

**Central Administrative Tribunal
Principal Bench**

OA No.1227/2016

Order pronounced on: 27.02.2017

Hon'ble Mr. V. N. Gaur, Member (A)
Hon'ble Mr. Raj Vir Sharma, Member (J)

Shiv Charan aged about 40 years
Son of Late S.D.Sharma,
H.No.226, Lane No.4, Sai Lok Phase-I,
GMS Road, Dehradun-284001
District-Dehradun.

- Applicant

(By Advocate: Mr. A.K.Behera)

Versus

1. Union of India through
Secretary
Ministry of Home Affairs,
Government of India,
North Block, New Delhi-110001.
2. Director,
Intelligence Bureau,
Ministry of Home Affairs,
Government of India,
North Block, New Delhi-110001.
3. Secretary,
Ministry of Personnel, Public
Grievances & Pensions,
Department of Personnel & Training,
North Block, New Delhi-110001.
4. Secretary,
Union Public Service Commission,
Dholpur House,
Shahjahan Road,
New Delhi-110011.
5. Rajiv Kumar Sharma (serial No.178 in
the impugned seniority list), Working
as Section Officer in Subsidiary

Intelligence Bureau, Oak Villa,
Pocket-C, Near IIMT Engineering
College, Ganga Nagar, Meerut-250001, UP.

6. Vinod Kumar Singh, (serial No.59 in the impugned seniority list), Working as Section Officer in Subsidiary Intelligence Bureau, 110, Mall Road, Lucknow-226001, UP.
7. Mohit Kumar, (serial No.166 in the impugned seniority list), Working as Section Officer in Subsidiary Intelligence Bureau, 110, Mall Road, Lucknow-226001, UP.
8. Hemraj Pandey, (serial No.184 in the impugned seniority list), Working as Section Officer in Subsidiary Intelligence Bureau, 110, Mall Road, Lucknow-226001, UP.
9. Dheeraj Kumar, (serial No.194 in the impugned seniority list), Working as Section Officer in Subsidiary Intelligence Bureau, CP-9, Awas Vikas Colony, Daulatpur, Pandeypur, Varanasi-221002, UP.
10. Amit Negi, (serial No.191 in the impugned seniority list), Working as Section Officer in Subsidiary Intelligence Bureau, IB Headquarters, 35, Sardar Patel Marg, Chanakyapuri, New Delhi-110021.
11. Manoj Sura, (serial No.185 in the impugned seniority list), Working as Section Officer in Subsidiary Intelligence Bureau, IB Headquarters, 35, Sardar Patel Marg, Chanakyapuri, New Delhi-110021.
12. Elina Das, (serial No.160 in the impugned seniority list), Working as Section Officer in Subsidiary Intelligence Bureau, IB Headquarters, 35, Sardar Patel Marg, Chanakyapuri, New Delhi-110021.

13. Rajesh Kumar Tiwari
S/o Late R.S.Tiwari
Presently posted as Section Officer,
Intelligence Bureau, H.Q., New Delhi.

- Respondents

(By Advocate: Mr. Rajinder Nischal for official respondents
Mr. Ajesh Luthra for private respondents)

ORDER

Hon'ble Mr. V.N.Gaur, Member (A)

The applicant joined Intelligence Bureau (IB) as Personal Assistant (PA) on the basis of selection in IB PA Grade Examination 1995. According to the Intelligence Bureau Secretariat Service Rules (IBSSR), 2003 for the next promotional post of SO, 60% of the vacancies are to be filled up through promotion and 40% through Limited Departmental Competitive Examination (LDCE). The PAs and Assistants of IB with 8 years of service are eligible for consideration against promotion quota and those with four years of service are eligible for competing in the LDCE. The rule 3 of IBSSR 2003 mandated that a fresh select list shall be prepared once in every year. The respondents had conducted LDCE in 2006 for the vacancy year 2005. Thereafter the next LDCE was advertised on 28.08.2010 for the vacancy years 2006, 2007 and 2008. The official respondents have not indicated the reason for not holding LDCE on yearly basis. In the result declared in October 2011, separately for 2006, 2007 &

2008, the applicant was promoted as SO against the vacancy year 2006 by order dated 18.10.2011. Applying rule 4 the approved service of the applicant was counted w.e.f. 01.07.2006, and counting 4 years therefrom he was given Non-Functional Selection Grade (NFSG) on 01.07.2010. The applicant got the benefits of retrospective appointment and financial upgradation even before joining that post.

2. The private respondents are Section Officers (SOs) promoted against 60% seniority quota. Private respondents no.6, and 13 (whose intervention application was allowed at a later stage) were promoted in the vacancy year 2007-08 and private respondents no.5, 7, 8, 10, 11 & 12 were promoted in the vacancy year 2010-11. The respondent no. 13 was promoted on 12.04.2007 and his name in the seniority list 03.11.2008 was at sl. No.140. The official respondents circulated a draft seniority list vide memorandum dated 01.03.2013 and called for objections within four weeks. In this list, the applicant was shown at Sl. No.41 in the list of promotees of 2006-07 and all the private respondents promoted under seniority quota were shown lower in seniority. A number of representations were received by the official respondents which were examined and after that the official respondents issued another seniority list on 09.06.2015. In this seniority list, the persons promoted as SO in 2010-11 through promotion quota were placed from Sl. No. 139 to 223. The

appointees of LDCE 2006, 2007 & 2008 (result declared in October 2011) were rotated with the promotees of 2011-12 in the ratio of 3:2 as per the quota fixed for each mode in the Recruitment Rules to the extent of available SOs/DPC and SOs/Examinee and the remaining SOs were placed *en bloc* below thereafter. In this seniority list the name of the applicant came at position no.227. The grievance of the applicant is that the applicant having been appointed against the vacancy year 2006, should have been rotated against the promotees of seniority quota for that year. The applicant has filed this OA with the following prayer:

- “(i) Call for the records of the case.
- (ii) Quash and set aside the seniority list dated 09.06.2015 and the Memorandum dated 10.08.2015.
- (iii) Issue a writ order or direction in the nature of mandamus directing the official respondents to prepare a seniority List of SOs afresh by assigning the applicant and others qualified in LDCE 2006 the seniority of the vacancy year 2006-07 and rotating the LDCE SOs like the applicant with the promotion quota SOs of the vacancy year 2006-07 in the ratio prescribed in the IB Secretariat Service Rules 2003 before effecting any further promotion from the grade of SO to the grade of Assistant Director (Non-police).
- (iv) Any other relief, which this Hon’ble Tribunal may deem fit and proper in the circumstances of the case may be given in favour of the applicant.
- (v) Award the costs of the original application in favour of the applicant.”

3. Learned counsel Sh. A.K.Behera appearing on behalf of the applicant submitted that the draft seniority list dated 01.03.2013 was issued after consulting Ministry of Home Affairs (MHA) and

DOP&T, who had clarified that the seniority of SOs appointed on the basis of LDCE will be fixed from the year of vacancies. The seniority of the applicant at Sl. No.41 in the seniority list dated 01.03.2013 treating his date of appointment as 01.07.2006 was correct seniority assigned according to the rules. The applicant is entitled to seniority from 1.07.2006 as approved service is the basis for determining seniority as well. The Rule 4 of IBSSR 2003 provides that in the case of LDCE appointees it will be counted from the 1st day of July of the year of vacancies. Rule 3 states that the method of recruitment etc. and 'other matters' shall be as specified in col 5 to 14 of the Schedule. The 'other matters' includes seniority. The Footnote in col. 13 defines that the approved service in the grade will be calculated in the manner as in rule 4. It can be therefore concluded that the IBSSR contain provision for assigning seniority from the date approved service of the applicant was counted. The law is well settled that once the RRs contain the method for fixing seniority even if it is retrospective, the same shall be lawful. The official respondents in violation of the RRs have tried to interpret the DOP&T OM of 07.02.1986 to rotate the LDCE candidates whose result was declared in 2011 with the promotees of 2011-12, ignoring the vacancy year for which they were selected. In fact a number of PAs and Assistants appeared in the LDCE but only a few could qualify still they have become senior to the applicant. The

applicant has information only in respect of three private respondents who were eventually promoted against the seniority quota of the vacancy year 2010-11 and their approved service was counted from 01.07.2010. The private respondents also have accepted the benefit of approved service from 01.07.2008 and 01.07.2011, from dates prior to their actual promotion. The applicant and other LDCE candidates were also in a similar manner promoted from 2006-07 by counting the approved service from 01.07.2006 and were given the benefit of NFSG w.e.f. 01.07.2010, i.e., after completion of four years from the date of appointment. The private respondents having accepted Rule 4 of the RRs are estopped from challenging or contesting legal consequences of such statutory provisions. The learned counsel relied on **H.V. Pardasani vs. UOI**, (1985) 2 SCC 468, **Sandeep Singh & ors. Vs. UOI**, OA No.1288/2009 and **R.S.Ajara vs. State of Gujarat**, (1997) 3 SCC 641. He further stated that private respondents have not challenged the rules, and therefore, they cannot challenge its consequences. He cited the case of **Karam Pal vs. UOI**, (1985) 2 SCC 457.

4. Drawing parallel with SOs appointed in LDCE quota to the Central Secretariat Service (CSS) through the same LDCE, it was submitted that the concept of “approved service” is statutorily prescribed. The counter parts of the applicant in CSS appointed against the vacancies of the year 2006-07 have been interspaced

with the promotees of the recruitment year 2006-07. This fact has not been disputed by the respondents. The same principle has to be applied to the IBSS also.

5. Countering the submission of the respondents that the impugned seniority list had been prepared on the basis of OM dated 03.04.2014 issued in terms of the judgment in the case of **Union of India vs. N.R. Parmar**, 2012 (11) SCALE 437, learned counsel has submitted that as per para 5 (f) of the said OM the initiation of recruitment of one mode is deemed as initiation of recruitment by other mode as well. Thus, the process of selection would deem to have been initiated in 2006-07 and the applicant persons would have to be interspaced with the promotees of that year. In a case where there is no concept of 'approved service' also, the LDCE candidates would get the seniority of the recruitment/vacancy year. In support of his contention he referred to OA No.4308/2014 **Sh Nafisur Rahman vs. UOI** decided on 09.03.2015.

6. Learned counsel for the official respondents raised the preliminary objection of non-joinder of necessary parties as a large number of SO who may be affected if the prayer of the applicant was granted, have not been made party in this OA. He further stated that the inter se seniority of SOs promoted through LDCE and those promoted through DPC is determined by rotating

the quota prescribed in the Recruitment Rules in accordance with the DOP&T instructions dated 24.06.1978, 07.02.1986 and 04.03.2014. "The year of availability" of a selected candidate is taken to be the date of completion of selection process as stipulated in DOPT OM dated 24.06.1978. These principles have been uniformly followed for determination of seniority of direct recruits, LDCEs and promotees in all the ranks in the IB since 1986. For appointments through LDCE-2000 also, the DOP&T had advised that "the seniority of the officers promoted through the LDCE, the result of which was declared in 2002, would be assigned seniority of 2002. The date of examination is not relevant here." (Annexure CA-5). These instructions have been followed in the years 2006, 2007, 2008 and 2010. The DOP&T has reiterated this principle in their note dated 16.06.2011 (Annexure A-6).

7. Initially in the seniority list dated 01.03.2013, the seniority of SOs from LDCE was fixed on the analogy of CSS with whom IBSS has historical parity, and they gained seniority over 66 persons who had been promoted much earlier to the applicant. This seniority list was in deviation of earlier advice of MHA/ DOPT and the OMs on seniority and un-settled the earlier settled seniority lists of SOs issued in 2007, 2008 and 2010 which had attained finality years ago. After receiving large number of objections, draft seniority list of 2013 was re-examined and the

advice of MHA and DOP&T was sought. In the meantime; 18 SOs promoted during 2006 to 2010 through DPC filed an OA No.3569/2014 with the grievance that their objections against the tentative seniority list had not been finalised by the official respondents. Vide order dated 08.10.2014 the OA was allowed and the department was directed to consider the objections raised by them within a period of six weeks. The respondents on the basis of observation of MHA/DOP&T (Annexure CA-8) finalised the seniority list taking into account the OM dated 04.03.2014 (Annexure CA-9).

8. Distinguishing the practice followed in the CSS, learned counsel submitted that in CSS rules there was specific provision for determination of seniority according to vacancy year whereas IBSS Rules do not have any such provision. (Annexure CA-6). Countering the submission of the learned counsel for the applicant, he stated that the words 'other matters' used in Rule 3 cannot be extended to seniority. The Rule 7 "Residuary Matters" states that "matters not specifically covered by these rules or by regulations or orders issued thereunder or by special orders, the members of the service shall be governed by the rules, regulations and orders applicable for the Central Service in general". The seniority of members of IBSS is, therefore, governed by the Government instructions issued on seniority from time to time. The seniority of private respondents no.6, 13 & 14 promoted in

2007 had already been finalised on 03.11.2008 and 19.03.2010 much before the LDCE 2006, 2007 & 2008 was conducted in 2010. The applicant cannot gain seniority above the persons whose seniority had been finalised much before even the LDCE was held. The claim of the applicant is self-contradictory. He, on one hand, claims seniority in terms of Rules 3 and 4 of IBSS Rules negating the Govt. instructions/OMs dated 24.06.1978 and 07.02.1986 on the issue of seniority, on the other hand he is claiming seniority on the basis of the very same order quoting the Hon'ble Supreme Court judgment in N.R. Parmar (supra). The applicant cannot rely on memorandum dated 24.01.2013 by which some DPC promoted SOs who had also been selected in LDCE, to give option as to which mode of selection they would opt for. This OM, which based on earlier advice of MHA of November 2012, stood superseded by MHA/DOP&T's latest advice of November 2014. Further, the official respondents had treated the year of availability as the date of declaration of result of the LDCE as per extant instructions in 2011. The judgment in N.R. Parmar (supra) came on 27.11.2012 which cannot be applied to the seniority already finalised prior to that judgement. He referred to the DOPT OM dated 04.03.2014 that provides that "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." Learned counsel

further distinguished the N.R. Parmar's case stating that the issue in that case was with regard to inter se seniority between the direct recruits and promotees while in the present case it was between the two sets of officers within the promotion quota itself.

9. Sh. Ajesh Luthra, learned counsel for private respondents 5 to 10 and 12, submitted that the LDCE for the years 2006, 2007 & 2008 could not be held in time because of some litigation and this delay adversely affected not only the applicant but many others, including the private respondents, who were deprived of the opportunity to appear in the LDCE. The promotion order of the applicant dated 18.10.2011 does not mention that his promotion is retrospective. Only a retrospective promotion could have given him antedated seniority. The applicant has not challenged his promotion order to the extent it gives him only prospective promotion. His claim for antedated seniority, therefore, is not maintainable. Learned counsel further argued that preparation of select list separately for the years 2006, 2007 & 2008 cannot be the basis for claiming seniority and other benefits w.e.f. 2006. The only purpose of preparing seniority list separately of 2006, 2007 & 2008 was to ensure that ineligible candidates in a particular year did not get promoted merely because of the merit position in the result of the examination. According to the learned counsel, the benefit of NFSG given to the applicant by counting his approved service from 01.07.2006, was

contrary to his promotion order and was wrongly given by the official respondents to the applicant. Though the private respondents have not challenged that order, a wrong order issued granting NFSG cannot be further perpetuated to give him antedated seniority as well. It was also argued that the seniority position of those promoted through DPC in the years 2006-2009, finalised vide seniority lists notified in November 2007, 2008 and 2010 attained finality long back. The draft seniority list of 2013 had unsettled the settled seniority list to the disadvantage of SOs. According to the learned counsel the holding of LDCE to fill up 26 vacancies of SOs for the years 2006, 2007 & 2008 itself was illegal. These vacancies were non-existent and wrongly notified by the department. This Tribunal in the order in OA No.3569/2013 had directed the department to re-examine the issue and to reply the private respondents. The Department and MHA and DOP&T re-examined the issue and had realised their mistake and reverted from the draft seniority list of 2013. According to learned counsel, the “approved service” defined in Rule 4 of IBSS Rules did not imply seniority from the previous years. Rule 3 of the IBSS Rules envisages that LDCE will be held every year and promotion by seniority will also take place annually. It is in that background that the dates of approved service for various channels have been prescribed. Rule 4 has to be read in conjunction with Rule 3, i.e., all the modes of recruitment have to

be initiated simultaneously in a vacancy year. In a situation where the process for all modes of recruitment is not initiated simultaneously or within the recruitment year, rules cannot be applied literally. The CSS Rules have specific provision to count seniority from the vacancy year which is not the case with IBSSR. In the case of IBSS the provision of Rule 7 "Residuary matters" will come into operation and the rules applicable to the civil services in general shall apply. N.R. Parmar's case (supra) is not applicable to the present OA as the dispute in the present case is between the appointees of LDCE and DPC and not between direct recruits and appointees through DPC. For the same reason the DOP&T OM of 1959 or 1986 will not apply. On the contrary, the DOP&T OM dated 24.06.1978 is applicable. Alternatively, the length of service rendered from the date of appointment would constitute the seniority and therefore, the date of appointment would be determining point. Learned counsel referred to three Judge Bench order of Hon'ble Supreme Court in **Central Provident Fund Commissioner v. N. Ravindran**, 1995 Supp (4) SCC 654, **Union of India vs. K.K. Vadera**, 1989 Supp (2) SCC 625, OA No.3596/2011 dated 05.09.2013 and OA No.591/2009 decided on 31.05.2016.

10. Rejoining, the learned counsel for the applicant submitted that the issue before the Tribunal in this case was regarding the principle that is being followed in the joint seniority list and some

of the affected parties have been impleaded by the applicant himself. Some private respondents have filed impleadment application and got impleaded. Thus, the point of view of private respondents has been adequately represented by the Tribunal. The impleadment of all private parties is not necessary. Learned counsel relied on **A. Janardhana vs. Union of India and others**, 1983 (1) AISLJ 564. With regard to the applicability of OM dated 24.06.1978 learned counsel submitted that the aforesaid OM was issued much prior to the Recruitment Rules of 2003 wherein the 'approved service' has been defined. It is an established law that if there is a conflict between the statutory rules and non-statutory rules in relation to computation of length of service, it is statutory rules which will prevail. Further 1978 OM only deals with the starting point of roster for the purpose of seniority and it is stated that if date of announcement of LDCE is prior to the advice of DPC then the starting point of roster will be LDCE candidate and if the recommendation of DPC is earlier than the starting point of roster would be a promotee. There is no mandate of that OM that LDCE candidates will count their seniority from the declaration of result of LDCE. Referring to the case of **Ajay Gautam vs. Union of India and others**, OA No.2942/2012 dated 10.01.2014 cited by the private respondents, the learned counsel stated that, that judgment was also on the basis of the OM dated 24.06.1978. This judgment was "*per incuriam* and *sub silentio*" and did not

consider the words of the said OM. On the concept of *sub silentio* learned counsel cited **State of U.P. and another vs. Synthetics and Chemicals Ltd. And another**, (1991) 4 SCC 139 and **Municipal Corporation of Delhi vs. Gurnam Kaur**, (1989) 1 SCC 101. With regard to OA No.3596/2011 on which the private respondents have placed reliance, learned counsel submitted that the said order of the Tribunal had already been overruled by Hon'ble Delhi High Court in WP (C) no.8154/2013 – **D.P.Jindal vs. Union of India and ors. and batch**. This judgment was also considered in Nafisur Rahman (supra).

11. With regard to the order of this Tribunal in OA No.591/2009 dated 31.05.2016, the learned counsel sought to distinguish on the ground that

- (1) The dispute in the aforementioned OAs was between direct recruits and promotees including LDCE appointees. The direct recruits were given seniority of over 20 years resulting in grant of seniority when they were 5-6 years of age.
- (2) The issue of carry forward of the direct recruitment vacancies beyond 2 years was also an issue.
- (3) OA No.591/2009 had relied on OA No.3596/2011 which had already been overruled by Hon'ble High Court of Delhi.

12. We have heard the learned counsel for the parties and perused the record.

13. The issues that arise in this case are:

- (i) Whether the OA suffers from non-joinder of necessary parties?
- (ii) Whether IBSSR enjoin that 'seniority' will be counted from the date of counting of 'approved service'?
- (iii) What are the rules that regulate inter se seniority of the DPC and LDCE appointees?
- (iv) Whether the rules permit appointment and seniority from a retrospective date?
- (v) Whether the seniority of private respondents promoted by DPC during the period 2006-07 to 2010-11 against promotion quota or diverted vacancies of LDCE quota will get seniority from the year of such promotion?

14. The respondents have raised the preliminary objection of maintainability of the OA on the ground of non-joinder of all the necessary parties. It has been argued that if the prayer of the applicant is granted that will affect many more SOs who were promoted during 2006 to 2011 as the applicant will gain seniority over them. It is observed that the applicant had impleaded 8 private respondents and two more private respondents got themselves impleaded at a later stage. The main

issue involved in this OA is regarding the rules that regulate the inter se seniority between the DPC and LDCE appointees. The answer to this question will determine the legal framework for determining such seniority. The impleadment of all the persons likely to be affected by the outcome of the OA is therefore not necessary. Apart from the originally impleaded private respondents two more respondents got themselves impleaded later. That has ensured that the case is adequately defended. In **A. Janardhana** (supra) the Apex Court took a view that when the relief claimed by the petitioners was against the Union Government and not directed against any individual, it was unnecessary to have all direct recruits to be impleaded. In **State of Uttaranchal vs. Madan Mohan Joshi**, (2008) 6 SCC 797 the Hon'ble Supreme Court held that in such a situation it would be sufficient to implead some of the affected parties in representative capacity. The relevant extracts from that judgement read as follows:

“20. For the reasons aforementioned, we are of the opinion that the interest of justice would be subserved if the impugned judgment is set aside and the matter is remitted to the High Court for consideration of the matter afresh. In the writ petition, the first respondent may file an appropriate application for impleading Savita (Mohan) Dhondyal and others as parties and/or some teachers in their representative capacity.”

We therefore do not find the challenge to the maintainability of OA to be valid.

15. On the second issue it has been strenuously argued by the learned counsel for the applicant that there is a statutory provision in the IBSSR to count the seniority of the LDCE appointees from the 1st July of the vacancy year. Though there is no explicit mention of the word 'seniority' in the IBSSR, the argument runs thus. Rule 3 regulates the method of recruitment, age limit and "other matters" relating to the said posts as specified in columns 5 to 14 of the Schedule (Annexure-2 of the Rules). The 'other matters' includes 'seniority'. Rule 4, which describes 'approved service' reads as follows:

"4. Description of a Approved Service – Approved service in the grade means the period of period of regular service rendered in that grade, including period or periods of absence during which the officer would have held a post on regular basis in the grade but for his being on leave or otherwise not being available to hold such post, from the 1st day of July of the year following the year in which the competitive examination for direct recruitment was held in respect of an officer recruited directly to that grade and from the 1st day of July of the year for vacancies for which Departmental Examination was held in respect of an officer recruited to that grade through Departmental Examination and from the 1st day of July of the year for which the recruitment was made in respect of an officer recruited to that grade on the basis of length of services in the immediate lower grade, as the case may be provided that in any of the cases mentioned above, any delay of more than ninety days in joining on appointment should not be due to any fault on the part of the officer."

16. There is a Footnote in column 12 pertaining to the grade of SO in the Schedule stating that *"in respect of an officer recruited in that grade through Departmental Examination, the period or periods of regular service rendered in that grade, including period or periods of absence during which the officer would have held the*

post on regular basis in the grade but for his being on leave or otherwise not being available to hold such post from first day of July of the year of vacancy of such Departmental Examination was held.” According to the learned counsel for the applicant rule 3 shows that the rules are applicable to all aspects of recruitment/appointment including seniority, and rule 4 enumerates the method of calculating it. In other words, the ‘seniority’ will also be calculated from the 1st July of the year for the vacancies of which the LDCE was held.

17. We are however not impressed by this long winded connection between the rule 3 and rule 4 sought to be established by the learned counsel for the applicant by introducing the word ‘seniority’, for two reasons. Firstly, the word ‘seniority’ finds no mention anywhere in the rule 3 or rule 4. Column 12 against the post “Assistant Directors (Non-Police)” given in the Schedule of the IBSSR reads thus:

“Note 1 : When juniors who have completed their qualifying/eligibility service are being considered for promotion, their senior would also be considered provided they are not short of requisite qualifying/eligibility service by more than half of such qualifying /eligibility service or two years, whichever is less, and have successfully completed their probation periods for promotion to the next higher grade along with their juniors who have already completed such qualifying/eligibility service.

Note (2): Approved service in relation to any grade means in respect of an officer recruited to that grade on the basis of length of service in the lower grade, Period or periods of regular service rendered in that grade, including period or periods of absence during which he would have held the post on regular basis in that grade but for his being on leave or otherwise not being available to hold such post from first July of the year for which the recruitment was made:

Provided that where there is delay of more than three months in joining on appointment, such delay is not due to any fault on the part of the officer.”

18. It can be seen that Note 2 relates to ‘approved service’ in relation to ‘any grade’ but again it does not make any reference to seniority. Secondly, rule 3 specifies the “Method of recruitment, age-limit and other qualifications” It further states that “the method of recruitment, age-limit, qualifications and other matters relating to the said posts shall be as specified in columns 5 to 14 of the said Schedule.” That means “other matters” have been specified in columns 5 to 14 of the Schedule whereas the learned counsel has not been able to show any provision in the Schedule that refers to seniority. It is trite that we cannot import into the statutory rules what is not mentioned there. On the contrary the rule 7 dealing with residuary matters stipulates that matters not specifically covered by these rules shall be governed by the rules governing the Central Service in general. We, therefore, hold the view that IBSSR does not contain provision to regulate seniority and by the virtue of the rule 7 the seniority will be regulated by the rules applicable to Central Services in general.

19. The action of the respondents in counting the approved service from 2006-07 by itself does not imply seniority from that date. In **UOI vs Vijinder Singh**, WP (C) 1188-90/2005 Hon’ble High Court of Delhi the issue before the High Court was “whether

the claimants before the Tribunal were entitled to be placed in the pay scale of Assistant Engineer and earned benefit with retrospective effect.” The High Court after considering the case law on the subject concluded that service jurisprudence did not recognise retrospective promotion. The applicant does not get any sustenance to his contention from the foresaid judgment.

20. The next issue relates to the rules that govern the inter se seniority of LDCE and seniority based promotees. The general principles of seniority for Central Government employees were notified by the DOP&T OM dated 22.12.1959 and it mandated the principle of rota quota where there was recruitment from more than one source.

21. The DOP&T OM dated 24.06.1978 defines the starting point of the roster when recruitment is made by more than one method. It is in that context that it defines the date of completion of selection process as the date of announcement of results of the selection examination. This definition cannot be interpolated for deciding the seniority of the applicant.

22. The DOP&T OM on 07.02.1986 retained the principle of rota quota enunciated in the OM dated 22.12.1959 but effected some modification to deal with the complication arising when the direct recruitment vacancies could not be filled up in the relevant vacancy year and it was filled up in subsequent year or years. It

provided for placement of candidates appointed against such direct recruit vacancies to be placed at the end of the seniority list of the year of such recruitment after applying the principle of rota quota to the extent promote candidates were available. The official respondents have relied on the DOP&T OM dated 07.02.1986 but interpreting the year of availability as in the DOPT OM dated 24.06.1978 to argue that the applicant was treated as being available in the year 2011-12 when he joined on the basis of LDCE examination result. It is important to note that in **N.R.Parmar** (supra) the year of availability was defined as the year in which the recruitment process was initiated for at least one of the modes of recruitment. The judgment further laid down that if the process of recruitment by one mode was initiated the process of other mode of recruitment will also be deemed to be initiated on that date irrespective of the date of culmination of the selection process.

23. The reliance of the official respondents on the DOP&T OM dated 24.06.1978 is, therefore, erroneous. Also the argument that N.R. Parmar will not apply to the seniority of promotees which was finalised prior to that judgment is fallacious as the aforesaid judgment only interpreted the year of availability mentioned in the OM dated 07.02.1986. The law is well settled that the aforesaid OM shall be treated to have been that way since its promulgation. It is concluded that the OM 07.02.1986 and connected orders will

hold the field regarding seniority in the case of the applicant. A coordinate bench of this Tribunal has also taken a view in **Nafisur Rehman** (supra) that in the absence of any separate rule to regulate inter se seniority between the promotees and LDCE appointees the aforementioned DOPT OM's will be applicable. With that we settle the second question.

24. The question of retrospective appointment and seniority, which is the next issue, arises from the contention that 'approved service' and 'seniority' are different sides of the same coin. In support of his argument the learned counsel for the applicant has cited judgments in **H V Pardasani**, **Sandeep Singh** and **R S Ajara** (all supra). Before we discuss the judgments it is observed that the basis for such conclusion is that (i) the IBSSR contains a provision to regulate seniority, a contention which has already been dealt with, and (ii) the approved service of the applicant has been counted from 2006-07 and he got financial upgradation to NFSG from 2010, after counting 4 years from 2006-07. It implies that the applicant was given retrospective appointment from the year 2006-07 without back wages.

25. In his context we consider it necessary to point out that counting of approved service from 2006-07 is itself based on wrong interpretation of the rules. The rule 4 has been interpreted in isolation without considering the provision of rule 3. The rule 3

mandates that “A fresh select list of each grade shall be prepared once in every year.” The rules proceed with the assumption that the select lists are being prepared every year and in that background the rule 4 provides that the approved service shall be counted “from the 1st day of July of the year for vacancies for which Departmental Examination was held”. Since the process of conducting Departmental Examination is intricate and the result may be finally declared after the vacancy year, for the sake of uniformity the rules envisage that the approved service be counted from 1st July of the vacancy year. There is nothing in the rules to indicate what will happen when examination is held collectively for the vacancies for several years. The interpretation given by the official respondents is contrary to the express provision of rule 3 and 4 taken together. It is established law that promotion cannot be given with retrospective effect. We have already seen the judgment of High Court of Delhi in **Vijinder Singh**, relying on **KK Vadera** (supra), that service jurisprudence does not permit retrospective promotion. It is obvious that counting of service of the applicant from 2006-07 and subsequent granting of NFSG is de hors the recruitment rules. The applicant cannot claim that to be a basis for giving further benefit of seniority from a retrospective date.

26. The last issue is whether the seniority of private respondents promoted by DPC during the period 2006-07 to 2009-10 against

promotion quota or diverted vacancies of LDCE quota will get seniority from the year of such promotion. It has been contended by the learned counsel for the official respondents that the seniority of the private respondents was fixed on the basis of the OM dated 07.02.1986 and the OM dated 24.06.1078. It has also been stated that **N R Parmar** will not apply in this case, a contention already rejected by us. The main objective of OM dated 07.02.1986 was, as stated in the OM itself, to check the unintended advantage flowing to the direct recruits, in this case LDCE appointees, because of the year-wise slots being kept for them if the vacancies are not filled as per the quota. The applicant therefore cannot get the advantage of the year-tag of the vacancy against which he was appointed. Preparation of year-wise merit list is only for the purpose of ensuring eligibility. The relevant para of the said OM is reproduced below for easy reference:

“2. While the above mentioned principle was working satisfactorily in cases where direct recruitment and promotion kept pace with each other and recruitment could also be made to the full extent of the quotas as prescribed, in cases where there was delay in direct recruitment or promotion, or where enough number of direct recruits or promotees did not become available, there was difficulty in determining seniority. In such cases, the practice followed at present is that the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees became available through later examinations or selections, such persons occupied the vacant slots, thereby became senior to persons who were already working in the grade on regular basis. In some cases, where there was short-fall 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 already to their credit. This matter had also come up for consideration in various Court Cases both before the High Courts and the Supreme Court and in several cases the relevant judgement had brought out the inappropriateness of direct recruits of later years becoming senior to promotees with long years of service.”

27. In the reply filed by the private respondents it has been averred that, with the concurrence of MHA and DOPT, 85 vacancies were diverted from LDCE quota to promotion quota in the year 2010 on an undertaking that the same will be restored to LDCE quota later. There is no document or even averment to show that such a diversion was in relaxation of the rules by exercising power under rule 8 (Power to relax) of the IBSSR. It goes without saying that if such relaxation were granted there would be no need to restore the LDCE quota. The context indicates that it was only a measure to temporarily fill up the vacancies by promotion. The approval of MHA and DOPT, as has been averred, was for temporary diversion. No regular appointment could have been made against temporarily diverted post which had to be restored to the original quota subsequently.

28. With regard to those promoted against promotion quota vacancies also, it is relevant to refer to para 5 of the OM dated 04.02.1986 which reads as follows:

5. With a view to curbing any tendency of under-reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only

to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees.

29. In this case since the official respondents have not made any averment that they reported LDCE vacancies for recruitment in the respective years, the promotion of the private respondents during the period 2006-07 to 2009-10 cannot be treated as regular for the purpose of counting their seniority. The LDCE was notified in 2010-11 and therefore, the promotions can be treated as regular from that year only. The only explanation coming forth for the not holding LDCE for so many years is from the learned counsel for private respondents 5 to 10 and 12 that it was due to some litigation. It is a vague explanation without specifying whether there was any stay or adverse order or any direction from any court that came in the way of holding LDCE. We therefore conclude that the promotions given by the respondents between 2006 and 2011 were not in accordance with the rules and the DOPT OM dated 07.02.1986, and therefore the promotees of those years cannot get seniority benefit from the year of promotion.

30. It is thus seen that neither the applicant nor the private respondents can claim seniority from a date that is not in conformity of the OM dated 07.02.1986 and the judgment in N.R.

Parmar. i.e. the applicant cannot claim seniority from a back date i.e. 2006-07 and the promotees of 2006 to 2009 can also not be treated as regular for the purpose of counting seniority. By application of the aforesaid OM they can be treated as regular only from the year 2010-11 when the LDCE was notified.

31. We will now discuss the judgments cited by the parties.

32. In the case of H. V. Pardasani (supra), para 15 to 17 thereof read as follows:

"15. The next contention raised on behalf of the petitioners was against note No. 2 appearing under Rule 12(5) which is to this effect.

"In case of persons included in the Select List for the Section Officers' Grade 'approved service' for the purpose of this rule shall count from the 1st July of the year in which the names of the officers are included in the Select List in the case of direct recruits to the Section Officers' Grade such service shall count from the 1st July of the year following the year of the competitive examination on the results of which they have been recruited provided that where there is a delay of more than three months in the appointment of any candidate, such delay is not due to any fault on his part."

This note initially appeared to be somewhat arbitrary but after hearing counsel at length we are inclined to agree with the submission advanced on behalf of the Union of India that in the process of direct recruitment, there is considerable delay and though the competitive examination is held in one particular year, by the time the selected officer comes to join the post more than a year is lost. Therefore a rational view has been taken of the situation and for the computation of length of service the particular provision has been made. This in our view is really not open to challenge as an arbitrary provision. We may reiterate that a very intricate process is involved in giving effect to the scheme and in harmonising the claims of the officers belonging to the different cadres. Mathematical precision cannot be expected in a matter like this and adoption of a test of such accuracy with a view to ascertaining whether Articles 14 and/or 16 of the Constitution are violated would not be appropriate.

16. Challenge to the scheme in Rule 18 in the matter of fixation of seniority had been advanced in the case of P.C. Sethi v. Union of India, (1975) 3 SCR 201: (AIR 1975 SC 2164), and was negated by this Court.

17. Delay and laches were advanced as contentions on behalf of the Central Government for rejecting the petitions. We do not think it is necessary to go into that question as we have already taken that into Consideration while dealing with other contentions. It is, however, relevant to point out that of the 11 petitioners as many as 9 had got into the cadre of Assistants as direct recruits and they had themselves got advantage over promotees who had put in a longer period of service in such cadre. They should not now grudge a similar advantage being obtained by some other direct recruits in the higher cadre. After all as we have already said in a case of this type a

broader perspective has to be maintained and examination cannot be permitted to be as strict as petitioners have asked us to adopt.”

33. The Hon’ble Supreme Court while interpreting Rules 12 and 15 of the Central Secretariat Service Rules observed that taking into account considerable delay in the process of direct recruitment it was rational to have fixed a particular date for counting the service of direct recruits. The judgment considered only the question of “approved service” and did not give any finding that seniority can also be fixed on the basis of the approved service. At this stage, we may also refer to the argument of the learned counsel for the applicant that the private respondents are also beneficiary of same rule 4; having accepted it they cannot question its consequences; and, that they have not challenged the rule 4. As discussed earlier counting of approved service from 1st July within the same vacancy year is permissible under the rule 4 and the promotees of 2010-11 were benefitted only to that extent when their approved service was allowed from 1st July of that year. The observation of the Hon’ble Supreme Court that a mathematical precision in such matters could not be expected, is relevant in this context. The “approved service” of the promotee officers (SOs) was counted from the date as envisaged in Rule 4.

34. In **R.S.Ajara** (supra) also, the Hon’ble Supreme Court reiterated the view taken in H.V.Pardasani (supra) and observed

that “a rational view had been taken of the situation and for the computation of length of service the particular provision had been made and the same was not open to challenge as an arbitrary provision”.

35. Learned counsel has quoted the order of this Tribunal in **Sandeep Singh** (supra), which was authored by one of us [Sh. V.N.Gaur, Member (A)]. However, this order also does not support the claim of the applicant in the present case because the facts of Sandeep Singh (supra) were quite different from the facts of the present case. The issue in Sandeep Singh (supra) was whether the LDCE conducted in December 2002 was for the vacancy year 2003-04 or included the vacancies for the year 2002-03. The Tribunal gave its finding that the LDCE of Dec 2002 did include the vacancy of 2002-03 and hence the seniority of the candidates had to fixed from the year 2002-03. LDCE 2002 was not a collective examination of preceding years as was the case in present OA. Further, there was no question of inter se seniority with the promotees was raised in that OA.

36. The judgment in **Karam Pal** (supra) has been relied on by the counsel for the applicant arguing that if a person fails to challenge the rules, he is not allowed to challenge the consequences of it. Para 13 of the judgment reads thus:-

“13. In course of the hearing counsel for the petitioners referred to instances where a direct recruit coming into the

cadre several years after others coming into the cadre from the Select List had been assigned seniority over such promotees. This was explained by counsel for the respondents to have been the outcome of giving effect to Cl. 3 of Regulation 3 as it stood prior to December, 1977 without the proviso. The instances relied upon were found to be events prior to the introduction of the proviso. In the absence of challenge to the Rules and the Regulations, resultant situation flowing from compliance of the same are not open to attack. Occasion for similar grievance would not arise in future as the proviso in the relevant regulation and Cls. (4) and (5) of the Regulation 3 will now meet the situation.”

37. In the context of the present OA, as we have already seen the rules do not provide for approved service or seniority from a date outside the year in which the LDCE was notified or DPC process was initiated, even if the LDCE was held collectively for a number of years. There is no relevance of a challenge to the rules and hence of this judgment.

38. Another case cited by the private respondents is **OA No.3596/2011** Birender Kumar Mishra and Others Vs. UOI and Others. In the aforementioned judgment this Tribunal had taken a view that LDCE was only a qualifying examination and not competitive examination. Hon'ble High Court of Delhi in the case of **D.P.Jindal** (supra) had set aside the finding of this Tribunal to this effect in OA No.3596/2011 and ruled that the LDCE is a competitive examination. Para 4 of the judgment is reproduced below:

“4. Having heard learned counsel for the parties, this Court is of the opinion that the findings of the CAT in this regard are clearly erroneous. The LDCE is in fact a competitive examination. Ordinarily, such of the vacancies which fall within the 50% LDCE quota are notified and a large number of eligible candidates are permitted to compete. However, only

those who are best merited – in strict order of merit – are deemed to be selected and are eventually appointed. This beats the CAT's finding that the LDCE is not a competitive examination but a qualifying examination. The findings to the contrary by the CAT are accordingly set-aside."

39. However having said that, the Hon'ble High Court confined its direction only to say that the respondents while framing appropriate norms and guidelines and proceeding to finalize the seniority list, care must be taken to balance both the aspects, i.e. relative merits of the candidate who clear such collective examination as well as the dictate of the rules vis-à-vis eligibility.

Para 6 of the judgment is reproduced below:

"6. This Court, after having considered the submissions, is of the opinion that the object of the LDCE procedure is to ensure that only those who are eligible to compete against specified vacancies for a given year, would be entitled to lay claim to be appointed to such posts. Whilst the CPWD's action in bunching the vacancies and holding a collective examination may not be per se irregular, it has obviously resulted in complications where the candidates with greater merit would, if appropriate clarifications are not made by the department, be capping more senior positions than others who were eligible at that point of time. This Court is, therefore, of the opinion that whilst framing appropriate norms or guidelines and proceeding to finalize the seniority list, care must be taken to balance both the aspects, i.e. relative merits of the candidates who clear such collective examination as well as the dictate of the rules vis-a-vis eligibility."

40. It can be seen that the judgment did not touch upon inter se seniority between the LDCE recruits and promotees but considered only the complication that may arise if the LDCE vacancies are filled up purely on the basis of merit without considering the year-wise eligibility of the candidates for LDCE

vacancies. OA No.3596/2011 does not help the case of the private respondents.

41. The case of Ajay Gautam (supra) has been cited by the learned counsel for the private respondents in support of his contention that the seniority of the LDCE appointees will be reckoned from the date of declaration of the result of LDCE. In this case he reliance had been placed on the DOPT OM dated 24.06.1978 which we have seen is not relevant in this case. Further, following **D P Jindal** the LDCE has to be treated as a competitive examination and for inter se seniority of LDCE and promotion mode appointees the DOPT OM of 07.02.1986 will apply. The Tribunal has taken this view in **Nafisur Rehman**.

42. Learned counsel for the private respondents also cited K.P. Ravikumar and Another Vs. Union of India and Others **OA No.943/2013** order dated 10.02.2016 wherein a view has been taken by this Tribunal that the past service prior to transfer of the applicant can be counted for eligibility regarding the length of service, the applicant cannot jump the queue and upset the seniority. Learned counsel has argued that on the same analogy the LDCE candidates even if their seniority is counted from the vacancy year the same cannot be counted for the purpose of seniority.

43. We have also considered the order of this Tribunal in OA 591/ 2009 with OA 2981/2009 and find that the controversy in that case related to the breakdown of rota quota system in fixing the inter se seniority of the direct recruits and promotees. The Tribunal on the same analogy as in the order in OA 3596/2011 concluded that “seniority in the cadre will be counted from the date of his substantive appointment in that cadre, irrespective of the year during which the vacancy which he came to substantively occupy had arisen earlier.” The premise in the order in OA 3596/2011 that LDCE is not a competitive examination has already been struck down by the judgment in DP Jindal. Further, the rules applicable in that case i.e. are the Railway board Secretariat Service which are similar to the Central Secretariat Service Rules (CSSR). In the present OA the applicable rule are IBSSR which, as seen earlier in this order, are different from the CSSR. The order in OA 591/2009 cannot be applied to the present OA.

44. The judgment of a three Judge Bench of Hon'ble Supreme Court in **N.Ravindran** (supra) dated 18.08.1993 is reproduced below:

“1. These appeals arise out of the order of the central Administrative tribunal, Ernakulam bench dated 11/2/1992 whereby the tribunal gave certain directions in regard to the Fixation of seniority of those promoted to the next higher post by virtue of seniority-cum-fitness and those promoted out of turn by virtue of their having passed a prescribed examination. A quota of 75 : 25 was prescribed; 75% for the former and 25% for the latter. The tribunal came to the

conclusion that both those categories must be treated as belonging to one single class of promotees and, therefore, they must be promoted to the next higher post by first satisfying the 75% quota of those entitled to promotion by virtue of the seniority-cum-fitness rule and the 25% quota of those who become entitled to promotion by virtue of having passed the prescribed examination must take their position below the said 75%. Mr Mahajan, the learned counsel for the appellants, however, drew our attention to the observations of this court in *Regional Provident Fund Commissioner v. Ashok Mehta* arising out of the judgment of the central Administrative tribunal, New Delhi, wherein this court while dismissing the special leave petition to the following effect stated:

“We see no reason to entertain this special leave petition. One ground in support of this petition was that there is a contrary decision by one of the Benches of the Administrative tribunal. That difficulty will not continue by refusing to grant leave. We are of the view that the appropriate rule for determining the seniority of the officers is the total length of service in the promotional posts which would depend upon the actual date when they were promoted.”

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Mr Mahajan submitted that in the instant case the tribunal has departed from this rule which was approved by this court and has, therefore, fallen into an error. We do not think so. What the tribunal has said is virtually the same thing in different words. It is stated that both the category of employees shall belong to the single class of promotees and will be promoted to the next higher post in the order of their inter se seniority in the lower cadre. That would naturally take care of the length of service of those incumbents. The tribunal has also pointed out that the recruitment rules or the promotion policy does not provide that the examinees will be given seniority over normal promotees. Ordinarily, the examinees would rank below those who would be entitled to promotion on seniority-cum-fitness principle because of their placement in the seniority list in the lower cadre. In order to get accelerated promotion they may appear at the prescribed examination and pass it. The basic idea of providing this incentive is to strengthen the upper cadre by induction of young meritorious persons. Mr Mahajan, however, submitted that there could be a case wherein an incumbent has passed the examination but by the time the promotion opens for him he becomes eligible for promotion on the basis of seniority-cum-fitness test but the Tribunal's order would slide him down below the 75%. We do not think that the apprehension of Mr Mahajan is well-founded. If he becomes entitled to promotion by virtue of mere seniority-cum-fitness test, he will become entitled to be promoted in normal course in the 75% of quota and merely because he has the additional qualification of having passed the examination, he will not be slid down in seniority. We are, therefore, not impressed by

the apprehension of Mr Mahajan assuming such freak cases do present themselves. On the whole, therefore, we think that the view taken by the tribunal is just and fair and does not call for interference at our hands. The appeals are dismissed with no order as to costs.”

45. The aforesaid judgment of Hon’ble Supreme Court is in the context of a situation where the Departmental examination is qualifying examination. In the instant case the Departmental Examination is a competitive examination where the seniority position of the successful candidates is determined by relative merit. Further their inter se seniority position is determined by rotating them with the promotees of that year. In the process the LDCE appointees are not placed en block below the promotees as was the case in the aforesaid Supreme Court judgment. There is no disagreement of the parties regarding rotation of vacancies except that the promotees of which year are to be rotated with the LDCE appointees. Such an admitted position establishes that the promotees and LDCE appointees do not belong to the same class of ‘promotees’ but the LDCE appointees are treated like direct recruits for the fixation of inter se seniority. The applicant has also relied on the order of this Tribunal in Nafisur Rehman that “though the said OM (dated 07.02.1986) pertains to inter se seniority of DR and promotees, the same principle is applicable when there are more than one method to fill up by promotion as well.” (para 16 of written argument of the applicant). N Ravindran therefore would not apply to the present case.

46. In **N R Parmar** the Hon'ble Supreme Court was dealing with the controversy that related to a particular recruitment year where the promotees had joined earlier but the direct recruits had joined on different dates which was much later to the date of joining of the promotees. It is in this context that the Hon'ble Supreme Court after extensively discussing the judicial precedents concluded that since the promotion of the promotees and the direct recruits in that case related to the same recruitment year it was immaterial when they actually joined. The judgment did not deal with a situation where the direct recruitment was held by bunching the vacancies for more than one recruitment year.

47. The main argument of the counsel for the applicant is that the seniority is nothing but a computation of length of service in a particular grade. However, he failed in establishing that tautology between approved service and seniority.

48. In view of the foregoing discussion and for the reasons stated, we quash the seniority list dated 09.06.2015. For the purpose of inter se seniority the DPC promotees from 2006-07 to 2009-10 shall be treated as ad-hoc till the year 2010-11 when in fulfilment of the statutory requirement the LDCE was also held. A list of DPC promotees from 2006-07 to 2010-11 shall be prepared in the same order as the settled position of seniority of the

promotees and the same shall be rotated with the LDCE appointees of 2010-11 for fixation of inter se seniority in accordance with the OM dated 07.02.1986. It is an admitted fact that the respondents have already considered the approved service of the applicant from the year 2006 and given the financial benefits and NFSG as well, by applying rule 4 of the IBSSR. We have shown that is not the correct interpretation of the rule 4 in the context of the rule 3. However, the orders of counting of approved service the appointees LDCE 2010 from 2006 and granting consequential financial benefits including NFSG are not interfered with. OA is disposed of in terms of the above. No costs.

(Raj Vir Sharma)
Member (J)

(V.N.Gaur)
Member (A)

27th February, 2017

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