Central Administrative Tribunal
Principal Bench, New Delhi

O.A No. 458/2013
O.A. No.3060/2014
T.A. No. 16/2015

Reserved: 28.04.2016
Pronounced on: 01.08.2016

Hon'ble Shri V Ajay Kumar, Member (J)
Hon'ble Dr. Birendra Kumar Sinha, Member (A)

OA No.458/2013

Amit Goyal s/o Shri Raj
R/o H.No.663-A, Ward No.17,
Kath Mandi Jind
Haryana-126102. .. Applicant

Versus

1. Union of India
through Secretary,
M/o Personnel, P.G. & Pensions
North Block, New Delhi.

2. Union Public Service Commission
Through Chairman
Dholpur House, Shahjahan Road
New Delhi-110003.

3. Secretary
Ministry of Railways
Railway Board, Rail Bhawan
New Delhi.

..Respondents

OA No.3060/2014

Anjay Tiwari
IRTS Probationer
Indian Railway Institute of Transport Management
Lucknow, S/o Shri Sita Ram Tiwari
R/o V-193, Mayur Vihar Colony
Shivapuram
Near Peace Home School Basaratpur East
Gorakhpur, (U.P.) Pin- 273004. .. Applicant

Versus

1. Union of India through Secretary,
M/o Personnel, P.G. & Pensions
North Block, New Delhi.

2. Union Public Service Commission
Through Chairman
Dholpur House, Shahjahan Road
New Delhi-110003.

..Respondents

TA No.16/2015

Lipin Raj M P
S/o Late Shri P K Pushparajan
R/o Murathickal (H)
Naranganam West P O
Pathanamthitta-6890642
(Kerala State) .. Applicant

Versus

Union of India, Rep. by the Secretary,
Ministry of Personnel, PG & Pensions
North Block, New Delhi.

..Respondent

Advocates for applicants:
Shri S.K. Rungta with Sh. Prashant Singh in OA No.3060/2014 & OA No.458/2013.
Shri Wills Mathew with Sh. Koshy Jacob in TA No.16/2015.

Advocates for respondents:
Shri Deepak Bhardwaj in OA No.3060/2014 for R-1
Shri Ravinder Aggarwal in OA No.3060/2014 for R-2.
Shri Naresh Kaushik in Ta No.16/2015 & OA No.458/2013 for R-2 UPSC.
Sh. R.K. Jain in TA No.16/2015 for DOP&T
Sh. S.N. Verma for DOP&T in OA No.458/2013
Ms. Bhaswati Anukampa for R-3 in OA No.458/2013 for Railways.

O R D E R

By Hon'ble Dr. B.K. Sinha, Member (A):

The above three cases involving a common issue arising from common cause of action and having carried a common set of arguments, they are decided by this common order. However, for the sake of convenience OA

No.458/2013-***Amit Goyal Vs. UOI and others*** has been adopted as the lead case.

The Grievance of the applicants

2. In the lead case (OA 458/2013), the applicant is aggrieved with the wrong allocation of service to the Indian Railways Accounts Service, Group 'A' on the basis of Civil Service Examination(CSE for short), 2011 while he claims that he was entitled to allocation to Indian Administrative Service or atleast Indian Foreign Service on the basis of his rank and the reserved vacancies for persons suffering with blindness or low vision.

3. In OA No.3060/2014, the applicant is aggrieved with the allocation of Railway Traffic Service in place of IRS(IT) or IRS(C&CE) on the basis of his rank in LDCP category.

4. In TA No.16/2015, the applicant is aggrieved with the non implementation of the decision dated 14.11.2014 in case No.837/1011/2014 passed by the Court of Chief Commissioner for persons with disabilities to consider and adjust Shri Aman Gupta against the open category in accordance with the provisions of para 7 of DOP&T O.M. No.36035/3/2004 Estt.(Res) dated 29.12.2005 and the applicant to be considered to an appropriate service/cadre

for the second reserved vacancy for persons with blindness and low vision.

The Prayer made by the applicants

5. The applicants have prayed for the following reliefs:-

OA458/2013	**OA 3060/14**	**TA 16/2015**
a) Allow this application; *b) Respondents may be directed to reconsider the allocation of service to the applicant and allocate him IAS or at least IFS instead of wrongly allocated Indian Railway Accounts Service either on the basis of his own merit or against one of the vacancies reserved for the blind by treating Shri Gagandeep Singh having been appointed and allocated IAS on his own general merit and not on the basis of reservation for persons suffering from blindness and low vision with all consequential benefits from the date of joining by the candidates allocated to IAS as a result of CSE 2011.* *c) That this Hon'ble Tribunal may further be pleased to direct the respondents to treat the foundation course done by the applicant so far towards the foundation course for IAS or IFS as the case may be.* *d) Grant any other relief which your lordship deem fit and proper in the circumstances of the case.*	a) Allow this application. b) Respondents may be directed to reconsider the allocation of service to the applicant and allocate him higher service including IRS(IT) or IRS (C&CE) instead of wrongly allocated Indian Railway Traffic Service against one of the vacancies reserved for the locomotor disabled by excluding all persons with disabilities selected on their own merit from computing all reserved vacancies for persons with disabilities and/or against the backlog vacancies against reservation for persons with locomoor disability with all consequential benefits from the date of joining by the candidates allocated to IRS (IT) or IRS (C&CE) as a result of CSE 2012 on the basis of his performance in CSE 2012. c) That this Hon'ble Tribunal may further be pleased to direct the respondents to treat the foundation course done by the applicant so far towards the foundation course for IRS (IT) or IRS (C&CE). d) Grant any other relief	"a) Allow the present petition and/or; b) Issue an appropriate Writ of Mandamus or any other Writ or order or direction directing the Respondents to implement the finding of the order dated 14.11.2014 in case No.837/1011/2014 passed by the Court of Chief Commissioner for persons with disabilities, New Delhi and/or; c) Issue an appropriate Writ of Mandamus or any other Writ or order or direction directing the Respondents to comply with and to implement the provisions of "The persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 within a stipulated time limit and/or;

e) Award the cost."	which your lordship deem fit and proper in the circumstances of the case. e) Award the cost."	

The Arguments advanced:

6. The case of the applicant in OA 458/2013 is that he is challenged with blindness and low vision and that he appeared for and was selected in the Civil Service Examination, 2011 having secured 778 rank in the list of 910 successful candidates including those provisionally selected. Of those selected, there were five candidates with such blindness or low vision whose results in CSE 2011 are tabularly represented as under:-

Sl. No.	**Name**	**Rank**	**Category**	**Medical deficiency**	**Service allocated**
1	*Shri Gagandeep*	25	General	VD	IAS
2	Sh. Ashish Bhargav	397	General	VD	IAS
3	Sh. Amit Goyal	778	General	VD	IRAS
4	Sh. Dilip Kumar Shukla	780	General	VD	IIA
5	Shri Senthil R	792	OBC	VD	IOFS

7. To substantiate his claim that his name should have figured in the main IAS list instead of IRAS, the applicant has principally used three limbed arguments during the course of the oral submissions in support of his claim which have been as listed below:-

(a)(i) The respondent No.2 issued an advertisement dated 19.02.2011 in respect of expected 880 vacancies. As per Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (referred hereinafter as the Disability Act 1995), persons suffering with physical disability were entitled to reservation of 3% posts divided equally amongst the three categories of persons suffering with visual/hearing/PH1 impairment i.e. (i) suffering with blindness or low vision (ii) Hearing impairment and; (iii) PH1 (LDCP) i.e. at 1% each. The total number of posts to be filled up being around 900, 1% thereof accounts for as many as 9 posts and thus, 9 persons suffering with blindness and low vision were entitled to be selected for appointment against 9 posts. Instead, only 5 persons were declared selected. This tantamounts to infringement of the rules.

(ii) Though 1% is the earmarked reservation, persons with such disability, as per provision 7 of the master OM dated 29.12.2005 of the Nodal Ministryall the successful physically disabled candidates competing in the general list, at their own merit, will be reckoned against the general candidate for appointment. The reserved vacancy is, thus, to be filled up separately

from the remaining eligible candidates with disabilities. Applying the said provisions, it would be seen that the first placed candidate i.e. Shri Gagandeep Singh (with the Rank 25) should have been treated as having been appointed on his own merit and should not have been reckoned against the 1% seats reserved for persons suffering with blindness and low vision. So is the case of Ashish Bhargav who had secured 397 rank and was, therefore, successful on his own general merit. Had these two been adjusted against the general category on their own respective merits, vacancies falling under the 1% quota for Visually Challenged would remain intact and nine persons under this category could be accommodated in these nine posts. In that case, the applicant having been the third in the list of visually challenged selected candidate with 778 rank shall be accommodated against the I.A.S. post.Instead, the department has erroneously adjusted Shri Gagandeep Singh and Shri Ashish Bhargav ranking 25 and 397 against the reserved quota for persons suffering with blindness or low vision.

(b) The second limb of the argument used by the applicant is that while the rank secured by the applicant is 778, one of the candidates, by name, Ms.

Bhagyashree Bhimraoji Banayat, securing 802 rank in the hearing impairment category, has been allocated IAS while the applicant has been allocated IRAS. Thus, the allocation made to the applicant vide the impugned communication letter dated 09.08.2012, militates against the fundamental principles of reservation for physical disabled persons.

(c) The third limb of the argument of the applicant is that no candidate suffering with blindness and low vision has been allocated Indian Foreign Service, Indian Railway Service etc. In the event of the applicant not being allotted IAS for justifiable reasons, he would have been allotted either Indian Foreign Service or Indian Railway Services had this anomaly not taken place.

8. In so far as OA No.3060/2014 is concerned, his case is that he is suffering with PH 1 (LDCP) and he competed in the CSE 2012 examination, in which a total of 1037 vacancies were notified, 1% whereof accounts for 11 vacancies to be allotted to the lot of candidates suffering with PH1 (LDCP). However, in all 998 candidates were selected of which 10 vacancies should have rightfully gone to the candidates with PH 1 (LDCP). Here again, the contention of the counsel for the applicant is that highly meritorious persons as in the case referred to above, were not adjusted against the merit

category. Other two limbs of arguments were also pressed into service by the counsel. In addition to adopting all the arguments advanced in OA No.458/2013. the learned senior counsel Shri S.K. Rungta has advanced yet another argument, which is the 4th limb of argument that the backlog vacancies have not been counted for whereas this Tribunal in OA No. 1893/2009 vide its order dated 08.10.2010 had categorically directed the respondents to compute the reserved vacancies and its backlog by excluding those candidateswith disabilities selected on their own merit. Thus, it is the case of the applicant that the action of the respondents in not allocating him higher service including IAS, IRS(IT) or IRS (C&CE) is contrary to the direction of this Tribunal in the aforementioned OA.

9. In TA No.16/2015 also the result of CSE 2012 is under challenge. The applicant in this case is a person suffering with blindness/low vision who had qualified in the examination with 224 rank in general category. The argument used by the applicant is the same as in other two cases as these cases have been commonly argued. However, learned counsel for the applicant submits that had the doctrine of exclusion of candidates selected in the general list, been applied to the case of one Aman Gupta who had secured 57th rank, and to himself, he would have been

allocated much higher service than the IRPS which he has got at present and which was 17thin the list of preference. The applicant has also alleged discrimination against him vis-a-vis one Shubham Singh ranked 930, who had been granted Indian Foreign Service despite having got a much lower rank. Here the applicant also admitted an error committed inadvertently by him due to visual impairment whereby he filled up IIS in place of Indian Foreign Service as his second option.

Contentions of the Respondents:

10. The respondents have filed counter affidavits in all the threecases. (in TA No.16/2015 the UPSC has not filed the reply having been deleted from the array of parties vide Tribunal's order dated 11.09.2015) The version of UPSC in the two cases is that under the Constitution, it is mandated to perform certain prescribed functions, and accordingly, it conducts Civil Services Examination for recruitment of IAS, IFS, IPS and other central services of group 'A' and 'B' categories by examination held in accordance with the Civil Service Examination Rules notified by the Govt. of India, Department of Personnel and Training. The selection process comprises (i) Civil Services (Preliminary) Examination (for selection of candidates for Civil Services (Main) Examination and (ii) Civil Services (Main) Examination, comprising written

examination and (iii) those qualifying in written examination are called for interview/personality test. The candidates are recommended in order of merit for appointment to various services in Group 'A' and 'B'.

11. First, the respondents have raised three preliminary objections, viz., limitation, resjudicata and non-joinder of necessary parties and submitted that it is only when the applicants could successfully cross the above legal impediments that the case has to be considered on merit.

12. In Explaining the seeming discrepancy between the number of vacancies notified and the number of vacancies recommended, the respondent no.2 i.e. UPSC explained in its counter affidavit filed in OA No.458/2013 that initially vacancies are notified on the basis of requisitions made by different Cadre Controlling Authorities. However, it would not be a fair proposition to make a simplistic calculation that the number of persons recommended should be exactly 1% of the total number of vacancies in each of the physically challenged categories. Reservation shall have to be keeping in view the feasibility of appointing such person to such services, where the efficiency in the Service is not hampered. There are many Services like IPS, IRPS and others which are to be necessarily exempted for reservation during the course of identification under Section 32. Therefore, the percentage

tally with arithmetical precision is not possible nor advisable. The vacancies are requisitioned to the Commission initially by various Cadre Controlling Authorities based on reservation rosters maintained by the respective Cadre Controlling Authorities. The number of reserved points are determined in terms of the roster point in the respective cadre in a particular year along with backlog of vacancies, if any. It has been further submitted by the UPSC that Section 33 provides for reservation of 3% in every establishment for the three physically challenged categories i.e. of blindness or low vision, hearing impairment, and locomotor disability or cerebral palsy.

13. Next, the UPSC stated that Section 33 provides for reservation of 3% in respect of every establishment. The term 'Establishment' has been defined under Section 2(k) of the Act, which reads as under:-

> "*Establishment" means a corporation established by or under a Central Provincial or State Act, or an authority or a body owned or controlled or aided by the government or a local authority or a government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government."*

In other words, the mandate of the provision is that the reservation of 3% as per the Act ought to be maintained in every department of the Government. Thus, the requirement of rules is not to reserve 3% posts in each advertisement but

as per roster being maintained in every department. Therefore, the vacancies pertaining to candidates under physically challenged categories may vary as they are notified by various Ministries depending upon the vacancies in each cadre/department whereas the vacancies notified in the Civil Services Examination are made upon requisitions by each participating Ministry/department to the UPSC.

14. Yet another limb of the argument adopted by the respondents is that Section 17 of the Civil Services Examination Rules, 2004,provides that "more than the number of vacancies reserved for them shall not be recommended by the Commission on the relaxed standards". The respondent-UPSC submits that this stipulation in the Act requires consequential amendments to be made by the DOP&T which, till date, has not taken place. In the absence of these rules duly amended, the respondent-UPSC is not in a position to make any recommendation for the exclusion of the candidates competing in general category as the reservation for the persons with disabilities, pertains to both horizontal and vertical.

15. In this regard, the UPSC submitted that an SLP No.19291/2014 has been filed, in this regard, before the Hon'ble Supreme Court and the same is pending consideration there. While admitting that there is no such

order granted as yet, the learned counsel for the respondents-UPSC is awaiting with sanguine hope for verdict which would go in their favour.

16. Respondent No.1 in OA No.458/2013 has also filed counter affidavit where it has referred to various rules governing the conduct of CSE. Rule 16 (1) of the Rules *ibid* deals with the process as to how the recommendation in respect of reserved categories is made. The Commission has been given the authority to relax the general qualifying standard with reference to number of reserved vacancies to be filled up in each of these categories. For the reserved category candidates belonging to SC/ST and other backward classes a special provision is there that such candidates if they have not been granted any concession and have been selected under the general category, they are not to be recommended against these vacancies reserved for SC/ST and other backward classes.

17. Section 16(4) deals with the process of computation of reservation. As a first step, the total number of recommended candidates are reduced by number of candidates belonging to SC/ST, OBC and other categories who have not availed of any concession or relaxation in the eligibility or selection criteria in terms of proviso to sub-rule (1). The respondent-UPSC also required to maintain a

reserve list which shall be the same as the list of reserved category candidates who have not availed of any concession. The allocation is made in the case that the candidates in the first list who have not availed of any concession are treated as a part of the general list then recommendation can be made from the reserved list as per the provisions of Rule 17.

18. Respondent No.1 has explained the modus operandi of allocation of services in vogue. According to them, after the declaration of the result, UPSC first finalises the list of successful candidates equal to the total number of vacancies to be filled up in the relevant CSE. Apart from taking into account the merit of the candidates, the preference expressed by them, their medical status and vacancy in the category of SC/ST and OBC and general category, further, PH status and general status are also declared by UPSC. The respondent No.1 further states that the role of the department is confined to allocation of service to the candidates declared successful and who have been selected by the UPSC. The service allocation in respect of PH candidates who qualify in general merit i.e. without availing any concession in PH category are selected through a software and the best preferred service is allocated.

19. Where a PH category general candidate is allocated category for his rank and preference, one vacancy in the PH

category remains unallocated which is carried forward to the next year advertisement. The respondents have stated that three candidates with rank 25, 397 and 778 were declared successful by the UPSC under VI category. It is stated that there were two vacancies in VI category for IAS for CSE 2011. Accordingly, rank 25 and rank 397 were allocated to IAS as per their high merit in the list. Hence, it is stated that the applicant Amit Goyal has rightly been allocated IRAS. In respect of OA No. 458/2013, with reference to an order under contempt jurisdiction in a case, the plea of *res-judicata* has also been raised.

20. In OA No.3060/2013, the respondent-UPSC in their counter affidavit has submitted that the orders, if implemented, are bound to adversely affect persons already selected and which have not been impleaded as parties. Therefore, the learned counsel for the respondents-UPSC prays that the case is fit to be dismissed for non joinder of parties. The respondents have also pleaded the ground of limitation as the allocation made during CSE 2012 is questioned by OA No.268/2014. The respondent-UPSC has submitted that there were 20 vacancies in PH 1 category against which 20 PH 1 category candidates have been recommended. In PH (2) (B/L Vision) and PH 3 (Hearing Impaired) there were 4 and 10 vacancies respectively, for

which 4 and 10 candidates respectively had been recommended. He also refers to Writ Petition No.4902/2013 filed by the DOP&T against order dated 30.05.2012 in OA No.3493/2011 filed by ***Pankaj Kumar Srivastava Vs. UOI and Others.*** While dismissing the same, vide order dated 11.10.2013 the Hon'ble High Court directed to bring about appropriate amendment in Rule 17 by the petitioner DOP&T within four months of the date of decision. The same is under challenge before the Hon'ble Supreme Court in SLP No.19291/2014. The respondent No.1 further pleads res-judicata on the ground that the department calculate the backlog vacancies as per the order dated 08.10.2010. The Tribunal has accepted the principle laid down by the department for allocation of service of PH candidates against backlog vacancies vide its order dated 10.04.2012, 26.04.2012, 18.05.2012 in CP No.105/2012 in OA No.2717/2011 filed by Ashish Singh Thakur, CP No.153/2012 in OA No. 2717/2010 filed by Ajit Kumar and CP No.197/2012 in OA No.1538/2009 respectively.

21. The simple but emphatic argument advanced by the respondent Union of India is that the UPSC did not recommend any candidate qualified on general merit or qualified without availing any relaxation available to PH candidates on the basis of CSE-2011. Therefore, question for

allocation of higher service does not arise at all to the applicant in OA No.3060/2014.

22. The respondent No.1-UPSC in TA No.16/2015 has filed counter affidavit stating *inter-alia* that the physical disability of the applicant found by the medical board at Safdarjung to be 30% and hence he was not qualified to be in the PH category. The Appellate Medical Board at RML confirmed the findings of the Safdarjung Hospital. The applicant filed another petition for reconsideration which was referred to the DGHS which finally declared him as PH candidate. Accordingly, the allocation of the service for the PH category was made in the following order:-

> *"On examination, he has visual acuity of PL negative right eye, 6/60 with no further improvement with PH, left eye. His BCVA is 6/24 with his own glasses (POG-6.0 DS) in left eye. He has NCT value of 9 mm, AL is 24.33 mm and Km 41.10 (164 degrees)/40.64 (74 degrees) in left eye. On Anterior segment evaluation cornea is normal, pupil 3 mm D +. On fundus evaluation of left eye, disc is normal, foveal reflex +, sharp. The diagnosis is Phthisis bulbi right eye and Refractive error wih? Ambylopia, Left eye. His visual disability is 40% only (Forty percent only)."*

23. The argument of the UPSC is that the contention of the applicant is that one Shri Amit Gupta, with his higher merit position ought to have been treated as one on merit and he should not have been treated as the one coming under the reserved category of physically challenged. This contention is rebutted as the Commission had not declared Shri Amit Gupta, as qualified without availing the relaxation available

to the reserved category candidates in which event alone he could be treated as one from the merit category. Again, Shri Amit Gupta has not bee impleaded as a party. Hence, the TA is likely to be dismissed for non joinder. Nor is this Tribunal the forum to enforce the order dated 14.11.2014 passed by the Chief Commissioner for Persons with Disabilities. The other arguments remained the same.

Analysis and discussion on merit of the cases:

24. We have considered the pleadings on record in respect of all the three cases along with such other documents as have been submitted, and have listened carefully to the oral submissions made by the learned counsels for both the parties. On the basis of the above, we find that instead of going into the individual merits of each case, it is more appropriate that the principles are first set at rest and the same telescoped upon each of the case to arrive at a just decision.

The core issues involved:

25. In this respect, we find the following issues germane to the dispute at hand:-

(1) Whether the cases are hit by limitation or res-judicata or non-joinder of parties?

(2) *Whether the contention of the respondents that the candidates have availed concessions in services of scribes tantamount to concession or otherwise?*

(3) *Whether the doctrine of exclusion of the candidates in general list is barred by SLP No.1929/2014?*

(4) *Whether the framing of rule for giving effect to doctrine of exclusion of candidates selected under the general list or reserved category under Rule 17 of the CSE 2011 and 2012 is a mandatory condition for implementation of the order?*

(5) *What relief, if any, can be granted to the applicants in the instant case?*

26. First as to the preliminary objections by the respondents as itemized as (1) above, as it is only when the applicants successfully meet the same, that the merit of the case may be looked into. As stated earlier, preliminary objections were raised with reference to limitation, principles of res-judicata and non-joinder of parties. Limitation aspect has been agitated on the ground that the selection relates to the period of 2010 and 11 and as such, the case of the applicants suffers from limitation. Again, since in one

C.P., certain orders on the subject have already been passed, the case suffers from the principles of *res-judicata* as well. As regards non joinder of parties, it has been argued that in case the OAs are allowed, the result would be that certain individuals moving from the reserved category to the general category, to that extent persons at the bottom of the list would have to be pushed down either to certain other services or would have to be declared as not selected. In that event, if any orders to that effect be passed, the same would amount to adverse orders passed behind the back of the persons concerned. As such, the OAs are bad for non joinder of parties.

Decision on Limitation:

27. In so far as the issue of limitation is concerned, considering the fact that the issue involves the rights of the disabled persons and alleged denial to them, we are of the considered opinion that it is a subject too important to be barred by technical aspect of limitation. By limitation, no party has acquired any statutory or other rights, in which event only normally limitation has to be reckoned with. Again, even if there be delay, it is marginal. Hence it is declared that the cases have not been hit by any such limitation.

On Res-judicata:

28. The other plea is that of *res judicata* which has been pleaded by respondent No.1 in the case of Amit Goyal in OA No.458/2013.. However, the basis of the plea is an order passed in contempt petition. We do not again accept this argument as no fresh order can be passed in contempt petition. It is filed only to punish the contemnor in the act of contempt proceedings. Hence, this plea becomes unsustainable for the simple reason that another contrary order could not have been passed on the same subject directly under issue. We notice that all the cases cited in CP No.105/2012 in OA No.2717/2011. The implementation of the order dated 08.10.2010 was under scanner. This Tribunal took the view that if the order has been to consider the case of the applicant for allocation to IAS and not for making allocation of IAS to the applicant , no other direction be given in contempt proceedings. For the sake of clarity, we reproduce from the relevant part of the order:-

> *"We have to consider whether there will be any wilful disobedience on the part of the respondents, and we are convinced that the respondents have fully complied with the direction of the Tribunal, and it cannot be said that there is wilful disobedience of the direction of the Tribunal. It may be possible that the applicant is not satisfied with the compliance, but we have to decide the contempt petition as per the law laid down by the Hon'ble Supreme Court in various judgments, and as we have stated, in view of the judgment of the J.S. Parihar, there is proper compliance of the order of the Tribunal."*

29. Likewise in the case of ***Ajit Kumar*** v **Professor*D P Aggarwal and another*** in CP No.153/2012 arising from OA No.2717/2010, this Tribunal had held, in view of the decision of the Hon'ble Supreme Court in the case of ***J S Parihar*** v **Ganpat Duggar & Ors.,** (1996) 6 SCC 291, that if in pursuance of the directions of the Tribunal/court the respondents pass an order whether it be right or wrong then it is to be presumed as an appropriate compliance. It is needless to mention that the CP was dropped. In case of ***Avnish Bansal*** v. **D P Aggarwal and Another** in CP No.197/2012 arising from OA No.1538/2009, the Tribunal took a similar view where the applicant was not able to take any of the three services as per his choice.

30. We note that contempt is only for non-compliance of the order [*Poonam Vs. State of U.P.*– MANU/SC/1240/2015] and as such it cannot be held to be *resjudicata*.

As to Non-joinder of Parties:

31. The respondents have raised, as one of the preliminary objections, the question of non joinder of parties. The respondent in TA 16/15 as also in OA 3060/2014 has contended in its reply as under:-

> *"11.3 The application under reply is bad and not tenable for the reason that in case the application, under reply, is allowed, the same would unsettle the settled administrative actions and the same is also likely to cause prejudice to the persons who have*

> *already been allocated the service claimed by the applicant, however, have not been impleaded as party in the present application and thus the application under reply is bad for non-joinder of party."*

There has been a denial to the above contention in the rejoinder filed by the applicants in OA No. 3060/2014 in the following manner:-

> *"8.1 That Para 8.q of the counter affidavit is wrong and hence denied. It is specifically denied that application is bad and not tenable for the reason that in case the application is allowed, the same would unsettle the settled administrative actions and the same is also likely to cause prejudice to the persons who have already been allocated the service claimed by the application, however, not been impleaded as a party in the present application and thus the application under reply is bad for non joinder of parties as alleged. "*

Though in the other TA, the aforesaid preliminary objection was raised, the applicants did not file any rejoinder to meet the said preliminary objections. Since the matter has been argued by the same counsel in these cases, the reply to the preliminary objection relating to non-joinder of parties as given in the said OA No. 3060/2014 is adopted with reference to the TA 16/15 as well.

32. With regard to this preliminary objection, we may first clarify that as a proposition of law it is not in dispute that natural justice is not an unruly horse. Its applicability has to be adjudged regard being had to the effect and impact of the order and the person who claims to be affected; and that is where the concept of necessary party becomes significant. In the instant cases, the applicants have asked for a larger

share of posts to be allotted on account of migration of the candidates selected at their own merit to the general list and their substitution by the persons remaining in the reserved categories for the physically disabled candidates. If a person in the reserved list for physically challenged candidates is included in the general list, some persons will have to move up and down in the allocation of service and there are bound to be changes which will also be far and wide. The entire matrix of selection may have to undergo a change. It is an axiomatically legal proposition that where the interest of party/parties stands to be adversely affected by any decision of the court, the principle of natural justice i.e. *audi alteram partem* springs up to be applied.

33. The issue of non-joinder thus arising from the consideration of the seminal right of the parties, first, it is necessary to understand the very concept of necessary and proper party.It is, indeed, advantageous, if the decisions in regard to non-joinder of the parties are first studied to discern the correct legal proposition on the subject.

34. A Four-Judge Bench in ***Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and Anr.***[AIR 1963 SC 786] has observed thus:

> *"7.....it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the*

> *principle.* ***A necessary party is one without whom no order can be made effectively****; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in this proceeding." (Emphasis supplied)*

35. In ***Vijay Kumar Kaul and Ors. v. Union of India and Ors.***[(2012) 7 SCC 610] the Court referred to the said decision and has opined thus:-

> *"36. Another aspect needs to be highlighted. Neither before the Tribunal nor before the High Court, Parveen Kumar and others were arrayed as parties. There is no dispute over the factum that they are senior to the Appellants and have been conferred the benefit of promotion to the higher posts.* ***In their absence, if any direction is issued for fixation of seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant****. (Emphasis supplied)*
>
> *37. In this context we may refer with profit to the decision in Indu Shekhar Singh v. State of U.P. (2006) 8 SCC 129 wherein it has been held thus: (SCC p. 151, para 56)*
>
> > *56. There is another aspect of the matter. The Appellants herein were not joined as parties in the writ petition filed by the Respondents. In their absence, the High Court could not have determined the question of inter se seniority."*

36. In **Public Service Commission v. Mamta Bisht**[(2010) 12 SCC 204 the Apex Court while dealing with the concept of necessary parties and the effect of non-impleadment of such a party in the matter when the selection process is assailed observed thus: (SCC pp. 207-08, paras 9-10)

> *"9. ... in Udit Narain Singh Malpaharia v. Board of Revenue [AIR 1965 SC 786], wherein the Court has explained the distinction between necessary party, proper party and proforma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural*

> *justice. More so, proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called 'Code of Civil Procedure') provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of Code of Civil Procedure are not applicable in writ jurisdiction by virtue of the provision of Section 141 Code of Civil Procedure but the principles enshrined therein are applicable. (Vide Gulabchand Chhotalal Parikh v. State of Gujarat [AIR 1965 SC 1153], Babubhai Muljibhai Patel v. Nandlal Khodidas Barot [(1974) 2 SCC 706] and Sarguja Transport Service v. STAT [(1987) 1 SCC 5].*
>
> *10. In Prabodh Verma v. State of U.P. [(1984) 4 SCC 251] and Tridip Kumar Dingal v. State of W.B. [(2009) 1 SCC 768],* ***it has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties."****(Emphasis supplied)*

37. At this juncture, it is necessary to state that in ***Udit Narain*** (supra) question arose whether a tribunal is a necessary party. Recently a two-Judge Bench in ***Asstt. G.M. State Bank of India v. Radhey Shyam Pandey***[2015 (3) SCALE 39] referred to ***Hari Vishnu Kamath v. Ahmad Ishaque and Ors.***[AIR 1955 SC 233] and adverted to the concept of a tribunal being a necessary partyand in that context ruled that:

> *"In* ***Hari Vishnu Kamath*** *(supra), the larger Bench was dealing with a case that arose from Election Tribunal which had ceased to exist and expressed the view how it is a proper party. In* ***Udit Narain Singh*** *(supra), the Court was really dwelling upon the controversy with regard to the impleadment of parties in whose favour orders had been passed and in that context observed that tribunal is a necessary party. In* ***Savitri Devi*** *(supra), the Court took exception to courts and tribunals being made parties. ……..Every adjudicating authority may be nomenclatured as a tribunal but the said authority(ies) are different that pure and simple adjudicating authorities and that is why they are called the authorities. An Income Tax Commissioner, whatever rank he may be holding, when he adjudicates, he has to be made a party, for he can defend his order. He is entitled to contest. There are many authorities under many a statute. Therefore, the proposition*

> *that can safely be culled out is that the authorities or the tribunals, who in law are entitled to defend the orders passed by them, are necessary parties and if they are not arrayed as parties, the writ petition can be treated to be not maintainable or the court may grant liberty to implead them as parties in exercise of its discretion. There are tribunals which are not at all required to defend their own order, and in that case such tribunals need not be arrayed as parties."*

The principle that has been culled out in the said case is that a tribunal or authority would only become a necessary party which is entitled in law to defend the order. But in the case of individuals, against whom an order is passed, necessarily he has to be given full opportunity as he is entitled to defend.

38. The term "***entitled to defend***" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of *audi alteram partem* has its own sanctity but the said principle of natural justice is not always put in strait jacket formula. That apart, a person or an authority must have a legal right or right in law to defend or assail.

39. Cases where necessary party need not be impleaded are generally exception to the general principle. In the judgment of ***The General Manager, South Central Railway, Secunderabad and Anr. v. A.V.R. Siddhantti and Ors.***[(1974) 4 SCC 335], the private Respondent therein

had approached the High Court under Article 226 of the Constitution for issue of a writ of mandamus directing the General Manager, South Central Railway and the Secretary, Railway Board to fix the inter se seniority as per the original proceedings, dated 16.10.1952, of the Railway Board and to further direct them not to give effect to the subsequent proceedings dated 2.11.1957 and 13.01.1961 of the Board issued by way of "modification" and 'clarification" of its earlier proceedings of 1952. The High Court accepted the contentions of the private Respondent and struck down the impugned proceedings. A contention was canvassed before the Apex Court that the writ Petitioners had not impleaded about 120 employees who were likely to be affected by the decision and, therefore, there being non-impleadment despite they being necessary parties, it was fatal to the decision. The Court first identified the point germane to the very issue and held that if the policy of the Government is under challenge, it would be as if the provisions of the Statute itself is under attack, i.e. validity of the provision in question, such a course, i.e. non impleadment of necessary parties may be permissible. The court held in that case as under:

> *"As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain*

> *Shop Departments. The Respondents-Petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of Government servant is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the Petitioners vis-à-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the re-adjustment of the Petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952, were, at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition."*

40. In ***State of Himachal Pradesh and Anr. v. Kailash Chand Mahajan and Ors.***[1992 Supp (2) SCC 251]a contention was raised that non-impleadment of the necessary party was fatal to the writ petition. In support of the said stand reliance was placed upon two decisions of two different High Courts; one, ***State of Kerala v. Miss Rafia Rahim***[AIR 1978 Ker 176] and the other in ***Padamraj v. State of Bihar***[AIR 1979 Pat 266]. The Court distinguished both the decisions by holding thus:

> *"The contention of Mr. Shanti Bhushan that the failure to implead Chauhan will be fatal to the writ petition does not seem to be correct. He relies on* ***State of Kerala v. Miss Rafia Rahim****. That case related to admission to medical college whereby invalidating the selection vitally affected those who had been selected already. Equally, the case Padamraj Samarendra v. State of Bihar, has no application. This was a case where the plea was founded in Article 14 and arbitrary selection. The selectees were vitally affected. The plea that the decision of the court in the absence of Chauhan would be violative of principle of natural justice as any adverse decision would affect him is not correct.*

> *The Court placed reliance on **A. Janardhana v. Union of India** [(1983) 3 SCC 601] and ultimately did not accept the submission that the writ petition was not maintainable because of non-impleadment of the necessary party."*

41. Again, in***Sadananda Halo and Ors. v. Momtaz Ali Sheikh and Ors.***[(2008) 4 SCC 619] the Apex Court had addressed the underlying reason for impleading the necessary candidates as parties. The Court referred to the principle of natural justice as enunciated in ***Canara Bank v. Debasis Das***[(2003) 4 SCC 557] and held as under:-

> *"Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.*
>
> *And again:*
>
> *Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognised by all civilised States is of supreme importance....*

42. We have referred to the aforesaid passages as they state the basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. The principle behind proviso to Order I Rule 9 that the Code of Civil Procedure enjoins it and the said principle is also applicable to the writs. An unsuccessful candidate challenging the selection as far as the service jurisprudence is concerned is bound to make the selected candidates parties.

43. In ***J.S. Yadav v. State of U.P. and Anr.***[(2011) 6 SCC 570] in Paragraph 31 it has been held thus:

> *"**No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice.** The principles enshrined in the proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the Petitioner-Plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a Plaintiff or a Defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the Petitioner-Plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the Petitioner without removing the person who filled up the post manned by the Petitioner-Plaintiff. (Vide Prabodh Verma v. State of U.P., Ishwar Singh v. Kuldip Singh, Tridip Kumar Dingal v. State of W.B., State of Assam v. Union of India and Public Service Commission v. Mamta Bisht). More so, the public exchequer cannot be*

burdened with the liability to pay the salary of two persons against one sanctioned post." (Emphasis supplied)

44. Authorities in this regard can be multiplied by referring to a catena of cases, such as **All India Railway Institute Employees Association through the General Secretary V/s. Union of India through the Chairman** [1990 (2) SCC 542], **Savita Garg (Smt.)V/s. Director, National Heart Institute**[2004 (8) SCC 56], **Premlala Nahata & Anr. Vs. Chandi Parshad Sikaria** [2007(2) SCC 551; ***Public Service Commission, Uttranchal v. Mamta Bisht and Ors.***[(2010) 12 SCC 204],]; ***Ranjan Kumar*** *v.* ***State of Bihar,*** Manu SC/0397/2014 decided on 16.04.2014 and a recently decided case of **Poonam vs State of UP & Ors.** [2016 (2) SCC 779],

45. Unlike in the case of General Manger, South Central Railway, Secunderabad vs A.V.R. Siddhanti (*supra),* this is not a case where the policy of the Government (Meritorious Reserved Candidate (MRC), would be treated only as General Category candidates) is under attack, and it is only its non-observance that has been under attack. As such, this Tribunal has necessarily to pass an order which would have direct and proximate impact on the selection of various other candidates. In such case, non joinder of parties becomes fatal to the case.

46. Acceding to the prayers of the applicant in all the three cases would mean large scale changes in the general list. We fully concur with the case of the respondents. The persons have joined, undergone training and are already ensconcedin their respective service in different states. Now, to order a change in these parameters would amount to causing a drastic change. Such matters shall be deemed to unsettle the settled matters. More than that, the fact that the parties who would be affected by the order of this Tribunal should the OA be allowed not being impleaded, non joinder of parties in this case is held as fatal to the very O.A.

47. In view of the fact that due to the above legal aspect, the OA is liable to be dismissed, there is no need to go into the merits of the case and accordingly all the O.As are dismissed.

(Dr. B. K. Sinha)
Member (A)

(V. Ajay Kumar)
Member(J)

'vb'