forward the DR quota vacancies endlessly, even up to 20 years, so much so that in the case of a DR appointee of 2003, he was assigned seniority of the year 1983, is totally absurd and illegal, and is violative of the Constitution, and bad in law, and against public policy, and, therefore, such practice, even though it may have been surreptitiously adopted by the Railway Board for a considerable length of time, without ever seeking even a clarification in this regard from the DoP&T, which is the nodal Department of Govt. of India for advising upon, and deciding such matters, cannot be termed to be good in law in terms of the aforesaid judgment of the Supreme Court.

178. The further contention raised by the official respondents was that as per the law laid down in **State of Jammu & Kashmir & Ors. vs. Javed Iqbal Balwan & Ors.** (supra) it is not in public interest to upset the settled position of seniority. But, since in the instant case the seniority position of SOs had never been settled through first a draft seniority list having been notified, calling for objections thereto, and thereafter the Railway Board having issued a finalized seniority list, and since the official respondents, belonging to the Attached Office Railway Board, had all along been working on the basis of a “**rolling list**”/“**integrated list**”, it cannot be accepted as a proposition that there

ever was a settled position of seniority of SOs which cannot be now upset through our Orders.

179. The official respondents had further sought shelter behind the Hon'ble Supreme Court's judgment in **P.S. Gopinathan vs. State of Kerala & Ors.** (supra), to state that one who sleeps over his rights is deemed to have waived the right, but in this case it is clear that the "**rolling list**"/"**integrated list**", which was being used by the official respondents, had never been made public, and it cannot be said that either the DPs, or the DRs, as a group, had knowledge of any infringement of their rights, and had acquiesced to the infringement of their rights in any manner whatsoever. Something which may have been in the knowledge of only a few among the officers working in the relevant positions of the Railway Board, cannot be stated to have been in the public realm and in the knowledge of either the DPs, or the DRs.

180. Lastly, but not the least, the Official Respondents never had any authority whatsoever to create posts in the rank equivalent to Joint Secretaries and Additional Secretaries of the Government of India, when even the RBSS Rules, themselves did not have any provision, whatsoever, for any such posts to exist and being available for occupation by RBSS Officers.

181. Under the law as laid down by the Hon'ble Apex Court in its order dated 16.02.2006 in Civil Appeal No. 8568 of 2002 **Union of India & Anr. vs. I.P. Awasthi & Ors.**, this Tribunal does not have the power to order only for prospective operation of its orders, which power is available

only to the Hon'ble Apex Court, and, therefore, all the above directions and determinations of the principles of law applicable in respect of these two cases covered by this Common Order would operate in the RBSS from the very inception of the RBSS as a separate service.

182. With these directions, these two connected OAs are disposed of, and the impugned Memorandum dated 22.12.2008 issued by the Secretary Railway Board, is set aside, and he is directed to issue fresh year-wise Seniority Lists of Section Officers from 1970 onwards, taking into account the above principles. The Respondent No.1 is, therefore, directed to re-cast the entire year-wise Seniority Lists of the RBSS at the level of Section Officers, from the very beginning of the RBSS as a Service, on the basis of principles as have been explained above, which may again be summarised as below:-

“i) The latin maxims *fiat justitia et pereat mundus* or *fiat justitia ruat caelum*, commonly ascribed to Ferdinand I, Holy Roman Emperor, and roughly meaning “**let there be justice, though the world perish**”, or “**let justice be done, though the heavens fall**” would apply, and, justice must be done, regardless of the result otherwise, and the law of the land shall be applied, and the plea of the official respondents that there would be chaos or mayhem, if the practice and system of assigning *inter-se* seniority of SOs as had been adopted by them is ordered to be changed is rejected outright. Let chaos and

mayhem prevail once, so that *inter-se* seniority of the respective sides are fixed in a legal manner, once and for all, and in future also.

- ii) Each and every person can claim seniority in the cadre of Section Officers only from the date of his substantive appointment in that cadre, irrespective of the year during which the vacancy which he came to substantively occupy had arisen earlier;
- iii) This proposition would apply to all categories of Section Officers, whether they were Direct Recruits nominated by UPSC, or Departmental Promotees, through any of the routes of (i) seniority-cum-merit-based promotion after 8 years' of continuous service, or (ii) accelerated promotion through LDCE route, after completion of 4 years' of service as Assistants, or (iii) through promotion of the Stenographers in respect of the two earmarked vacancies, which continued to be so earmarked till the promulgation of the RBSS Amendment Rules of 2004;
- iv) No weightage whatsoever can be, or shall be given to anybody in respect of any In-charge, or ad hoc, or officiating basis appointment as Section Officers, even if he had been included in the Select List of SOs by the DPC already, before his assuming charge as such, or had qualified for accelerated promotion being granted to him

through the LDCE route, before his assuming charge as such, until such a person comes to substantively occupy the post of SO either in the regular DP quota, or the DR quota transferred to the DP mode after having remained unfilled for two years.

v) The seniority in the cadre of Section Officers at level-3 of RBSS so determined, in the manner as indicated above, shall alone be taken into consideration of further promotions to level-2 and level-1 of RBSS thereafter.

vi) The Respondent No.1 shall, after finalization of the SOs' level Seniority List, convene DPCs or Review DPCs, for considering year-wise further promotions of all the incumbent SOs in that seniority list as Under Secretaries and Deputy Secretaries etc., and so on.

183. However, it is further made clear that after undertaking such proper promotions, if any individual is found to have already enjoyed higher emoluments fortuitously in the meanwhile, in view of his having been wrongly so promoted to the promotional posts concerned earlier than when it actually became due to him, as per law, and as per the Review DPCs etc., no recoveries in respect of the excess salary and emoluments, paid already to him in such promotional posts, due to erroneous promotions having been granted earlier to any individual incumbent, before they became due to such individual, no recoveries of

any amounts already disbursed due to the fault of the official respondents shall be effected.

184. There shall be no order as to costs.

(Dr. Brahm Avtar Agrawal)
Member (J)

(Sudhir Kumar)
Member (A)

cc.