

**Central Administrative Tribunal
Principal Bench:New Delhi**

OA No.2515/2012

Reserved on :14.07.2016
Pronounced on:15.11.2016

**Hon'ble Shri Sudhir Kumar, Member (A)
Hon'ble Shri Raj Vir Sharma, Member (J)**

1. Manish Huria,
Aged about 36 years
S/o Sh. K.L.Huria
R/o 17/108, Geeta Colony
Delhi-110031.
2. Mahesh Kumar,
Aged about 38 years
S/o Sh. Lal Singh
R/o House No.3, Block No.24,
MCD Govt. Flats, Model Town-III,
Delhi-110009.
3. Dhirendra Kumar,
Aged about 35 years
S/o Sh. Rajeshwar Prasad Roy,
R/o Flat No.52, DDA Flats,
Sector 6, Pocket 1, Dwarka,
New Delhi-110075. ...Applicants

(By Advocate: Shri M.K.Bhardwaj)

Versus

Govt. of NCT of Delhi & Ors. Through

1. Chief Secretary
Govt. of NCT of Delhi
I.P.Estate, New Delhi.
2. Secretary
DSSSB FC-18, Institutional Area,
Karkardooma, Delhi.

3. The Director
Local Bodies
Govt. of NCT of Delhi.
4. Commissioner
South Delhi Municipal Corporation
Civic Centre, Minto Road,
New Delhi.Respondents.

(By Advocates: Ms.Alka Sharma for R-1 to R-3 &
Ms. Anju B.Gupta for R-4)

ORDER

Per Sudhir Kumar, Member (A):

The three applicants of this OA have approached this Tribunal since they are aggrieved as the respondents have not correctly decided their eligibility for appointment to the post of Assistant Engineer (Civil) [A.E.(Civil), in short], by taking into account the time of occurrence of vacancies of the said quota, and are also aggrieved with the discriminatory action of the respondents for their having continued to grant promotions to the posts of A.E. (Civil) since 2002, but not taking any steps to fill up the Direct Recruitment Quota (DR Quota, in short) vacancies in the said cadre.

2. The applicants are degree holder Engineers, serving as J.E. (Civil), and their next promotion was to the post of AE (Civil), the Recruitment Rules (RRs, in short) for which post prescribed that those posts have to be filled up 50% by way of DR Quota and 50% by way of promotion.

3. In order to fill up the vacancies which had become available in the DR Quota, the respondents had issued an Advertisement No.01/2002 against Post Code No.003/2002, and, thereafter, the process of recruitment had been initiated by Respondent No.2 on receipt of a requisition from the Respondent No.4 -South Delhi Municipal Corporation (SDMC, in short). At that point of time, all the vacancies of DR Quota in the said cadre of AE (Civil) were not filled up, and the applicants have submitted that in the subsequent years, more than 100 vacancies became further available upto 2005, which vacancies were required to be filled up by holding a competitive examination, which the respondents did not hold, and they continued to make promotions in the cadre of AE (Civil). The applicants became eligible for their appointments as AE (Civil) in the meanwhile, and they started requesting the respondents to fill up the DR quota posts as well, simultaneously.

4. The applicants have submitted that while considering the similar issue of not filling up of vacancies in a timely manner, the Hon'ble Delhi High Court had in the cases of **Dr. Sehadeva vs. Union of India & Ors.** WP(C) No.5549/2007 decided on 28.02.2012 and **V.K.Jain vs. Union of India & Others** WP(C) No.561/2003 decided on 03.05.2012 held that the vacancies are required to be filled up immediately on their availability, and as

per the relevant rules and instructions, and it has also been held that any delay in filling up the vacancies cannot be made the basis to grant benefit of holding higher post only from the date of promotion. The applicants have, therefore, pleaded that through these two judgments the Hon'ble High Court had held that there should not be any discrimination in the matter of promotions, and when once the official was eligible for promotion as per rules, and that there were specific instructions that the promotions should relate back to the date of availability of vacancies. The applicants have also claimed that despite this position of law, the respondents had not initiated the selection process for filling up the vacancies under DR Quota for more than 10 years, and due to which delay, even though they had become eligible to participate in the selection for appointment to the post of AE (Civil) under 50% DR Quota long back, they had been deprived from appearing in the selection process, for no fault on their part.

5. The applicants are further aggrieved that though after 10 years the respondents had brought out an Advertisement No.02/2012 for initiating the process for filling up all the DR Quota vacancies lying vacant since 2002, but that Advertisement made it clear that only such candidates were eligible, who are less than 30 years of age, and in case of Government servants, 5

years' age relaxation had been provided. Their grievance is that if the respondents had initiated such process for filling up the vacancies of DR Quota in the years 2003, 2004, 2005, 2006, 2007 onwards up to 2011, they would have become eligible, as till then they were below the age of 35 years, and they became ineligible thereafter on account of age, only a few months back, because of which, they have been made to suffer for no fault on their part. It was further submitted that as per the Advertisement brought out in 2012, the respondents had decided the eligibility age as on the last date of receipt of the applications, i.e. 15.05.2012, and not with reference to the dates/years of occurrence of vacancies to be filled up on direct recruitment basis, because of which the applicants have been made to suffer for no fault on their part. They have submitted that once the vacancies of 2002 could not be filled up, the eligibility of the candidates was required to be decided by giving age relaxation, or by deciding their age as on 2002 and other relevant years, when the vacancies had arisen, but that the respondents are not inclined to do the same, and hence this OA.

6. Among other grounds, the applicants had assailed the actions of the respondents to be in violation of Articles 14 and 16 of the Constitution, as they had been deprived of an opportunity

to participate in the selection process for DR Quota, since the selection process had not been taken up in a timely manner. They had taken the further ground that the respondents have acted in violation of the Government of India's Instructions wherein it has been provided that the vacancies in any particular cadre are required to be filled up by deciding the age eligibility with reference to the availability of the vacancy, and completion of eligible service. It was submitted that once the applicants had acquired the requisite degree, they became entitled to appear in the DR selection process of 2005, and that the respondents were not justified to decide their age as in 2012, and not in 2005, when the vacancies of AE (Civil) now sought to be filled up in 2012 were available, since it is settled law that the eligibility has to be decided with reference to the relevant rules applicable at the time of occurrence of the vacancy.

7. The applicants have sought shelter behind the judgment of the Hon'ble Delhi High Court, in which it was held that it is mandatory to hold the DPC timely in order to fill up the available vacancies, and the delay that had occurred in holding the DPC by the respondents cannot be made the basis to deny them their seniority and other benefits from the dates of occurrence of the vacancies. They have taken the further ground that the delay

caused due to respondents not initiating the process for filling up the DR Quota vacancies after they had become eligible for the years 2003 and 2005 respectively cannot be held against them, and that the action of the respondents in not filling up the direct recruitment vacancies in a timely manner was highly illegal, arbitrary and unconstitutional. In the result, they had prayed for the following reliefs:

- "(i) to declare the action of the respondents in determining age for appointment to the post of AE (Civil) under DR quota on the last date of receipt of belated advertisement as illegal and arbitrary.
- (ii) to direct the respondents to decide the eligibility regarding qualification and age etc. with reference to the period of occurrence of vacancies of AE (Civil) or grant of age relaxation to the applicants to the extent of delay caused in conducting selection process for filling up direct recruitment vacancy of AE (Civil).
- (iii) to direct the respondents to fill up the vacancy of AE (Civil) under DR quota as per the relevant rules applicable at the time of occurrence of vacancy and declare the applicants as eligible for appointment to the post of AE (Civil) under DR quota.
- (iii) To pass such other and further orders which their lordships of this Hon'ble Tribunal deem fit and proper in the existing facts and circumstances of the case."

8. The applicants had also prayed for interim relief, which was, however, not considered on any dates of hearing of the case by any of the Coordinate Benches, before this case came up for final

hearing. While the case was pending, MA No.933/2015, filed by the applicants, was decided on 23.03.2015 by a Coordinate Bench, including one of us, permitting the applicants to provisionally appear in the examination to be held by the Respondent No.2. Thereafter, another MA No.1678/2015 had also been filed, praying for the execution of the direction issued by this Tribunal, which was disposed of by the same Bench on 25.05.2015.

9. The counter reply of Respondent No.2 was filed on 05.02.2013. They had pointed out that the Advertisement had been brought out as per the RRs, and in respect of the reservation benefits etc. provided therein, it was submitted that no further relaxation in age could have been provided by answering the Respondent.

10. The counter reply on behalf of Respondent No.4 was filed on 15.02.2013 raising a preliminary objection that the present OA is barred by limitation, as the applicants have themselves submitted that they became eligible for promotion under DR Quota in 2003 and 2005, while they had filed the present OA challenging the alleged inaction on the part of the respondent in 2012, which is highly belated and time barred, and, therefore, it should be dismissed at the outset.

11. It was further submitted that though as per the earlier RRs of the posts of AE (Civil), 50% of the posts were to be filled up by way of promotion, and 50% under DR Quota. However, as per the amended RRs of the posts of AE (Civil), which were notified on 01.07.2004, 75% of the posts were to be filled up by way of promotion, and 25% of the posts were to be filled up by direct recruitment. It was further submitted that a requisition was sent to the DSSSB for recruitment to 48 posts of AE (Civil) through DR Quota. The DSSSB advertised the said posts, and the process for direct recruitment was concluded within that year, and the result was received by the erstwhile MCD in parts during the years 2003, 2004, 2005 & 2007. It was submitted that since the respondent no.2 is the nodal agency for recruiting for any vacant posts of the DR Quota in respondent no.4 – SDMC also, and the SDMC itself has no role to play.

12. It was further submitted that some more vacancies were created vide Corporation Resolution Nos. 868 and 869 on 26.02.2007, but still some of those vacancies remained unfilled, in spite of the dossiers sent by the DSSSB from the DR Quota panel since the candidates did not join, for various reasons, and some posts were allotted to the direct recruitment quota by the DPC held on 02.03.2009, whereafter a requisition was sent on

31.05.2010 to the Respondent No.2-DSSSB by the erstwhile MCD for filling up 23 vacant posts of AE (Civil) under DR Quota. A reminder was also issued in this regard on 01.06.2011, and it was submitted that in view of the aforementioned facts and circumstances, and in view of the amendment in the RRs, no wrong was committed by the Respondent No.4 in respect of filling up of the posts under DR Quota for the said cadre. It was, therefore, submitted that since the DR Quota vacancies had been filled on the basis of recommendations made by the DSSSB in the years 2003, 2004, 2005 & 2007, it was incorrect on the part of the applicants to state that there had been total inaction to fill up the vacancies under DR Quota. Acknowledging the Government of India's instructions for holding year-wise DPC, it was pointed out that the present OA relates to filling up of the vacancies of DR Quota, in which backlog vacancies were available only from 2007 onwards, and, thereafter, steps for filling up the vacancies were initiated by the erstwhile MCD at the earliest. It was further submitted that both the cited judgments are not applicable to the facts and circumstances of the present OA, and that the grounds as raised by the applicants in this OA are misconceived, and legally not tenable. It was further submitted that the prayer clause is wrong, baseless and devoid of any merit, in view of the

submission made in the preceding paragraph of the OA, because of which, the OA is liable to be dismissed.

13. No rejoinder was filed by the applicants to the counter replies filed by the R-2-DSSSB, and the R-4-SDMC.

14. Heard. Learned counsel for the applicants had emphasized on the contents of the advertisement Annexure A-1, and submitted that even though the applicants were over-age, as per Annexure A-3, Applicant Nos.1 & 3 had sought "No Objection Certificate" for applying to the post of AE (Civil) in Delhi Jal Board and MCD (Annexure A-3 colly). He had produced Special Registration for Advertisement No.02/2012, through which, in obedience of the orders of this Tribunal, Special Registration had been granted to the applicants for their being allowed to appear at the examination concerned. He had relied upon the above cited judgments of the Hon'ble Delhi High Court and submitted that the case of the applicants ought to have been considered.

15. However, we have gone through both the judgments cited by the applicants, and it is seen that both these judgments apply to the process of promotion through DPC, and none of these two judgments has laid down any law in regard to the age relaxation being provided for direct recruitments under DR Quota.

16. Learned counsel for the applicants also produced a copy of the order dated 13.11.2013 pronounced by a Coordinate Bench of this Tribunal in OA No.3297/2012 in **Devender Singh vs. Govt. of NCT of Delhi & Others**, in which case the Coordinate Bench had considered as to whether the DoP&T Notification dated 1998, granting age relaxation to various categories of candidates could be made applicable pending amendment of the RRs for the post concerned. The Coordinate Bench had on that day held that the period for which such age relaxation is allowed is different for different categories, and that all these details cannot be prescribed in the RRs against each post in the Government, and had then allowed the OA, directing the respondents to allow the applicant therein age concession as a departmental candidate, under the terms of the DoP&T Notification dated 21.12.2009. It is seen that the said direction issued in that specific case was not a *ratio decidendi*, and cannot be made directly applicable to the instant case, because in the advertisement, special age relaxation of five years had already been provided to the departmental candidates.

17. The applicants have not been able to rebut the fact brought forward by the respondents that the DR Quota posts had kept on getting filled up till 2007 on the basis of the dossiers sent on the

recommendations made by the Respondent No.2-DSSSB, and that the backlog posts remained unfilled under DR Quota only from 2008 onwards, when some of the selected candidates did not join their duties. Thereafter, the erstwhile unified MCD had been undertaking correspondence with the recruiting agency, DSSSB-Respondent No.2, for filling up the unfilled DR Quota vacancies, which had resulted in the present impugned advertisement being issued.

18. Just because the applicants had in the years 2003 & 2005 passed their Engineering Degree Examinations, and had attained the eligibility to appear at any stage at the examination for the DR Quota vacancies, as and when it was held, they were never deprived from being simultaneously eligible for being considered from such promotion against the 75% promotional quota vacancies, which kept on getting filled up through DPC Meetings held year after year. Just because the respondents did not undertake any direct recruitment, to fill up DR Quota vacancies immediately after availability of some such vacancies from 2007 onwards against the said post, does not give rise to a cause of action in favour of the applicants to agitate the matter in the manner which they have done now.

19. The plea of the applicants is that the DR Quota vacancies of the previous years should be filled up by taking those years as the cut-off date for age eligibility also cannot be accepted, as it is settled law that once a particular quota of vacancies is not filled up for three years, that quota lapses, and even if the concerned vacancies are carried forward to the subsequent year for being filled up through direct recruitment selection process, the cut-off date in respect of age cannot relate to those previous years, when such direct recruitment had not been held, or had not materialized, if the recruitment process had been held.

20. This very Bench of this Tribunal had passed an order in **N.K.Sharma & Others vs. Union of India & Others**, in OA No.591/2009 with OA No.2981/2009, which has not been challenged, and has become final. Relevant paras of that Order read thus:

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

- 1) **Uttaranchal Forest Rangers' Assn. (Direct Recruits) & Ors. v. State of U.P. & Ors., : 2007 (2) SLJ 133 (SC) = (2006) 10 SCC 346,**

2) **State of Uttarakhand & Anr. v. Dinesh Kumar Sharma: 2007 (3) SLJ 242 SC = (2007) 1 SCC 683".**

142 to 146 xxxxxxxx not reproduced here.

147. The case of **Union of India & Ors. vs. N.R. Parmar & Others (and the four related cases): (2012) 13 SCC 340=JT 2012(12) SC 99**, was decided by a two Judges' Bench of the Supreme Court, and had laid down the law in regard to DRs vs. DPs in respect of situations where the Rota Quota has not broken down. Also, as it is obvious, that judgment could not have over-ruled in any manner the point of law decided already by a three Judges' Bench in **Central Provident Fund Commissioner vs. N. Ramachandran** (supra) in respect of the promotees from two categories, (i) through seniority-cum-merit, and (ii) through LDCE. The issues which were discussed by the Hon'ble Supreme Court in **N.R. Parmar** (supra) had been examined by a Coordinate Bench of this Tribunal, in which one of us [Member (A) Shri Sudhir Kumar] was one of the Members, in its orders dated 27.09.2012 in OA No.248/2012 **Pankaj Kumar Mishra & Ors. vs. Union of India & Ors.**, and orders dated 05.09.2013 in OA No.3596/2011 with connected cases **Shri Birendra Kumar Mishra & Ors. vs. Union of India & Ors.**, and the following paragraphs may be cited from those two orders as follows:-

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

"130. Selection and promotion are two entirely different things in Administrative Law. Promotion can only be in the line of a promotional hierarchy, and not to an ex-cadre post. While selection, by its very definition, is to an ex-cadre post, or to a new post, on which the person concerned could not have claimed movement by way of seniority-cum-merit, or through passage of time in his own existing service. Whenever the candidates face a process of selection, and after passing such process of selection or examination etc., their appointment is in a new/fresh service, like the appointment of GDS as Postmen, or of Postmen as Postal Assistants, such selection cannot be called a promotion, as it

was not that they could have come into that new Cadre or service merely in the course of natural progression through passage of time, and attaining seniority within their earlier Cadre or Service. Any advancement in Service career, which is based upon a process of selection, especially undertaken for that purpose, and which results in movement to a different cadre or service altogether, cannot be called as a promotion. A promotion, by its very definition, has to be only to a higher category in the same service or cadre, or through a prescribed avenue or channel of promotion, with or without any essential element of an efficiency bar, or a process of selection, through tests or examinations etc. where any test or examination (like the LDCE in the instant case) only results in speeding up (by three years) the process of promotion as UDCs, with the bar of "Good" ACR/APAR having been removed, it cannot be called a selection for Direct Recruitment.

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

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

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

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

133.xxxxxxxxxxxxxx(Not reproduced here).

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

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

(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the back date and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even born in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the mean time".

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

"37. We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely appointed validly in the meantime, as decided by this court in the case of K.C. Joshi & others vs. Union of India, 1992 Suppl (1) SCC 272 held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one, it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship, but it is unavoidable

and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Articles 14 and 16(1) of the Constitution.

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

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

the impugned Government orders made in annexures, 8, 9 and 10 is unexceptionable."

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

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

29-33. xxxxxx

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

21. In this Tribunal's order in OA No.3596/2011 with connected cases- Order dated 05.09.2013, it had been held as follows:

"218. The issue No.14 framed by us overlaps the Issue No.11/above, as to whether any of the instructions of the Govt. of India DoP&T, or any case law, as applicable to the cases of direct recruits vs. promotees, can apply to the cases of DPC promotees vs. accelerated promotees through the LDCE route. The obvious answer as already provided above is 'No'. Unfortunately, the DoP&T had displayed clarity in their thoughts and perception only up to the issuance of their above cited OM dated 24.06.1978 (reproduced in para 147/above), which clarity was existing in the previous consolidated instructions dated 22.11.1959 (also reproduced extensively above), issued by the respondents, Govt. of India. At the cost of repetition it must be stated by us that most parts of that OM dated 22.12.1959 issued by the DoP&T when it was under the Ministry of Home Affairs, still stand valid and applicable as on today also, unamended, which has been referred to in Para-18 & 19 of the Hon'ble Apex Court's latest judgment in **Union of India & ors. vs. N.R. Parmar & Ors.** (supra) also. Only a portion of that O.M. dated 22.12.1959, particularly para-6 thereof, has been amended since then, many times over. Since the Hon'ble Apex Court was in the case of "**N.R. Parmar**" (supra) dealing with the issues concerning only direct recruits vs. promotees, in the subsequent paragraphs of its judgment it went on to discuss and decide the said case only on the basis of the subsequent OMs of the Union of India, dated 07.02.1986 and 03.07.1986 and onwards, which had been issued in the context of the emerging case-law on the subject of fixation of *inter-se* seniority in between the Direct Recruits and Promotees. But the very fact that these two OMs dated 07.02.1986 and 03.07.1986, and the subsequent OM dated 03.03.2008 were all issued to only partially modify the para 6 of the Annexure to the original instructions dated 22.12.1959, in so far as it concerned the subject of the relative seniority of direct recruits and promotees, was fully reflected by the Hon'ble Apex Court also in "**N.R. Parmar**" (supra), which is apparent from the fact that OM dated 07.02.1986 was cited by the Hon'ble Apex Court as follows:-

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

"6. Relative seniority of Direct Recruits and Promotees.

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

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

19. The aforesaid prescription of the manner of determining inter se seniority between the direct recruits and promotees, determined through the OM dated 22.11(sic 12).1959, was modified by an office memorandum dated 7.2.1986, issued by the Government of India, Department of Personnel and Training (hereinafter referred to as, "the OM dated

7.2.1986"). The modification introduced through the OM dated 7.2.1986 was to redress a situation wherein, vacancies of one of the sources were kept (or remained) unfilled during the process of selection, and the unfilled vacancies, had to be filled up through "later" examinations or selections. **For the determination of seniority, in the contingency wherein the process of recruitment resulted in filling the vacancies earmarked for the two sources of recruitment, the manner of determining inter se seniority between promotees and direct recruits, expressed in the OM dated 22.11(sic 12).1959 remained unaltered.** But where the vacancies could not be filled up, and unfilled vacancies had to be filled up "later" through a subsequent process of selection, the manner of determining inter se seniority between promotees and direct recruits, was modified". (Emphasis supplied).

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

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

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

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

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

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

(d to g) xxxxxxxxxxxxxxxxxxxx (*Not reproduced here*).

(h) **In paragraph 6 of the OM dated 7.2.1986 it was asserted, that the general principles for determining seniority in the OM dated 22.11(sic 12).1959 were being "modified" to the extent expressed** (in the OM dated 7.2.1986). The extent of modification contemplated by the OM dated 7.2.1986 has already been delineated in the foregoing sub-paragraphs. Para 6 therefore leaves no room for any doubt, that **the OM dated 22.11(sic 12).1959 stood "amended" by the OM dated 7.2.1986 on the issue of determination of inter se seniority between direct recruits and promotees, to the extent mentioned in the preceding sub-paragraphs.** The said amendment was consciously

carried out by the Department of Personnel and Training, with the object of remedying the inappropriateness of direct recruits of "later" examination(s) or selection(s) becoming senior to promotees with long years of service, in terms of the OM dated 22.11(*sic* 12).1959".

(Emphasis supplied).

221. Therefore, it is clear that even after the judgment in **Union of India & ors. vs. N.R. Parmar & Ors.** (supra), apart from the changes brought about in respect of the subject of the relative seniority of direct recruits vs. promotees through the issuance of the DoP&T OMs dated 07.02.1986, 03.07.1986 and 03.03.2008, even as on today, the rest of the instructions which were contained in the consolidated General Principles for determining seniority in Central Services as laid down in the OM dated 22.12.1959 have continued to be applicable, in respect of all other matters and fact situations requiring the determination of *inter-se* seniority, other than the situations between the Direct Recruits and Promotees, which we can reiterate on the strength of that very judgment of the Hon'ble Apex Court in "**N.R. Parmar**" (supra), as cited above."

22. Therefore, since the present applicants were never deprived of their right for consideration of their cases for promotion against the 75% promotional posts, and the process of selection of unfilled vacancies of 2007 onwards could somehow never get started, and it was only started in 2012 through advertisement (Annexure A-1), they cannot now be allowed to plead that age criteria should not be applied in the year 2012, since some of the

posts had fell vacant and were available in the years 2007, 2008, 2009, 2010 or 2011 etc. In the above cited order, the Indian Railways, by a wrong understanding of the law related to carry forward of the DR Quota vacancies, had granted more than 20 years' antedated seniority to the DR Quota selectees, because of which, on the date of their joining, such DR Quota selectees had gained seniority in respect of years in which they were students in Primary Classes, which had been struck down by the order of this very Bench, and has become final as it has remained unchallenged.

23. A similar situation would arise if any age relaxation is provided over and above the five years' age relaxation for the departmental candidates already provided in the year 2012, which would automatically relate to the eligibility of the present applicants as departmental candidates in the year 2007, five years before the year 2012. If any further age relaxation is granted, as prayed for by the applicants, it would result in more than their due seniority being granted to them, when the applicants were themselves either underage, like in the above cited case (*supra*), or the year would relate to an year even before they had passed their Engineering Degree examination.

24. Therefore, for parity of reasons and legal position with the orders passed in the above mentioned O.A., we find no merit in the present OA also, and it is rejected, but there shall be no order as to costs.

(Raj Vir Sharma)
Member (J)

(Sudhir Kumar)
Member (A)

/kdr/

(OA No.2515/2012)

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