

# **Central Administrative Tribunal Principal Bench, New Delhi**

O.A.No.1194/2015

Reserved on 4<sup>th</sup> February 2016

Pronounced on 4<sup>th</sup> March 2016

**Hon'ble Mr. A.K. Bhardwaj, Member (J)  
Hon'ble Mr. Shekhar Agarwal, Member (A)**

Ms. Veena Kothavale,  
w/o Mohd. Iqbal Khairati,  
50 years  
(Additional Legislative Counsel)  
r/o L-12, Andrews Ganj Extension  
New Delhi-49

..Applicant  
(Mrs. Jyoti Singh, Senior Advocate (Col. R. Balasubramanian, Ms. Tinu  
Bajwa and Mr. Sameer Sharma, Advocates with her)

Versus

1. Union of India through the Secretary  
Legislative Department  
Ministry of Law & Justice  
Department of Legal Affairs  
Shastri Bhawan, New Delhi
2. Union of India through the Secretary  
Department of Legal Affairs  
Ministry of Law & Justice  
Department of Legal Affairs  
Shastri Bhawan, New Delhi
3. Union of India through the Secretary  
Ministry of Personnel, Public Grievances & Pensions  
Department of Personnel & Training  
North Block, New Delhi
4. The Union Public Service Commission  
Through its Secretary  
Dholpur House, New Delhi
5. Mr. Diwakar Singh  
Deputy Legislative Counsel  
c/o Legislative Department  
Ministry of Law and Justice  
(presently on deputation to  
Government of Seychelles)

6. Sudha Rani Relangi  
 Age 50 years  
 w/o Mr. L. Vijayendra Nath  
 r/o Quarter No.159  
 West Kidwai Nagar, New Delhi

(In terms of M.A. No.4004/2015 allowed on 17.12.2015)

..Respondents

(Mr. Gyanendra Singh, Advocate for respondent Nos. 1 to 3 –  
 Mr. R. N. Singh and Mr. Amit Sinha, Advocates for Mr. R.V. Sinha,  
 Advocate for respondent No.4 –  
 Mr. Sanjay Poddar, Senior Advocate (Ms. Sahila Lamba and Ms. Parni  
 Poddar, Advocates with him) for respondent No.5 –  
 Mr. Naresh Kaushik and Ms. Joymoti Mize, Advocates for respondent  
 No.6)

## ORDER

### **Mr. A.K. Bhardwaj:**

Indian Legal Service (ILS) was constituted in terms of ILS Rules 1957. There are four Grades in the Service and each Grade consists of duty posts specified in the First Schedule to the Rules. Both the applicant and respondent No.5 belong to ILS. The applicant herein, namely, Ms. Veena Kothavale, was appointed to the ILS w.e.f. 19.11.2003 whereas respondent No.4 was so appointed on 16.09.2003. There are total nine sanctioned posts in the grade of Deputy Legislative Counsel (DLC) (Grade III of ILS). Four vacancies in the grade occurred in the year 2007. As per ILS Rules, 1957, the duty post in Grade III of the Service is filled alternatively by direct recruitment and promotion from amongst the members of Service in Grade IV. Accordingly, two out of four vacancies were filled up by direct recruitment and remaining two by promotion. Process was initiated to fill up the posts in the year 2007. Against the vacancies in promotion quota, two officers, namely, Mr. Udaya Kumara and Mrs. Sudha Rani Relangi (respondent No.6 in terms of M.A. No.4004/2015) were promoted w.e.f. 11.07.2007. A requisition was sent to the Union Public Service Commission

(UPSC) on 12.07.2007 for making direct recruitment against the remaining two vacancies. The Interview Board constituted by the UPSC interviewed nineteen candidates for direct recruitment to the posts. Initially the applicant had not been called for interview, thus she had moved this Tribunal by filing O.A. No.2553/2008. When the arguments in the said Original Application was concluded and on 19.07.2010 the judgment was reserved, the applicant moved a miscellaneous application on 22.07.2010 seeking to withdraw the Original Application as not pressed, thus the O.A. No.2553/2008 was dismissed as withdrawn. The Order dated 28.07.2010 reads thus:-

“Arguments in this case were heard on 19.7.2010 when judgment was reserved. We had started preparing the judgment, but before it could be completed and pronounced, the applicant has filed an application on 22.7.2010 seeking to withdraw the Original Application as not pressed, and has prayed that the same may be dismissed as such. In tune with the prayer made by the applicant in the hand written application dated 22.7.2010, the OA is dismissed as not pressed.”

However, in the meantime, the applicant had been interviewed and her name was included at Sr. No.1 in the recommendations of the Interview Board. The second candidate included in the list was Sudhi Ranjan Mishra. The report of the Interview Board dated 01.12.2008 placed on record as Annexure R-2 to the rejoinder of the applicant reads thus:-

“File No.F.1/149(26)/2007-R.II  
Date(s) of Interview:27<sup>th</sup> & 28<sup>th</sup> Nov.2008

Report of the Interview Board constituted by the Union Public Service Commission convened to select candidate/candidates for the post/ posts two Deputy Legislative Counsel (Gr.III of ILS) in the Legislative Department, Ministry of Law and Justice.

2. The Commission considered 292 applications for the above post(s). It summoned for interview 24 candidates who were

considered *prima-facie* suitable. Of these candidates 19 were interviewed; the others failed to appear.

We recommend for appointment to the post(s), the name/names of the following 2 candidates in the order of merit:

Sl.No. Name of the Candidates(S/Shri/Ms) Cat Marks obtained

(i)	Veena Kothavale	(Cat.Gen/Roll No.107)	75
(ii)	Sudhi Ranjan Mishra	(Cat.Gen/Roll No.209)	72

The candidate(s) are in reserve for this/these post(s) as per list in the sealed cover placed below.

3. The following Advisor(s)/Expert(s) were present at the Interview and assisted us in our deliberations:

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4. Shri N.L. Meena, Addl. Secretary represented the Ministry only to apprise the Interview Board about the requirements of the post; service conditions, career prospects, possible places of posting etc. M.R. was not present during the interviews.”

As can be seen from the aforementioned recommendations, besides the main list, a reserved panel was also prepared.

2. The interview was held in the Commission on 27<sup>th</sup> and 28<sup>th</sup> November 2008, result was declared on 24.02.2010 and recommendation letter was issued on 04.03.2010. When the requisition for operation of reserved list was sent to the UPSC, the reserved panel was released by it on 29.01.2010.

Name of respondent No.5 was there in the said panel. He was appointed as DLC (Grade III of ILS) w.e.f. 07.10.2010 and before that, he had been promoted to the Grade w.e.f. 25.05.2009. In the seniority list of DLC (Grade I of ILS) dated 15.09.2011, the applicant was placed at Sr. No.6 and the name of respondent No.5 was at Sr. No.8 thereof. In the subsequent seniority list dated 07.03.2014 the applicant was again shown senior to respondent No.5. A proposal for convening Departmental Promotion

Committee (DPC) for promotion to the post of Additional Legislative Counsel (Grade II of ILS) in the Legislative Department was received in the Commission on 13.11.2014. After examination of the proposal, meeting of DPC was fixed on 17.02.2015. In the seniority list appended with the proposal, name of the applicant was below Mrs. Sudha Rani Relangi (private respondent No.6) and above Mr. Diwakar Singh (private respondent No.5). During the DPC meeting held on 17.02.2015, the Secretary, Legislative Department, one of the Members of the Committee brought to the notice of the Chairman of the DPC that the seniority list sent by the Department on the basis of which the DPC was being convened had undergone a change and a formal communication in this regard would be sent by the Department shortly. On account of the information, the meeting was deferred. Subsequently, vide letter dated 18.02.2015, the Department intimated that in pursuance to Department of Personnel & Training O.M. No.20011/1/2012-Estt.D dated 04.03.2014 regarding fixation of inter-se-seniority of promotees and direct recruits based on the judgment of Hon'ble Supreme Court in **Union of India & others v. N.R. Parmar & others** (2012) 13 SCC 340, the seniority list of Deputy Legislative Counsels had been revised and as per the revised seniority list name of applicant had been placed below respondent No.5. After such intimation, the Committee met on 02.03.2015, wherein the applicant along with private respondent No.5 was recommended for promotion in the extended panel. Since one of the officers, namely, Mrs. Sudha Rani Relangi (private respondent No.6) recommended in the main panel was on long term deputation with Ministry of Home Affairs, Mr. Diwakar Singh (private respondent No.5) was recommended for promotion. Thereafter the final seniority list of DLC

(Grade III of ILS) was revised and fresh list was issued on 27.02.2015. The applicant preferred representation against the said seniority list, which was rejected vide impugned order. In view of the change in the seniority position, the applicant filed the present Original Application wherein we passed the interim Order dated 01.04.2015, which reads thus:-

“Shri Amit Yadav, learned proxy counsel for Shri Ravinder Aggarwal, counsel for UPSC, seeks time to file counter reply, which prayer is allowed, as prayed for.

After hearing for some time the learned counsel for both sides on the point of interim relief, we direct that the promotions, which are being proposed to be made on the basis of the DPC held on February, 2015 will not be given effect to till the next date of hearing. The applicant is also directed to serve notice upon respondent no.5 in the meanwhile, positively before the next date of hearing.

List the case on 16.04.2015.”

3. According to Mrs. Jyoti Singh, learned senior counsel for applicant:
  - i) Once the process for promotion to DLC (Grade III of ILS) had been set in motion and the DPC met, the seniority list of DLC (Grade III) could not have been changed.
  - ii) Once even after the judgment of Hon'ble Supreme Court in **N.R. Parmar's** case (supra) the Department had issued seniority list dated 07.03.2014, there was no occasion for it to revise the same again, that too, in the middle of the process of promotion to the next higher post.
  - iii) Once the seniority of the applicant had been determined in accordance with Rule 11 (1) of Indian Legal Service (Amendment) Rules, 2008 and Rule 11 (2) thereof, which provides that the seniority

of an officer or incumbent is fixed on the date he/she enters the grade substantively, the same could not have been altered subsequently.

- iv) The seniority once settled in terms of the statutory rules should not be unsettled after long lapse of time as held by the Hon'ble Supreme Court in **D.P. Sharma v. Union of India**, 1989 Supp. (1) SCC 244.
- v) No circular or Office Memorandum or any office note can override the statutory Rules.
- vi) Nowhere in Department of Personnel & Training O.M. dated 04.03.2014, issued in terms of the decision of Hon'ble Supreme Court in **N.R. Parmar's** case (supra), it was ruled that settled seniority should be revised/unsettled.
- vii) The applicant herein is working on higher duty post, i.e., Additional Legislative Counsel on *ad hoc* basis w.e.f. 24.04.2014 while respondent No.5 is still working as DLC (Grade III of ILS).
- viii) In the interview held for DLC Grade III (direct recruitment), the applicant secured highest marks while respondent No.5 was at 4<sup>th</sup> position. Respondent No.5 joined at the post of DLC only on 07.10.2010 on account of non-joining of Sudhi Ranjan Mishra, who was selected for direct recruitment.
- ix) A candidate included in the reserved list cannot, on his appointment, claim same status regarding fixation of seniority as can be claimed by the select listed candidate.

- x) Nowhere in the case of **N.R. Parmar's** case (supra) Hon'ble Supreme Court directed to re-fix the inter-se-seniority list of direct recruits and promotees for the past period.
- xi) Mr. Sudhi Ranjan Mishra had sought some clarification regarding status of his seniority and had not requested for any extension of time and further the reserved panel could not have been operated after 18 months.
- xii) In terms of O.M. No.9/23/71-Estt. (D) dated 06.06.1978, the appointment of applicant from reserved list could not have created any right in her favour to claim seniority in similar fashion in which it could be claimed by a candidate included in the main list.

4. In the counter reply filed on behalf of respondent No.4, i.e., UPSC, the factual position is brought to the fore. In the short reply filed by it, the Government of India, Ministry of Home Affairs (Legislative Department) espoused that in view of the law declared by the Apex Court in the case of **N.R. Parmar** (supra), the Department of Personnel & Training vide its O.M. dated 04.03.2014 withdrew the O.M. No.20011/1/2006-Estt. (D) dated 03.03.2008 and provided certain guidelines for determining the inter-se-seniority of direct recruits and promotees, thus the seniority list in the grade of DLC Grade III had to be revised.

5. Mr. Sanjay Poddar, learned senior counsel appearing on behalf of respondent No.5 read out the judgment of Hon'ble Supreme Court in **N.R. Parmar's** case (supra) extensively and submitted that after the said judgment, the respondents had no option but to refix the seniority of his

client with reference to the date of sending the requisition for filling up the vacancies of DLC Grade III, i.e., the year 2007. To meet the plea of Mrs. Jyoti Singh, learned senior counsel for applicant regarding treatment of wait-listed and selected candidates for direct recruitment differently, Mr. Poddar relied upon the judgment of this Tribunal in **Narayana Rao Battu v. Union of India & another** (O.A. No.3594/2011) decided on 11.10.2013 and submitted that irrespective of their position in the selection/select list, once a candidate is selected for appointment against a post on direct recruitment, the seniority vis-a-vis promotee need to be dealt with in accordance with relevant rules and instructions in this regard.

6. Mr. Naresh Kaushik, learned counsel for respondent No.6 (M.A. No.4004/2015) submitted that there is squabble between the applicant and respondent No.5, thus the promotion of his client should not be adversely affected.

7. In the detailed reply filed by it, Ministry of Law reiterated its stand taken in the short reply.

8. We heard the learned counsels for the respective parties and perused the record.

9. As far as the plea put forth by the learned senior counsel for applicant regarding the change in seniority position of the applicant and respondent No.5 being within the teeth of seniority lists dated 15.09.2011 and 07.03.2014 is concerned, we are unable to appreciate the same. When the authorities, which issued the seniority lists dated 15.09.2011 and 07.03.2014 could follow the law declared by Hon'ble Supreme Court in

**N.R. Parmar's** case (supra) and revised the seniority list dated 07.03.2014, it cannot be said that change in seniority position is within the teeth of previous seniority lists itself. An action can be said to be within the teeth of another action when earlier action is by a superior authority and the subsequent action is by the lower or subordinate authority and is contrary to the action of the superior authority. It may be so that the seniority of the applicant, vis-a-vis respondent No.5 was determined on 15.05.2011 and 07.03.2014 in accordance with Rule 11 (1) of Indian Legal Service (Amendment) Rules, 2008 but as can be seen from Rule 11 (2) of the Amendment Rules, the seniority of the members of the Service in each Department should be determined in accordance with the general instructions issued by the Central Government in that behalf from time to time. The Rule 11 reads thus:-

“11. Seniority:- (1) A list of members of the service shall be maintained separately for Legislative Department and each of the three cadres in the Department of Legal Affairs as indicated in the 'First Schedule' to these rules, in the order of their seniority.

(2) The seniority of members of the service in each Department shall be determined in accordance with the general instructions issued by the Central Government in that behalf, from time to time.”

10. In O.M. No.9/11/55-RPS dated 22.12.1959, the Government of India, Ministry of Home Affairs issued ‘general principles for determination of seniority the in Central Services’. In paragraph 1 of the principles, it was specifically provided that the principle shall apply to the determination of seniority in Central Civil Services and Civil posts except such services and posts for which separate principles had already been issued or might be issued afterwards by Government. Ministries or Department, which had made separate rules or had issued instructions on the basis of instructions

contained in the Ministry of Home Affairs, O.M. No.30/44/48-Appts. dated 22.06.1949 were requested to consider modification of those rules or instructions on the basis of those general principles enunciated in the O.M. In the said principles, it was further provided that whenever it could be considered necessary to follow principles different from those laid down in the O.M., a specific reference should be made to the Ministry of Home Affairs, which should consult the UPSC and take a view thereafter. The 6<sup>th</sup> principle mentioned in Annexure to the O.M. dated 22.12.1959 provided for 'relative seniority of Direct Recruits and Promotees'. The principle reads thus:-

**“6. Relative seniority of Direct Recruits and Promotees.**

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

11. The said principle was revised in terms of O.M. No.35014/2/80- Estt. (D) dated 07.02.1986, which basically provided that if adequate number of direct recruits do not become available in any particular year, rotation of quota for the purpose of determining seniority should take place only to the extent of the available direct recruits and the promotes. In other words, in terms of the O.M. to the extent direct recruits are not available, the promotees should be bunched together at the bottom of the seniority list, below the last position upto which it was possible to determine seniority on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. Paragraph 3 of the O.M. dated reads thus:-

“3. This matter, which was also dismissed in the national Council has been engaging the attention of the Government for quite some time and it has been decided that in future, while the principle of rotation of quotas will still be followed for determining the inter-se seniority of direct recruits and promotees, the present practice of keeping vacant slots for being filled up by direct recruits of later years, thereby giving them unintended seniority over promotees who are already in position, would be dispensed with. Thus, if adequate number of direct recruits do not become available in any particular year, rotation of quotas for purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list, below the last position upto which it is possible to determine seniority on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter, in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promote (or direct recruit as the case may be) in the seniority list based on the rotation of vacancies for that year. The same principle holds good in determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent years.”

12. Subsequently, the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) issued O.M. No.22011/7/86-Estt. (D) dated 03.07.1986 consolidating important orders on the subject of fixation of seniority. In the said O.M., the issue of fixation of seniority of direct recruits and promotees had been dealt with in paragraphs 2.1 to 2.4.4. Paragraph 2.4.1 provided for fixation of relative seniority of direct recruits and promotees by rotation of vacancies between them on the basis of the quota of vacancies reserved for two methods. Paragraph 2.4.2 provided for rotation of quotas only to the extent of available direct recruits and the promotees. Paragraphs 2.3.2 provided for

maintenance of vacancy register giving a running account of the vacancies arising and being filled from year to year in the proforma enclosed with the O.M. It is paragraph 2.4.4, which is material and relevant to the controversy involved in the present Original Application, which provided that with a view to curbing any tendency of under reporting/ suppressing the vacancies to be notified to the concerned authorities for direct recruitment, the promotees would 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 failing to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as *ad hoc* promotees. The paragraph reads thus:-

**“2.4.4** 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 failing to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as *ad hoc* promotees.”

13. As can be seen from the provisions of paragraph 2.4.4 (*ibid*), its only ramification was that if in the year 2007 the vacancies for direct recruitment were not notified to the UPSC, the promotion of the applicant made in the year 2009 could not have been treated as regular and she could be treated only *ad hoc*. But since the vacancies to be filled up by way of direct recruitment had been notified in the year 2007, the promotion of the applicant in the year 2009 was to be treated as regular. The O.M. did not provide that the seniority of the direct recruit should be fixed with reference

to the date of notification of vacancies to the concerned agency for direct recruitment. After the said instructions, O.M. No.20011/1/2006- Estt.(D) dated 03.03.2008 was issued by the Government of India, Department of Personnel & Training. In the said O.M., after taking note of paragraphs 2.4.1 and 2.4.2 of the O.M. dated 03.07.1986 (ibid), the Department of Personnel & Training clarified that the year of availability, both in the case of direct recruits as well as promotees for the purpose of rotation of seniority and fixation of seniority, should be the actual year of appointment after declaration of results/selection and completion of pre-appointment formalities as prescribed in the O.M. The O.M. reads thus:-

“The undersigned is directed to refer to this Department’s consolidated instructions contained in O.M. No.22011/7/1/1986-Estt. (D) dated 3.7.1986 laying down the principles on determination of seniority of persons appointed to services/posts under the Central Government.

2. Para 2.4.1 and 2.4.2 of the O.M. dated 3.7.1986 contains the following provisions:-

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

2.4.2 If adequate number of direct recruits does not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees.

3. Some references have been received seeking clarifications regarding the term ‘available’ used the O.M. dated 7.2.86 and 3.7.1986. It is clarified that while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quotas of vacancies, the year of availability, both in the case of direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/selection and completion of pre-appointment formalities as prescribed. It is further clarified that when appointments against unfilled vacancies are made in subsequent year

or years either by direct recruitment or promotion, the persons so appointed shall not get seniority of any earlier year (viz. year of vacancy/panel or year in which recruitment process is initiated) but get the seniority of the year in which they are appointed on substantive basis. The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch of promotees joins the post/service.”

4. Cases of seniority already decided (prior to issue of this O.M. dated 3.3.2008), with reference to any other interpretation of the term ‘available’ as contained in O.M. dated 3.7.1986 need not be reopened.”

14. The direct recruits Income Tax Inspectors of the Income Tax Department felt aggrieved by the said O.M. and consequent ramification of the same on fixation of their seniority and approached the Ahmedabad Bench of the Tribunal by filing O.A. No.92/2003. Another O.A. No.123/2003 was filed by Mr. N.R. Parmar and others on the same subject. Both the Original Applications were decided by the Tribunal by a common Order dated 12.01.2004 and it was ruled that the seniority of direct recruits has to be treated with reference to the date of their actual appointment. The decision of the Ahmedabad Bench of the Tribunal dated 12.01.2004 was assailed before the Hon’ble High Court of Gujarat at Ahmedabad in **Union of India & others v. N.R. Parmar & others** (Special Civil Appeal No.3574/2004). The Hon’ble Gujarat High Court by its order dated 17.08.2004 upheld the Order passed by the Ahmedabad Bench of the Tribunal. The Union of India assailed the Order passed by the Hon’ble Gujarat High Court before the Hon’ble Supreme Court by Civil Appeal Nos.7514-7515 of 2005). Their Lordships of Hon’ble Supreme Court dealt with the issue at great length and after having taken note of all the Office Memoranda on the subject commented upon the O.M. dated 07.02.1986 in the following words:-

“Since the OM dated 7.2.1986 would primarily constitute the determination of the present controversy, it is considered just and appropriate to render an analysis thereof. The following conclusions are apparent to us, from a close examination of the OM dated 7.2.1986:

(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 22.11.1959), 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 22.11.1959 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 22.11.1959, without any scope of relaxation.

(b) The position expressed in the sub-paragraph (a) above, was sought to be modified by the OM dated 7.2.1986, by providing in paragraph 3 thereof, that the earlier “...principle of rotation of quotas would still be followed for determining the inter se seniority of direct recruits and promotees...” except when the direct recruit vacancies were being “... filled up by direct recruits of later years...”. Read in conjunction with paragraph 2 of the OM dated 7.2.1986, the words “...direct recruits of later years...” must be understood to mean, direct recruits who became available through “later” examination(s) or selection(s). Essentially the “later” examination(s) or selection(s) should be perceived as those conducted to fill up the carried forward vacancies, i.e., vacancies which could not be filled up, when the examination or selection for the concerned recruitment year was originally/ first conducted. This change it was clarified, was made to stop direct recruits of “later” years, from gaining “...unintended seniority over promotees who are already in position...”, as High Courts and the Supreme Court had “...brought out the

inappropriateness..." thereof. 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 22.11.1959. 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 22.11.1959, 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) Paragraph 3 of the OM dated 7.2.1986 provided, the manner of assigning seniority to vacancies carried forward on account of their having remained unfilled in the original/first examination or selection process. The change contemplated in the OM dated 7.2.1986, referred to hereinabove, was made absolutely unambiguous by expressing that, "The unfilled direct quota vacancies would ...be carried forwarded and added to the corresponding direct recruitment vacancies of the next year.....". It is therefore apparent, that seniority of carried forward vacancies would be determined with reference to vacancies of the recruitment year wherein their selection was made, i.e., for which the "later" examination or selection was conducted.

(e) The OM dated 7.2.1986 formulated the stratagem to be followed, where adequate number of vacancies in a recruitment year could not be filled up, through the examination or selection conducted therefor. The OM provided, "...to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list, below the last position upto which it is (was) possible to determine the seniority on the basis of rotation of quotas with reference to the actual number of direct recruits who become available...".

(f) Paragraph 3 of the OM dated 7.2.1986 further postulated, that the modification contemplated therein would be applied prospectively, and that, "...the present practice of keeping vacant slots for being filled up by direct recruits of later years, ...over promotees who are (were) already in position, would be dispensed with...". It is therefore apparent, that the slots assigned to a particular source of recruitment, would be relevant for determining inter se seniority between promotees and direct recruits, to the extent the vacancies could successfully be filled up (and the unfilled slots would be lost) only for vacancies which arose after the OM dated 7.2.1986, came to be issued.

(g) The illustration provided in paragraph 3 of the OM dated 7.2.1986 fully substantiates the analysis of the OM dated 7.2.1986 recorded in the foregoing sub-paragraphs. In fact, the conclusions drawn in the foregoing sub-paragraphs have been drawn, keeping in mind the explanatory illustration narrated in paragraph 3 of the OM dated 7.2.1986.

(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 22.11.1959 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 22.11.1959 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 22.11.1959.”

In the said judgment, their Lordships also commented upon paragraphs 2.4.1 to 2.4.4 of the O.M. dated 03.07.1986 (ibid), which we have reproduced hereinabove. From the said O.M., their Lordships could draw the following conclusions:-

“(a) If adequate number of direct recruits (or promotees) do not become available in any particular year, “rotation of quotas” for the purpose of determining seniority, would stop after the available direct recruits and promotees are assigned their slots for the concerned recruitment year.

(b) To the extent direct recruits were not available for the concerned recruitment year, the promotees would be bunched together at the bottom of the seniority list, below the last position upto which it was possible to determine seniority, on the basis of rotation of quotas. And vice versa.

(c) The unfilled direct recruitment quota vacancies for a recruitment year, would be carried forward to the corresponding direct recruitment vacancies of the next year (and to subsequent years, where necessary). And vice versa. In this behalf, it is necessary to understand two distinct phrases used in the OM dated 3.7.1986. Firstly, the phrase “in that year” which connotes the recruitment year for which specific vacancies are earmarked. And secondly, the phrase “in the subsequent year”, which connotes carried forward vacancies,

filled in addition to, vacancies earmarked for a subsequent recruitment year.

(d) The additional direct recruits selected, against the carried forward vacancies of the previous year, would be placed en-bloc below the last promotee. And vice versa.

It is, therefore, apparent, that the position expressed in the O.Ms. dated 7.2.1986 and 3.7.1986, on the subject of inter se seniority between direct recruits and promotees, was absolutely identical. This is indeed how it was intended, because the OM dated 3.7.1986 was only meant to “consolidate” existing governmental instructions, on the subject of seniority.”

15. As far as the aforementioned conclusions are concerned, the applicant herein is safe and the notification of direct recruitment vacancies in the year 2007 could not have made respondent No.5 senior to her. Nevertheless, in paragraph 22 of the judgment (supra) having taken note of the Office Note of Department of Personnel & Training, Establishment (D) Section dated 20.12.1999, their Lordships viewed that initiation of action for recruitment within the recruitment year would be sufficient to assign seniority to the concerned appointees in terms of the “rotation of quotas” principle. Paragraph 22 of the judgment, wherein the Office Note dated 20.12.1999 could be taken note of, reads thus:-

“22. Chronologically, it is necessary, at the present juncture to refer to an Office Note of the Department of Personnel and Training, Establishment (D) Section, dated 20.12.1999 (hereinafter referred to as, “the O.N. dated 20.12.1999”). Undoubtedly, an office note has no legal sanction, and as such, is not enforceable in law. Yet an office note is certainly relevant for determining the logic and process of reasoning which prevailed at the relevant point of time. These would aid in the interpretation of the binding office memoranda, only when the language of the office memoranda is ambiguous. Ofcourse, only where there is no conflict between the two i.e., the office note and the office memoranda sought to be interpreted. In the aforesaid background, and for the aforesaid limited purpose, reference is being made to the O.N. dated 20.12.1999. The same is being reproduced hereunder:-

“Department of Personnel and Training Estt.(D) Section  
Ref. Preceding notes.

It is not clear whether the instructions contained in our O.M. dated 07.02.1986 has been interpreted correctly. It is clarified that on a perusal of our O.M. dated 22.12.1959 read with our O.M. dated 07.02.1986 it will be clear that the inter-se seniority of direct recruits and promotees will have to be fixed by following the principle of rotation of quotas prescribed for them in the recruitment rules subject to the condition that the rotation as per quota will be made only upto the actual number of DRs/Promotees available and to the extent direct recruits/promotees do not become available in any recruitment year the promotees or the direct recruits as the case may be will be bunched together at the bottom of the seniority list. In other words, only where appointing authority has not been able to fill up the post inspite of best efforts with reference to the requisition for the particular recruitment year in question, the instructions contained in O.M. dated 07.02.1986 will come into operation as will be clear from para 5 thereof. For example, if the quota in the Rrs and DR and promotee is fifty-fifty and if the UPSC has recommended only 2 DRs against the three vacancies of a particular recruitment year, say 1987 for which requisition was sent to them in 1987 and even if both the DRs had joined in 1988 the inter-se seniority of DRs and promotees may be fixed in the ratio of 1:1 upto the number of DRs available i.e. the first four places in the seniority list will be assigned alternatively to DR and promotee, the 5th in the seniority list which would have normally gone to DR will not go to the promotee because of the non-availability of DR and the 6th will in any case go to promotee. But for the instructions contained in our O.M. dated 07.02.1986, the 5th place would have been kept reserved for the DR as and when it is actually filled by DR, even if it takes a few years. However, after the issue of our O.M. dated 07.02.1986, it is no longer kept vacant but is assigned to the promotee who is available. It is not necessary that the DR for 1987 vacancy should join in 1987 itself. It would suffice if action has been initiated for 1987 DR vacancies in 1987 itself. This is because, in a case of direct recruitment, if the administrative action in filling up the post by DR takes more than a year or so the individual cannot be held responsible for such administrative delay and hence it would not be appropriate to deprive him of his due seniority for delay on the part of administration in completing his selection by direct recruitment. In fact ordinarily the process of direct recruitment takes more than a year to be completed and if DR is to join in the same year for getting seniority of that year then no DR will get seniority of the same year because as already stated the DR process takes more than a year. Hence, as already stated initiation of action for recruitment is sufficient.

It is not clear whether our O.M. of 07.02.1986 has been interpreted correctly on the above line by the Deptt. of Revenue. Hence the above position may be suitably incorporated in the para-wise comments prepared by them and it may be modified accordingly. Subject to this, the parawise comments appear to be generally in order. It is however for the Department of Revenue to ensure the correctness of the factual position mentioned therein.

Deptt. of Revenue may please see.

Sd/-

(K. Muthu Kumar)

Under Secretary

3357/DIR E 1/99

2/012

Dir (E-1)

The clarification given above needs to be adhered to as we have been consistently advising on the aforesaid lines. Any other interpretation of the relevant instructions would be illogical.

Sd/-

DIR (E-1)

21.12.99"

(emphasis is ours)

The logic and the process of reasoning, emerging from the O.N. dated 20.12.1999, as they appear to us, are analysed below:-

(a) Only where the appointing authority has not been able to fill up the vacancies earmarked for direct recruits/promotees, with reference to the requisition for a particular recruitment year, inspite of its best efforts, the instructions contained in O.M. dated 7.2.1986 will come into operation.

(b) It is not necessary, that the direct recruits for vacancies of a particular recruitment year, should join within the recruitment year (during which the vacancies had arisen) itself. As such, the date of joining would not be a relevant factor for determining seniority of direct recruits. It would suffice if action has been initiated for direct recruit vacancies, within the recruitment year in which the vacancies had become available. This is so, because delay in administrative action, it was felt, could not deprive an individual of his due seniority. As such, initiation of action for recruitment within the recruitment year would be sufficient to assign seniority to the concerned appointees in terms of the "rotation of quotas" principle, so as to arrange them with other appointees (from the alternative source), for vacancies of the same recruitment year."

16. In the said paragraphs, Hon'ble Supreme Court specifically viewed that undoubtedly an Office Note has no legal sanction, and as such, is not enforceable in law. Yet an Office Note is certainly relevant for determining the logic and process of reasoning which prevailed at the relevant point of time. These would aid in the interpretation of the binding Office Memoranda, only when the language of the Office Memoranda is ambiguous. Following the Office Note dated 20.12.1999, the Department of Personnel & Training examined the issue in yet another Office Note dated 02.02.2000. In the said Note, the Department of Personnel & Training had specifically clarified that initiation of action for recruitment/ initiation of recruitment process would refer to the date of sending the requisition to the recruiting authority for a particular recruitment year. In the said Note, the recruitment year was specifically defined. Having taken note of the said Office Note, their Lordships concluded that the selected candidates will be entitled to the seniority with reference to the recruitment year (in which the vacancies have arisen). Paragraphs 23 and 24 of the judgment read thus:-

“23. Following the ON dated 20.12.1999, the Department of Personnel and Training, Establishment (D) Section, examined the issue in yet another Office Note dated 2.2.2000 (hereinafter referred to as “the ON dated 2.2.2000”). Just like the earlier ON dated 20.12.1999, the instant ON dated 2.2.2000 also has no legal sanction, and as such, is not enforceable in law. But just like the earlier office note, the instant ON dated 2.2.2000 would also be relevant in determining the logic and process of reasoning which prevailed at the relevant point of time. This would aid in the interpretation of binding office memoranda, only where the language is ambiguous, and only if there is no conflict between the two (the office note and the office memoranda, sought to be interpreted). In the aforesaid background, and for the aforesaid limited purpose, reference is also being made to the ON dated 2.2.2000. The same is being extracted hereunder:

“Department of Personnel & Training  
Estt. (D) Section

Notes from p.17/ante may please be seen with reference to our earlier note on Pp.9-10 ante.

With reference to 'X' on p.18 and 'Y' on p.19/ante, it will be clear from our note on Pp.9-10/ante that if action for the Recruitment Year 1986-1987 has been initiated at any time during that Recruitment Year even if the exam is held in 1988 and the results are declared in 1989 and the candidate join only in 1990, since the action for recruitment was initiated in 1986-1987 itself merely because the process of recruitment took so long for which the candidates cannot be blamed and since the responsibility for the delay in completing the process of recruitment squarely lies with the administration, it would not be appropriate to deprive the candidates of their due seniority of 1986-87. Consequently, if action was initiated during the Recruitment Year 1986-1987 even if it culminates in the joining by the selected candidates only in 1990, they will get seniority of 1986-1987. This applies equally to DRs as well as promotees. In other words, if such DRs of 1986-1987 ultimately join in 1990 yet they will be rotated with promotees of 1986-87.

As regards point (1) on page 19/N, it is clarified that "initiation of action for recruitment/initiation of recruitment process" would refer to the date of sending the requisition to the recruiting authority for a particular Recruitment Year in question.

Points (2) & (3) are the concern of Estt.(B).

As regards point (4), it is clarified that as already stated the concept of initiation of action for recruitment is applicable equally to direct recruits and promotees.

As regards point (5), it may be stated that even if DOPT is also one of the respondents, it is for the Administrative Ministry/Department who are concerned with the persons involved in the CAT court case to take necessary action on behalf of DOPT also. In any case, our comments are already contained in our earlier note as well as this note. It is for the Administrative Ministry/Department to incorporate them suitably in the counter reply. Hence, the counter reply on Pp.159-175/Cor. May be suitably modified in the light of our advice on Pp.9-10/ante as already advised at 'X' on p.10/ante and this note.

In future, the Department of Revenue, if they want our advice, refer such cases well in time (instead of making such reference at the eleventh hour) to enable us to consider the matter in its proper perspective without any time constraint.

Estt.(B) may please see for comments on points (2) and (3) on Pp.19-20/ante before the file is returned to Department of Revenue.

Sd/-  
(Under secretary)  
2.2.2000."

The logic and process of reasoning emerging from the ON dated 2.2.2000, as is apparent to us, is being analysed below:

(a) If the process of recruitment has been initiated during the recruitment year (in which the vacancies have arisen) itself, even if the examination for the said recruitment is held in a subsequent year, and the result is declared in a year later (than the one in which the examination was held), and the selected candidates joined in a further later year (than the one in which the result was declared), the selected candidates will be entitled to be assigned seniority, with reference to the recruitment year (in which the requisition of vacancies was made). The logic and reasoning for the aforesaid conclusion (expressed in the ON dated 2.2.2000) is, if the process of direct recruitment is initiated in the recruitment year itself, the selected candidate(s) cannot be blamed for the administrative delay, in completing the process of selection.

(b) The words "initiation of action for recruitment", and the words "initiation of recruitment process", were explained to mean, the date of sending the requisition to the recruiting authority.

24. Having examined the matter thus far, it is necessary to refer to the Ministry of Finance, Department of Revenue's, letter dated 11.5.2004 (hereinafter referred to as, "the letter dated 11.5.2004"). The aforesaid letter is being reproduced below:

"New Delhi, the 11th May, 2004  
To,  
The Chief Commissioner of Income Tax (CCA),  
CHANDIGARH

Subject: Fixation of inter-se seniority of DR and Promotee Income Tax Inspectors in view of clarification given by DOP&T in r/o OM dated 3.7.87 Sir, I am directed to refer to your letter F.No.CC/CHD/2003-04/935 dated 4.12.2003 on the above subject and to say that the matter has been examined in consultation with DOP&T and necessary clarification in the matter is given as under:

Point/querry raised	Clarification	
Whether direct recruit	'It is clarified by DOP&T	
inspectors should be given	that Direct Recruits'	
seniority of the year in	seniority vis-à-vis the	
which selection process	promotees is reckoned from	

initiated or vacancy occurred or otherwise	the year in which they are actually recruited. DRs cannot claim seniority of the year in which the vacancies had arisen. The question of grant of seniority to DRs of the period when they were not even in service does not arise.'
--	--

3. The representations may please be disposed off accordingly.

Yours faithfully,  
Sd/-  
Under Secretary to the Government of India"

A perusal of the letter dated 11.5.2004 reveals, that it adopts a position in clear conflict with the one expressed in the OMs dated 7.2.1986 and 3.7.1986, as well as, in the ONs dated 20.12.1999 and 2.2.2000. In the aforesaid letter dated 11.5.2004 it was sought to be "clarified", that the seniority of direct recruits vis-à-vis promotees, would be determined with reference to the year in which the direct recruits are appointed. And further, that direct recruits cannot claim seniority with reference to the year in which the vacancies against which they are appointed had arisen. In our considered view reliance on the letter dated 11.5.2004, for the determination of the present controversy, is liable to outright rejection. This is so because, the letter dated 11.5.2004 has been styled as a "clarification" (see heading in right hand column). One of the essential ingredients of a clarification is, that it "clarifies" an unclear, doubtful, inexplicit or ambiguous aspect of an instrument. A "clarification" cannot be in conflict with the instrument sought to be clarified. The letter dated 11.5.2004 breaches both the essential ingredients of a "clarification" referred to above. That apart, the letter dated 11.5.2004 is liable to be ignored in view of two subsequent letters of the Ministry of Finance, Department of Revenue dated 27.7.2004 and 8.9.2004. The letter dated 27.7.2004 is reproduced hereunder:

"New Delhi, the 27th July, 2004

To

Chief Commissioner of Income Tax (CCA)  
CHANDIGARH

Subject: Fixation of inter-se seniority of DR and Promotee Income tax Inspectors in view of clarification given by DOP&T in r/o OM dated 3.7.86.

Sir, I am directed to refer to Board's letter of even number dated 11.5.2004 on the above subject and to request that the

application of this clarification may be kept in abeyance till further orders.

Yours faithfully, Sd/-  
Under Secretary to the Government of India”

A perusal of the letter dated 27.7.2004 reveals, that the allegedly clarificatory letter dated 11.5.2004, had been kept in abeyance. The second letter dated 8.9.2004 (referred to above) is also being reproduced below:

“New Delhi, the 8th September, 2004  
To  
Al CCITs(CCA)

Sub: Fixation of inter se seniority between Direct Recruits (DR) and Promotee (PR) Inspectors of Income tax in various charges of the Income tax Department – regarding.

Sir, I am directed to say that a number of OAs/WPs are pending/under adjudication in the various benches of CAT and High Courts on the above subject. The Board has been taking a consistent stand in all those cases that the policy as laid down in Sanjeev Mahajan’s case (pertaining to CCIT, Delhi Charge), which was finalized in consultation with DOP&T and the Ministry of Law would prevail and that seniority of DRs would be reckoned with reference to date of initiation of recruitment process in their case.

2. Subsequently on a query raised by CCIT, Chandigarh on an issue relating to the treatment to be given to the promotee Inspectors, who would face reversion on account of refixation of seniority as per DOP&T/Ministry of Law’s advice, the Board issued a clarification vide letter of even number, dated 11.5.2004, which created an adverse situation before the Gujarat High Court in a related case. As such this clarification was held in abeyance vide letter dated 27.07.2004 till further orders.

3. The matter has been reexamined and it has been decided that the stand taken/finalized by the Board in the case of Sanjeev Mahajan would hold good in future also and all the cases on the issue would be handled/defended in the light of clarification submitted in that case.

4. All CCITs(CCA) are accordingly requested to take necessary action in the matter of fixation of seniority of DRs & Promotee Inspectors accordingly.

Yours faithfully,  
Sd/-

Under Secretary (V&L)”

A perusal of the letter dated 8.9.2004 reveals, that the clarification given in the letter dated 11.5.2004, would be ignored in favour of the position adopted in Sanjeev Mahajan's case, in consultation with the Department of Personnel and Training. It would be relevant to notice, that the position adopted in Sanjeev Mahajan's case, referred to in the letter dated 8.9.2004 was, that seniority of direct recruits would be reckoned with reference to the date of initiation of the process of recruitment in their case. In the aforesaid view of the matter, the letter dated 11.5.2004 is bound to be disregarded and excluded from consideration not only because it does not satisfy the legal parameters of a "clarification", but also because, it is deemed to have been superseded by the subsequent letters dated 27.7.2004 and 8.9.2004."

17. In the aforementioned backdrop, their Lordships noted O.M. dated 03.03.2008 in paragraph 25 of the judgment and ruled that being clarificatory in nature, which propounded the manner of determining the inter-se-seniority between the direct recruits and promotees conflicting with the original O.M. cannot be sustained. Paragraphs 25 to 30 of the judgment read thus:-

"25. Reference necessarily needs to be made to yet another office memorandum issued by the Government of India, Department of Personnel and Training, dated 3.3.2008 (hereafter referred to as, "the OM dated 3.3.2008"). In view of the emphatic reliance on the OM dated 3.3.2008, during the course of hearing, the same is reproduced hereunder, in its entirety:

"New Delhi, dated the 3rd March, 2008

OFFICE MEMORANDUM

Subject: Consolidated instructions on seniority contained in DOP&T O.M. No.22011/7/1986-Estt.(D) dated 3.7.1986 – Clarification regarding

The undersigned is directed to refer to this Department's consolidated instructions contained in O.M. No.22011/7/1986-Estt.(D) dated 3.7.1986 laying down the principles on determination of seniority of persons appointed to services/posts under the Central Government.

2. Para 2.4.1 and 2.4.2 of the O.M. dated 3.7.1986 contains the following provisions:

2.4.1 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 quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

2.4.2 If adequate number of direct recruits does not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of available direct recruits and the promotees.

3. Some references have been received seeking clarifications regarding the term 'available' used in the preceding para of the OM dated 3.7.1986. It is hereby clarified that while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quota of vacancies, the year of availability, both in the case of direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/selection and completion of pre-appointment formalities as prescribed. It is further clarified that when appointments against unfilled vacancies are made in subsequent year or years, either by direct recruitment or promotion, the persons so appointed shall not get seniority of any earlier year (viz. year of vacancy/panel or year in which recruitment process is initiated) but should get the seniority of the year in which they are appointed on substantive basis. The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch of promotees joins the post/service.

4. Cases of seniority already decided with reference to any other interpretation of the term 'available' as contained in O.M. dated 3.7.1986 need not be reopened.

5. Hindi version will follow.

Sd/-

Director (Estt.I)"

(emphasis is ours)

The following conclusions, in our view, can be drawn from the OM dated 3.3.2008:

(a) The OM dated 3.3.2008 is in the nature of a "clarification", to the earlier consolidated instructions on seniority, contained in the OM dated 3.7.1986 (referred to and analysed, in paragraph 21 above).

(b) The term “available” used in para 2.4.2 in the OM dated 3.7.1986 has been “clarified” to mean, both in case of direct recruits as well as promotees, for the purpose of fixation of seniority, would be the actual year of appointment “...after the declaration of the result/selection, i.e., after the conclusion of the selection process, and after the “...completion of the pre-appointment formalities...” (medical fitness, police verification, etc.).

(c) As per the OM dated 3.7.1986, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would “not” get seniority with reference to the year in which the vacancy arose, or the year in which the recruitment process was initiated, or the year in which the selection process was conducted.

(d) As per the OM dated 3.3.2008, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would get seniority of the year in which they are appointed “on substantive basis”.

26. Before examining the merits of the controversy on the basis of the OM dated 3.3.2008, it is necessary to examine one related submission advanced on behalf of the direct recruits. It was the contention of learned counsel, that the OM dated 3.3.2008 being an executive order issued by the Department of Personnel and Training, would apply only prospectively. In this behalf it was pointed out, that the disputed seniority between rival parties before this Court was based on the appointment to the cadre of Income Tax Inspectors, well before the OM dated 3.3.2008 was issued. As such, it was pointed out, that the same would not affect the merits of controversy before this Court. We have considered the instant submission. It is not possible for us to accept the aforesaid contention advanced at the hands of the learned counsel. If the OM dated 3.3.2008 was in the nature of an amendment, there may well have been merit in the submission. The OM dated 3.3.2008 is in the nature of a “clarification”. Essentially, a clarification does not introduce anything new, to the already existing position. A clarification, only explains the true purport of an existing instrument. As such, a clarification always relates back to the date of the instrument which is sought to be clarified. In so far as the instant aspect of the matter is concerned, reference may be made to the decision rendered by this Court in S.S. Garewal vs. State of Punjab, (1993) 3 Suppl. 234, wherein this Court had observed as under:

“8 .... In the alternative, it was urged that the order dated April 8, 1980 could only have prospective operation with effect from the date of issue of the said order and the sub-roster indicated by the said order could be given effect to only from that date and on that basis the first post reserved for Scheduled Castes should go to Balmikis or Mazhabi Sikhs and on that basis also respondent No. 3 was entitled to be placed against point No. 7

in the 100-point roster and Shri G.S. Samra against point No. 9 in the said roster.

9. From a perusal of the letter dated April 8, 1980, we find that it gives clarifications on certain doubts that had been created by some Departments in the matter of implementation of the instructions contained in the earlier letter dated May 5, 1975. Since the said letter dated April 8, 1980 is only clarificatory in nature, there is no question of its having an operation independent of the instructions contained in the letter dated May 5, 1975 and the clarifications contained in the letter dated April 8, 1980 have to be read as a part of the instructions contained in the earlier letter dated May 5, 1975. In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See: Craies on Statute Law, 7th Ed., p.58). It must, therefore, be held that all appointments against vacancies reserved for Scheduled Castes made after May 5, 1975 (after May 14, 1977 in so far as the Service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980. On that view, the appointment of Shri Balwant Rai in 1979 has to be treated to be an appointment made under the said instructions and operation of these instructions cannot be postponed till April 8, 1980....." In view of the above, it is not possible for us to accept that the OM dated 3.3.2008, would only apply prospectively. We are also satisfied, that the OM dated 3.3.2008 which is only a "clarification" of the earlier OM dated 3.7.1986, would relate back to the original instrument, namely, the OM dated 3.7.1986.

27. We shall now endeavour to examine the effect of OM dated 3.3.2008 on the subject of inter se seniority between direct recruits and promotees. Would the OM dated 3.3.2008 supersede the earlier OMs dated 7.2.1986 and/or 3.7.1986? And, would the OMs dated 7.2.1986 and 3.7.1986 negate the OM dated 3.3.2008, to the extent that the same is repugnant to the earlier OMs (dated 7.2.1986 and 3.7.1986)? In our view, what needs to be kept in mind while determining an answer to the aforesaid queries is, that the OM dated 7.2.1986 is in the nature of an amendment/modification. The Department of Personnel and Training consciously "amended" the earlier OM dated 22.11.1959, by the later OM dated 7.2.1986. The said amendment was consciously carried out, with the object of remedying the inappropriateness of direct recruits of later years becoming senior to promotees with long years of service. It is not the case of any of the parties before us, that the OM dated 7.2.1986, has ever been "amended" or "modified". It is therefore imperative to conclude, that the OM dated 7.2.1986 is binding for the determination of the issues

expressed therein, and that, the same has the force of law. The OM dated 3.7.1986 is in the nature of consolidatory instruction, whereby, all earlier instructions issued from time to time were compiled together. This is apparent, not only from the subject of the aforesaid OM dated 3.7.1986, but also, the contents of paragraph 1 thereof. Paragraph 1 of the OM dated 3.7.1986, is being reproduced hereunder:

“Dated 3.7.86

**OFFICE MEMORANDUM**

Subject: SENIORITY – consolidated orders on

The undersigned is directed to say that instructions have been issued by this Department from time to time laying down the principles for determining seniority of persons appointed to services and posts under the Central Government. For facility of reference, the important orders on the subject have been consolidated in this office memorandum. The number and date of the original communication has been quoted in the margin so that the users may refer to it to understand fully the context in which the order in question was issued.”

(emphasis is ours)

It is therefore clear, that the OM dated 3.3.2008 is neither in the nature of an “amendment” nor in the nature of a “modification”. Since the OM dated 3.3.2008, is a mere “consolidation” or compilation of earlier instructions on the subject of seniority, it is not prudent to draw any inferences therefrom which could not be drawn from the earlier instruction/office memoranda being “consolidated” or compiled therein, or which is contrary thereto.

28. It is relevant to notice, that there is a marginal note against paragraph 2.4.2 in the OM dated 3.7.1986. The aforesaid marginal note is being extracted hereunder:

“DOPT No.35014/2/80-Estt(D) dt.7.2.86”

Therefore, paragraph 2.4.2 must be deemed to have been recorded in the consolidating OM, on the basis of the OM dated 7.2.1986. The instant assertion has been made on account of it having been expressly mentioned in the opening paragraph of the OM dated 3.7.1986 (extracted above), that the number and date of the original communication has been quoted in the margin, so that the user may refer to it, to understand fully the context in which the order in question was issued. Therefore, for all intents and purposes the OM dated 3.3.2008 is with reference to the OM dated 7.2.1986. It is for this reason, that while debating the exact purport of the OM dated 3.3.2008, it has been our endeavour to examine the same, with

reference to the earlier OMs dated 7.2.1986 and 3.7.1986, which were *inter alia* “consolidated” in the OM dated 3.3.2008.

29. A perusal of the OM dated 3.3.2008, would reveal, that a reference to paragraphs 2.4.1 and 2.4.2 of the OM dated 3.7.1986, has been made therein. Thereupon, the meaning of the term “available” used in paragraph 2.4.2 of the OM dated 3.7.1986, is statedly “clarified”. In view of the conclusion drawn in the foregoing paragraph, the said clarification must be deemed to be with reference, not only to the OM dated 3.7.1986 but also the OM dated 7.2.1986. We have already noticed, in an earlier part of the instant judgment, the essential ingredients of a “clarification” are, that it seeks to explain an unclear, doubtful, inexplicit or ambiguous aspect of an instrument, which is sought to be clarified or resolved through the “clarification”. And that, it should not be in conflict with the instrument sought to be explained. It is in the aforesaid background, that we will examine the two queries posed in the preceding paragraph. We have already analysed the true purport of the OM dated 7.2.1986 (in paragraph 20 hereinabove). We have also recorded our conclusions with reference to the OM dated 3.7.1986 wherein we have duly taken into consideration the true purport of paragraph 2.4.2 contained in the OM dated 3.7.1986 (in paragraph 21 hereinabove). The aforesaid conclusions are not being repeated again for reasons of brevity. We have separately analysed the effect of the OM dated 3.3.2008 (in paragraph 26 of the instant judgment). It is not possible for us to conclude that the position expressed in the earlier office memoranda is unclear, doubtful, inexplicit or ambiguous. Certainly not on the subject sought to be clarified by the OM dated 3.3.2008. A comparison of the conclusions recorded in paragraph 20 (with reference to the OM dated 7.2.1986) and paragraph 21 (with reference to OM dated 3.7.1986) on the one hand, as against, the conclusions drawn in paragraph 26 (with reference to OM dated 3.3.2008) on the other, would lead to inevitable conclusion, that the OM dated 3.3.2008 clearly propounds, a manner of determining *inter se* seniority between direct recruits and promotees, by a method which is indisputably in conflict with the OMs dated 7.2.1986 and 3.7.1986. Of course, it was possible for the Department of Personnel and Training to “amend” or “modify” the earlier office memoranda, in the same manner as the OM dated 7.2.1986 had modified/amended the earlier OM dated 22.11.1959. A perusal of the OM dated 3.3.2008, however reveals, that it was not the intention of the Department of Personnel and Training to alter the manner of determining *inter se* seniority between promotees and direct recruits, as had been expressed in the OMs dated 7.2.1986 and 3.7.1986. The intention was only to “clarify” the earlier OM dated 3.7.1986 (which would implicitly include the OM dated 7.2.1986). The OM dated 3.3.2008 has clearly breached the parameters and the ingredients of a “clarification”. Therefore, for all intents and purposes the OM dated 3.3.2008, must be deemed to be non-est to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986. Having so concluded, it is natural to record, that as the position presently stands, the OMs dated 7.2.1986 and 3.7.1986

would have an overriding effect over the OM dated 3.3.2008 (to the extent of conflict between them). And the OM dated 3.3.2008 has to be ignored/omitted to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986. In the light of the conclusions recorded hereinabove, we are satisfied that the OM dated 3.3.2008 is not relevant for the determination of the present controversy.

30. Besides the interpretation of the relevant OMs issued by the DOPT, learned counsel representing the promotees placed reliance on some judgments of this Court in order to press their contention, that seniority for direct recruits could not be determined with reference to a date preceding the date of their recruitment. In so far as the instant aspect of the matter is concerned, reliance was placed on Jagdish Ch. Patnaik & Ors. v. State of Orissa and others, (1998) 4 SCC 456; Suraj Prakash Gupta & Ors. v. State of J&K & Anr., (2000) 7 SCC 561; and Pawan Pratap Singh & Ors. v. Reevan Singh & Ors., (2011) 3 SCC 267.”

18. Finally, the claim of the promotees that the direct recruit Income Tax Inspectors should be assigned seniority with reference to the date of their actual appointment in the Income Tax Department was nixed. Relevant paragraphs of the judgment read thus:-

“33. Having interpreted the effect of the OMs dated 7.2.1986 and 3.7.1986 (in paragraphs 20 and 21 hereinabove), we are satisfied, that not only the requisition but also the advertisement for direct recruitment was issued by the SSC in the recruitment year in which direct recruit vacancies had arisen. The said factual position, as confirmed by the rival parties, is common in all matters being collectively disposed of. In all these cases the advertised vacancies were filled up in the original/first examination/selection conducted for the same. None of the direct recruit Income Tax Inspectors herein can be stated to be occupying carried forward vacancies, or vacancies which came to be filled up by a “later” examination/selection process. The facts only reveal, that the examination and the selection process of direct recruits could not be completed within the recruitment year itself. For this, the modification/amendment in the manner of determining the inter-se seniority between the direct recruits and promotees, carried out through the OM dated 7.2.1986, and the compilation of the instructions pertaining to seniority in the OM dated 3.7.1986, leave no room for any doubt, that the “rotation of quotas” principle, would be fully applicable to the direct recruits in the present controversy. The direct recruits herein will therefore have to be interspersed with promotees of the same recruitment year.

34. In view of the above, the Civil Appeals, the Transferred Case, as well as, the Transfer Case (filed by the direct recruits and the Union of India) are hereby allowed. The claim of the promotees, that the direct recruit Income Tax Inspectors, in the instant case should be assigned seniority with reference to the date of their actual appointment in the Income Tax Department is declined.”

19. After the said judgment, the Government of India, Department of Personnel & Training issued O.M. 20011/1/2012-Estt. (D) dated 04.03.2014, which reads thus:-

**“OFFICE MEMORANDUM**

Subject: Inter se seniority of direct recruits and promotees - instructions thereof

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The undersigned is directed to refer to the subject mentioned above and to say that the fundamental principles of inter se seniority of direct recruits and promotees in Central Civil Services/posts were laid down in the Department of Personnel & Training (DOPT) O.M. No. 9/11/55-RPS dated 29.12.1959 which provided, inter alia, that 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 Recruitment Rules.

2. The carrying forward of unfilled slots of a vacancy year, for being filled up by direct recruits of later years, was dispensed with through modified instructions contained in DoPT O.M. No.35014/2/80-Estt.(D) dated 7.2.1986 which provides that rotation of quotas for purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. The unfilled direct recruitment/promotion quota vacancies would be carried forward and added to the corresponding direct recruitment/promotion quota vacancies of the next year (and to subsequent years where necessary) for taking action for the total number of direct recruitment/promotion according to the usual practice. Thereafter, in that year, while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees, as determined according to the quota for that year, the additional direct recruits/promotees selected against the carried forward vacancies of the previous year, would be placed en-bloc below the last promotee/direct recruit, as the case may be, in the seniority list, based on the rotation of vacancies for that year.

3. All the existing instructions on seniority were consolidated by DoPT through a single O.M. No. 22011/7/86-Estt(D) dated 03.07.1986.

4. In view of divergent stance taken by different Ministries/Departments on interpretation of 'available direct recruits and promotees' in the context of OM dated 7.2.86, the DoPT had issued O.M. No. 20011/1/2006-Estt.(D) dated 3.3.2008 which provided that the actual year of appointment, both in the case of direct recruits and promotees, would be reckoned as the year of availability for the purpose of rotation and fixation of inter se seniority.

5. The matter has been examined in pursuance of Hon'ble Supreme Court Judgment on 27.11.2012, in Civil Appeal No. 7514-7515/2005 in the case of N.R. Parmar vs. UoI & Ors in consultation with the Department of Legal Affairs and it has been decided, that the manner of determination of inter-se-seniority of direct recruits and promotes would be as under:

- a) DoPT OM No. 20011/1/2006-Estt.(D) dated 3.3.2008 is treated as non-existent/withdrawn ob initio;
- b) The rotation of quota based on the available direct recruits and promotees appointed against the vacancies of a Recruitment Year, as provided in DOPT O.M. dated 7.2.1986/3.07.1986, would continue to operate for determination of inter se seniority between direct recruits and promotees;
- c) The available direct recruits and promotees, for assignment of inter se seniority, would refer to the direct recruits and promotees who are appointed against the vacancies of a Recruitment Year;
- d) Recruitment Year would be the year of initiating the recruitment process against a vacancy year;
- e) Initiation of recruitment process against a vacancy year would be the date of sending of requisition for filling up of vacancies to the recruiting agency in the case of direct recruits; in the case of promotees the date on which a proposal, complete in all respects, is sent to UPSC/Chairman-DPC for convening of DPC to fill up the vacancies through promotion would be the relevant date.
- f) The initiation of recruitment process for any of the modes viz. direct recruitment or promotion would be deemed to be the initiation of recruitment process for the other mode as well;
- g) Carry forward of vacancies against direct recruitment or promotion quota would be determined from the appointments

made against the first attempt for filling up of the vacancies for a Recruitment Year;

h) The above principles for determination of inter se seniority of direct recruits and promotees would be effective from 27.11.2012, the date of Supreme Court Judgment in Civil Appeal No. 7514-7515/2005 in the case of N.R. Parmar Vs. Uo1 & Ors.

i) The cases of seniority already settled with reference to the applicable interpretation of the term availability, as contained in DoPT O.M. dated 7.2.86/3.7.86 may not be reopened.

7. As the conferment of seniority would be against the Recruitment Year in which the recruitment process is initiated for filling up of the vacancies, it is incumbent upon all administrative authorities to ensure that the recruitment process is initiated during the vacancy year itself. While requisition for filling up the vacancies for direct recruitment should be sent to the recruiting agency, complete in all respects, during the vacancy year itself, the timelines specified in the Model Calendar for DPCs contained in DoPT O.M. No.22011/9/98-Estt(D) dated 8.9.98 and the Consolidated Instructions on DPCs contained in O.M. No.22011/S/86-Estt(D) dated April 10, 1989 should be scrupulously adhered to, for filling up the vacancies against promotion quota.”

20. In the said O.M., the controversy regarding interpretation of recruitment year has been set at rest once and for all. Such interpretation is contained in clauses (e) to (f) of paragraph 5 of the O.M. It was also specifically provided in the said O.M. that the principle enunciated therein would be effective from 27.11.2012. If we go strictly by the interpretation of the O.M. and Rule 11 (1) of Indian Legal Service (Amendment) Rules, 2008, the direct recruitment and promotion of respondent No.5 and applicant being of a date prior to 27.11.2012 should not be reopened. However, once their Lordships of Hon'ble Supreme Court quashed the O.M. dated 03.03.2008 and interpreted the provisions of O.Ms. dated 07.02.1986 and 03.07.1986, in the absence of there being any view taken in the judgment itself that the interpretation will apply only prospectively and the past cases should not be reopened, the respondents cannot be found unjustified in

issuing the impugned seniority list in consonance with the view taken by their Lordships of Hon'ble Supreme Court. Rule 11 (ibid) relied upon by the applicant has to be read with instructions issued by the Government of India from time to time, as interpreted the Apex Court. The plea of the applicant that in revising her seniority already fixed the respondents have violated Rule 11 (ibid) cannot be countenanced.

21. It is not so that in following the instructions issued by the Central Government from time to time the respondents have violated Rule 11 (2) of Indian Legal Service (Amendment) Rules, 2008. In fact Rule 11 (ibid) itself provided that the seniority in the grades was to be fixed as per the instructions issued by the Government of India from time to time. No one, far less the respondents, can attach any interpretation to O.Ms. dated 07.02.1986 and 03.07.1986 different from which was given. It is true that in **N.R. Parmar's** case (supra), the Apex Court did not give any direction for revising or unsettling of seniority list previously settled but once in the said judgment their Lordships could quash the O.M. dated 03.03.2008 and interpret the O.Ms. dated 07.02.1986 and 03.07.1986, if any Department decides to act in consonance with the said judgment, it is not open for this Court to find fault with the same. Nevertheless in view of the law declared by Hon'ble Supreme Court in **B.S. Bajwa & another v. State of Punjab & others**, JT 1998 (1) SC 57 and O.M. dated 04.03.2014 (ibid) itself in such cases where the seniority had already been fixed on interpretation of O.Ms. dated 07.02.1986 and 03.07.1986, particularly prior to the year 03.03.2008, the seniority list should not be unsettled. In the said judgment, it could be ruled thus:

“6. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the judgments of the Single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of latches because the grievance made by B.S. Bajwa and B.D. Gupta only in 1984 which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the order aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B.S. Bajwa and B.D. Gupta and this position was known to B.S. Bajwa and B.D. Gupta right from the beginning as found by the Division Bench itself...”

22. One peculiar factual position involved in the present case is that in the direct recruitment process commenced in the year 2007 the applicant stood at the top of the list and respondent No.5 was at 4<sup>th</sup> position. Maybe the legal battle undertaken by the applicant was given-up by her in the year 2010 when she had been promoted as DLC (Grade III of ILS), but at that time she believed that in terms of O.M. dated 03.03.2008 her seniority would be fixed with reference to the date of actual promotion, thus she was not going to gain anything by pursuing her claim with direct recruitment. In the changed circumstances, when on account of her joining on the next higher post against promotion quota she is losing her seniority, she may workout her claim for adjustment on the post of DLC (Grade III of ILS) against direct recruitment quota. In any case, such request can be examined only by her employer in consultation with the UPSC with due regard to the pros and cons. The applicant has also espoused the plea that after 18 months the reserved panel had expired and the appointment of the applicant in itself is questionable. First of all, there is no prayer for quashing the appointment of respondent No.5. Secondly, as can be seen from paragraph 6.2 of the reply filed by the UPSC, the result of the

interview was declared on 24.02.2010 and the recommendation letter was issued on 04.03.2010 and thereafter the reserved panel was released on 21.09.2010. We are unable to understand that in what manner the panel was more than 18 months old as on the date of appointment of respondent No.5 as DLC (Grade III of ILS). Paragraph 6.2 of the reply reads thus:-

“6.2 It is also respectfully submitted that the interviews for the post of Deputy Legislative Counsel (Grade-II) of Indian Legal Service in the legislative Department, Ministry of Law and Justice against 02 vacancies of the year 2007 was held on 27<sup>th</sup> & 28<sup>th</sup> November, 2008 in the office of the Commission. The result was declared on 24.02.2010 and recommendation letter was issued on 4.3.2010 in view of pending OA NO.2553/2008 filed by Ms. Veena Kothavale before Hon’ble CAT, PB, New Delhi. The request for operation of Reserve list was received in the Commission vide Ministry’s letter dated 20.07.2010. As the decision to declare the result was taken only on 24.02.2010 and Recommendation letter was issued on 4.3.2010, the Reserve Panel released by the Commission on 21.09.2010 is valid.”

23. Learned senior counsel for applicant also contended with vehemence that the judgment of Hon’ble Supreme Court would apply prospectively. We are afraid that such stand cannot be accepted. It is *stare decisis* that once the Apex Court took a view and declared the law, the law so declared has to be treated in vogue for all times, including the past period unless their Lordships declared the effect of the same prospectively. In **Union of India & another v. Charanjit S. Gill & another** (2000) 5 SCC 742, their Lordships had specifically viewed that the judgments rendered by the court martial cannot be permitted to be reopened. Paragraph 26 of the judgment reads thus:-

“26. Fears have been expressed that in case the proceedings of the court-martial are quashed on the ground of the judge-advocate being lower in rank than the officer facing trial before the court-marital, many judgments delivered, orders passed and actions taken by various court-martials till date would be rendered illegal as according to appellants a number of court-martials have already been held and

conducted under the assumption of the disqualification not being referable to Rule 40(2), on the strength of Note 2 attached to Rule 102 of the Rules. In that event, it is apprehended, a flood-gate of new litigation would be opened which ultimately is likely to not only weaken the discipline in the Armed Forces but also result in great hardship to all those whose rights have already been determined. Such an apprehension is misplaced in view of "de facto doctrine" born out of necessity as acknowledged and approved by various pronouncements of the courts. This Court in Gokaraju Rangaraju vs. State of Andhra Pradesh [1981 (3) SCC 132] applying the de facto doctrine in a case where the appointment of a judge was found to be invalid, after reference to various judgments and the observations of the constitutional experts held:

"17. A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commended for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack.

18. We do not agree with the submission of the learned counsel that the de facto doctrine is subject to the limitation that the defect in the title of the judge to the office should not be one traceable to the violation of a constitutional provision. The contravention of a constitutional provision may invalidate an appointment but we are not concerned with that. We are concerned with the effect of the invalidation upon the acts done by the judge whose appointment has been invalidated. The de facto doctrine saves such acts. The de facto doctrine is not a stranger to the Constitution or to the Parliament and the Legislatures of the States. Article 71(2) of the Constitution provides that acts done by the President or Vice-President of India in the exercise and performance of the powers and duties

of his office shall not be invalidated by reason of the election of a person as President or Vice-President being declared void. So also Section 107(2) of the Representation of the People Act, 1951 (43 of 1951) provides that acts and proceedings in which a person has participated as a member of Parliament or a member of the legislature of a State shall not be invalidated by reason of the election of such person being declared to be void. There are innumerable other Parliamentary and State legislative enactments which are replete with such provisions. The twentieth amendment of the Constitution is an instance where the *de facto* doctrine was applied by the constituent body to remove any suspicion or taint of illegality or invalidity that may be argued to have attached itself to judgments, decrees, sentences or orders passed or made by certain District Judges appointed before 1966, otherwise than in accordance with the provision of Article 233 and Article 235 of the Constitution. The twentieth amendment was the consequence of the decision of the Supreme Court in *Chandra Mohan v. State of U.P.* [1967 (1) SCR 77], that appointments of District Judges made otherwise than in accordance with the provisions of Article 233 and 235 were invalid. As such appointments had been made in many States, in order to pre-empt mushroom litigation springing up all over the country, it was apparently though desirable that the precise position should be stated by the constituent body by amending the Constitution. Shri Phadke, learned counsel for the appellants, argued that the constituent body could not be imputed with the intention of making superfluous amendments to the Constitution. Shri Phadke invited us to say that it was a necessary inference from the twentieth amendment of the Constitution that, but for the amendment, the judgments, decrees, etc. of the District Judges appointed otherwise than in accordance with the provisions of Article 233 would be void. We do not think that the inference suggested by Shri Phadke is a necessary inference. It is true that as a general rule the Parliament may be presumed not to make superfluous legislation. The presumption is not a strong presumption and statutes are full of provisions introduced because *abundans cautela non nocet* (there is no harm in being cautious). When judicial pronouncements have already declared the law on the subject, the statutory reiteration of the law with reference to particular case does not lead to the necessary inference that the law declared by the judicial pronouncements was not thought to apply to the particular cases but may also lead to the inference that the statute-making body was mindful of the real state of the law but was acting under the influence of excessive caution and so to silence the voices of doubting Thomases by declaring the law declared by judicial pronouncements to be applicable also to the particular cases. In *Chandra Mohan* case this Court had held that appointments of District Judges made otherwise than in accordance with Article 233 of the Constitution were invalid. Such appointments had been made in Uttar Pradesh and a few other States. Doubts had been cast upon the validity of the

judgments, decrees etc. pronounced by those District Judges and large litigation had cropped up. It was to clear those doubts and not to alter the law that the twentieth amendment of the Constitution was made. This is clear from the statements of Objects and Reasons appended to the Bill which was passed as Constitution (20th Amendment) Act, 1966. The statement said:

"Amendments of District Judges in Uttar Pradesh and a few other States have been rendered invalid and illegal by a recent judgment of the Supreme Court on the ground that such appointments were not made in accordance with the provisions of Article 233 of the Constitution... As a result of these judgments, a serious situation has arisen because doubt has been thrown on the validity of the judgements, decrees, orders and sentences passed or made by these District Judges and a number of writ petitions and other cases have already been filed challenging their validity. The functioning of the District Courts in Uttar Pradesh has practically come to a standstill. It is, therefore, urgently necessary to validate the judgments, decrees, orders and sentences passed or made heretofore by all such District Judges in those States....".

This position of law was again reiterated in State of U.P. vs. Rafiquddin [1988 (1) SLR 491=1987 Supp. SCC 401] wherein it was held:

"We have recorded findings that 21 unplaced candidates of 1970 examination were appointed to the service illegally in breach of the Rules. We would, however, like to add that even though their appointment was not in accordance with the law but the judgment, and orders passed by them are not rendered invalid. The unplaced candidate are not usurpers of office, they were appointed by the competent authority to the posts of munsifs with the concurrence of the High Court, though they had not been found suitable for appointment according to the norms fixed by the Public Service Commission. They have been working in the judicial service during all these years and some of them have been promoted also and they have performed their functions and duties as de facto judicial officers. "A person who is ineligible to judgeship, but who has nevertheless been duly appointed and who exercise the powers and duties of the office of a de facto judge, he acts validly until he is properly removed." Judgment and orders of a de factor judge cannot be challenged on the ground of his ineligibility for appointment."

Such view in respect of its judgment can be taken by the Apex Court only and it is not open for this Tribunal to say that the judgment of Hon'ble Supreme Court would apply prospectively.

24. As far as plea of Mrs. Jyoti Singh, learned senior counsel for applicant regarding change of seniority list during process of promotion is concerned, once in terms of G.I., Department of Personnel & Training, O.M. No.22013/1/97-Estt. (D) dated 13.04.1998, where the seniority of a person is revised with retrospective effect resulting in a variance of the seniority list placed before the DPC, it may be necessary to convene review DPCs to rectify certain unintentional mistakes, there cannot be any infirmity in the act of the respondents in deferring a meeting of DPC to make promotion on the basis of the seniority list being revised during the process of promotion.

Paragraph 18.1 of the instructions reads thus:-

“18.1 The proceedings of any DPC may be reviewed only if the DPC has not taken all material facts into consideration or if material facts have not been brought to the notice of the DPC or if there have been grave errors in the procedure followed by the DPC. Thus, it may be necessary to convene Review DPCs to rectify certain unintentional mistakes, e.g. –

- (a) where eligible persons were omitted to be considered; or
- (b) where ineligible persons were considered by mistake; or
- (c) where the seniority of a person is revised with retrospective effect resulting in a variance of the seniority list placed before the DPC; or
- (d) where some procedural irregularity was committed by a DPC; or
- (e) where adverse remarks in the CRs were toned down or expunged after the DPC had considered the case of the officer”.

25. Learned senior counsel for applicant also argued that such direct recruitment who come from waiting list cannot be compared with those,

who come from wait list while the benefit of judgment in **N.R. Parmar's** case (supra) is extended. The issue could be dealt with by this Tribunal in the case of **Narayana Rao Battu** (supra), in which it could be ruled thus:-

“2. The brief facts of the case are that in the recruitment year 2002-03, there were 2 vacancies for the post of DLCs, i.e., 1 under direct recruitment quota and other under the promotion quota. For recruitment of the Direct Recruit quota candidate, the UPSC issued advertisement on 26.04.2003. From amongst the candidates applied for the aforesaid post, the UPSC, on 25.09.2003, recommended one Shri Ashok G. Pawade for appointment and he accordingly joined the said post on 19.08.2000. However, the vacancy earmarked under the Promotion Quota could not be filled due to non-availability of eligible candidates. Later on, one Shri N.K. Ambastha was promoted as DLC against the aforesaid carried forward vacancy of 2003-04. The Private Respondent No.2, Shri Saji Kumar, Assistant Legislative Counsel ('ALC' for short), was also promoted as DLC against the Direct Recruit vacancy for the year 2003-04 converted into the promotee quota vacancy. Shri Ashok G. Pawade, later on resigned from the post on 09.11.2004 and the Ist Respondent, vide its letter dated 16.11.2004, informed the aforesaid position to the UPSC and requested them to provide a substitute in his place from the reserved list of candidates. Thereafter, the UPSC informed the Applicant, vide their letter dated 27.12.2004, that the Commission found it possible to recommend his name to the Secretary, Ministry of Law and Justice for appointment to the aforesaid post on the basis of his interview held on 25.09.2003. Further, the UPSC informed him that the offer of appointment will be made to him only after the Respondent No.1 is satisfied themselves after such enquiry, as may be considered necessary that he is suitable in all respects for appointment to the service and he has good mental and bodily health and also subject to such other conditions prescribed by the Government. The Applicant accepted the aforesaid offer and joined the Respondent No.1 as DLC on 25.02.2005.

xx                    xx                    xx                    xx

19. Admitted position in this case is that Shri Ashok G. Pawade and the Applicant have applied for the sole post of DLC under DR quota which has arisen during the recruitment year 2002-03 and after interviewing them on 25.09.2003, the UPSC prepared the panel of selected candidates in which the former was at Sl.No.1 and the latter at Sl.No.2. On his recommendation by the UPSC, Shri Pawade joined as DLE on 19.08.2010 and worked for less than three months and resigned from that post on 09.11.2011. The executive instructions to be followed in such a situation by the Ministries/Departments has been prescribed by the DOP&T in their OM dated 13.06.2000 (supra). According to the said OM, the Union Public Service Commission, wherever possible, maintains a reserve panel of candidates found

suitable on the basis of selections made by them for appointment on direct recruitment, transfer on deputation, transfer basis and it is operated by it, on a request received from the Ministry/ Department concerned when the candidate recommended by it either does not join, thereby causing a replacement vacancy or he joins but resigns or dies within six months of his joining. Ministries/ Departments have also been advised that whenever such a contingency arises, they should first approach the UPSC for nomination of a candidate from the reserve panel, if any. The recruitment process be treated as completed only after hearing from the UPSC and the Ministry/ Department concerned may resort to any alternative method of recruitment to fill up the vacancy thereafter. Later on, the Fifth Central Pay Commission, in para 17.11 of its Report, recommended that with a view to reduce delay in filling up of the post, vacancies resulting from resignation or death of an incumbent within one year of his appointment should be filled up immediately by the candidates from the reserve panel, if a fresh panel is not available by then. Such a vacancy should not be treated as a fresh vacancy. The Government has accepted the said recommendations and issued directions to the Ministries/ Departments accordingly for future compliance. The Respondent No.1 acted accordingly and vide its letter dated 16.11.2004, requested the UPSC to provide a substitute from its reserve panel. Thereafter, the UPSC, vide its letter dated 27.12.2004, ascertained the willingness of the Applicant and on his acceptance he was recommended and accordingly he joined as DLC on 25.02.2005 in the place of Shri Pawade. The aforesaid OM dated 13.06.2000 clearly stipulates that such a vacancy should not be treated as fresh vacancy. Therefore, undoubtedly the vacancy which was available for the Applicant was the vacancy which has arisen in the year 2002-03. It is also not the case of Respondent No.1 and Respondent No.2 that the Applicant was appointed against any other vacancy. The Respondent No.2 has never challenged the aforesaid OM dated 13.06.2000 in this OA or in any other proceedings. Therefore, the contention of the Respondent No.2 that with the resignation of Shri Pawade on 08.11.2004 a new vacancy has arisen in the year 2004 is absolutely wrong and unfounded. As far as the Respondent No.1 is concerned, their contention was also that in such situation DOP&T's OM dated 03.03.2008 would apply. They have also got confirmation in this regard from the DOP&T itself. Despite the above position, they advised the Respondent No.1 in the present case to go according to the instructions contained in Para 3 of the aforesaid OM dated 3.32008. By giving such an advice, they have violated their own advice in the next para of the said OM, i.e., Para 4 which reads as under:-

“4. Cases of seniority already decided with reference to any other interpretation of the term ‘available’ as contained in OM dated 3.07.1986 need not be reopened.”

Admittedly, the Respondent No.1 had issued the Draft Seniority List of DLCs at least 3 times, firstly on 29.12.2005, secondly on 31.08.2005 and thirdly on 15.02.2010. Following their wrong advice,

Respondent No.1 has upset the seniority list which was in operation for 5 years and issued the impugned seniority list dated 25.10.2010 showing the Applicant for the first time junior to Respondent No.2. Moreover, the aforesaid stipulation in Para 4 of the said OM is in fact in conformity with the Apex Court's judgment in D. P. Sharma Vs. Union of India 1989 Supp (1) SCC 244. In the said judgment, the Supreme Court held that 'the general rule is if seniority is to be regulated in a particular manner in a given period, it shall be given effect to and it shall not be varied to disadvantage retrospectively'. In the case of Rajendra Pratap Singh Yadav and Other's case (supra) also, the Apex Court held that the seniority list once published cannot be disturbed at the behest of the persons who chose not to challenge it for four years. The relevant part of the said judgment is as under:

"52. We deem it appropriate to reiterate that in service jurisprudence there is immense sanctity of a final seniority list. The seniority list once published cannot be disturbed at the behest of person who chose not to challenge it for four years. The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial justice. This is imperative to avoid avoidable litigation and unrest and chaos in the services".

20. Apart from the above position, the interpretation given by the Respondent No.1 to para 3 of the OM dated 3.03.2008 itself is wrong. The Apex Court in N.R. Parmar's case (supra) has clearly held that the said OM is only clarifying the earlier OMs of the Department of Personnel dated 7.02.1986 and 3.07.1986. The OM dated 7.02.1986 is on the issue of determination of inter-se seniority between direct recruits and promotees. The OM dated 3.07.1986 was issued for the purpose of consolidating the existing government orders on the subject. The Apex Court has further held that there is nothing new in OM dated 3.03.2008 as the is only the clarification of the aforesaid OMs. Accordingly, the Apex Court held that 'as per the OM dated 3.3.2008, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would get seniority of the year in which they are appointed 'on substantive basis'. Further, it has been held in the said judgment that 'the OM dated 3.3.2008 has clearly breached the parameters and the ingredients of a 'clarification'. Therefore, for all intents and purposes the OM dated 3.3.2008, must be deemed to be non-est to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986. Having so concluded, it is natural to record, that as the position presently stands, the OMs dated 7.2.1986 and 3.7.1986 would have an overriding effect over the OM dated 3.3.2008 (to the extent of conflict between them) and the OM dated 3.3.2008 has to be ignored/omitted to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986'.

21. We, in the above facts and circumstances of the case, allow the OA. Consequently, we quash and set aside OM dated 27.06.2011, seniority lists dated 25.10.2010 and 15.09.2011 respectively and direct

the Respondent No.1 to restore the seniority of the Applicant to the actual position as on 2005 and 2008. We further direct the Respondent No.1 to restore the position of the Applicant in its seniority lists dated 25.12.2005, 31.8.2008 and 15.2.2010 when he has been shown senior to Respondent No.2. The Respondent No.1 shall also issue appropriate orders/seniority list in compliance of the aforesaid directions within 2 months from the date of receipt of a copy of this order.”

26. As has been ruled by Hon’ble Supreme Court in **Sub Inspector Rooplal & another v. Lt. Governor through Chief Secretary, Delhi & others**, (2000) 1 SCC 644, unless we are inclined to take a view different from one taken by the coordinate Bench and refer the matter to Larger Bench, it is not permissible for us to ignore the judgment of the coordinate Bench of equal strength. Relevant portion of the said judgment reads as under:-

“12. At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every Presiding Officer of a Judicial Forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate Court is bound by the enunciation of law made by the superior Courts. A coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. This Court in the case of *Tribhuivandas Purshottamdas Thakur v. Ratilal Motilal Patel*, (1968) 1 SCR 455 : (AIR 1968 SC 372) while dealing with a case in which a Judge of the High Court had failed to follow the earlier judgment of a larger Bench of the same Court observed thus (para 11 of AIR) :-

"The judgment of the Full Bench of the Gujarat High Court was binding upon Raju, J. If the learned Judge was of the view that the decision of Bhagwati, J. in Pinjare Karimbhai's case (1962 (3) Guj LR 529) and of Macleod, C.J., in Haridas's case (AIR 1922 Bom 149) did not lay down the correct law or rule of practice, it was open to him to recommend to the Chief Justice that the question be considered by a larger Bench. Judicial decorum, propriety and discipline required that he should not ignore it. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by Courts of coordinate authority or of superior authority. Gajendragadkar, C. J. observed in *Lala Bhagwan v. Ram Chand*, (AIR 1965 SC 1767).

"It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be re-considered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench, or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety."

13. We are indeed sorry to note the attitude of the tribunal in this case which, after noticing the earlier judgment of a coordinate Bench and after noticing the judgment of this Court, has still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to the declaration of law involved in this case. Because of this approach of the latter Bench of the tribunal in this case, a lot of valuable time of the Court is wasted and the parties to this case have been put to considerable hardship.

27. Besides in paragraph 2.4.1 of the DPC guidelines, it has nowhere been provided that the direct recruits appointed from waiting list and main list are to be treated differently, thus no force is found in the stand taken on behalf of the applicant that respondent No.5 being the wait-listed candidate could not have been given the benefit of the O.Ms. dated 07.02.1986 and 03.07.1986, as interpreted by the Hon'ble Supreme Court (ibid). Nevertheless, we cannot be oblivious of the fact that in the selection (direct

recruitment) in which respondent No.5 was included in the wait list, the applicant was included in the main list at Sr. No.1. Though in view of legal position no fault can be found in the action of the respondents in fixing the seniority of direct recruits with reference to the date the vacancies are notified to the recruiting agency for recruitment, but the interest of the applicant herein need to be protected.

28. In view of the aforementioned, we are unable to grant the relief sought in the Original Application, ergo the same is nixed. Before parting with, we observe that in view of the changed circumstances, i.e., loss of her seniority in the wake of interpretation of O.M. dated 07.02.1986 and 03.07.1986 and quashing of O.M. dated 03.03.2008, the applicant may workout her claim for her adjustment on the post of DLC (Grade III of ILS) against direct recruitment quota on the basis of selection in which she was placed at the top of panel. On a representation made by her in this regard, if so advised, the respondents may examine the same. Till the decision on such representation, the promotion of respondent No.5 would remain provisional. Interim order dated 01.04.2015 is vacated.

29. Original Application stands disposed of. No costs.

**( Shekhar Agarwal )**  
**Member (A)**

/sunil/

**( A.K. Bhardwaj )**  
**Member (J)**