

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 4355/2012

Reserved on:28.04.2016

Pronounced on:17.05.2016

Hon'ble Mr. P.K. Basu, Member (A)

Hon'ble Dr. Brahm Avtar Agrawal, Member (J)

1. Shri P.K. Paul,
S/o Late Shri P.C. Paul
Aged about 52 years
Employee Code No.242301
R/o A/6, 1st Floor
G.P. Extension, Kalkaji,
New Delhi-110019

2. Shri M.S. Yadav
S/o Shri Lok Nath Paul
Aged about 52 years
Employee Code No.246693
R/o Ghaziabad, U.P.

... Applicants

(Through Shri Nilansh Gaur, Advocate)

Versus

1. Secretary
Ministry of Defence
South Block,
New Delhi
2. The Joint Secretary (Trg) and CAO
Ministry of Defence
C-II Hutments,
New Delhi
3. Shri Hari Om Rastogi
Employee Code No.125589
4. Shri Rajeev Sharma
Employee Code No.125831
5. Shri Om Prakash
Employee Code No.125956
6. Shri J.V. Rao
Employee Code No.148346

7. Shri T.S. Chidambaram
Employee Code No.236380
8. Shri J.P. Mahato
Employee Code No. 148250
9. Shri N.M. Kulkarni
Employee Code No.148289

Through Respondent No.2
All are C/o Army Head Quarter
Ministry of Defence
Sena Bhawan, New Delhi-11

... Respondents

(Through Shri Subhash Gosain, for official respondents
Shri Padma Kumar S., for private respondents)

ORDER

Mr. P.K. Basu, Member (A)

The applicant No.1 joined respondents as Senior Technical Assistant (STA) on 12.10.1988 and applicant No.2 as STA on 13.05.1988.

2. Pursuant to direct recruitment advertised by Union Public Service Commission (UPSC) for the post of Junior Research Officer (JRO) in Defence Ministry, the applicants applied and were selected. The order of appointment was issued to applicant No.1 on 16.09.1998 and to applicant No.2 on 27.01.1999. Applicants joined the post on 9.09.1998 and 15.01.1999 respectively.

3. The Recruitment Rules for the posts of JRO and SRO are collectively at Annexure A-4 (colly.).

4. The Department of Personnel and Training (DoP&T) issued guidelines on seniority whereby the seniority to direct recruits has to be given on the basis of merit in the selection as far as inter se seniority is concerned from the year in which the direct recruit joins this post. For promotee, the availability of direct recruits has been laid down in para 4.2.2. but has been clarified subsequently in 2008 to be from the date the promotee joins the promotional post.

5. The seniority list issued on 1.01.2001 showed applicants senior, by virtue of earlier joining of the applicants as direct recruits in the grade of JRO, than the private respondents, who had been promoted much later than the applicants. However, another seniority list with a juxtaposition was issued in the year 2005.

6. The DoP&T issued a clarification on 23.09.2005 whereby the seniority for direct recruit has to be assigned with reference to the year in which a particular batch of direct recruits joins the post.

7. At the time the applicants joined the post of JRO on direct recruitment basis, the private respondents were working in the feeder post of STA.

8. The private respondents have been appointed as JRO only in 2000. However, the respondents before constituting the DPC for promotion to the post of Research Officer revised their earlier seniority list of JRO issued on 1.05.2005 showing private

respondents as senior to them. However, an office order issued on 30.01.2006 circulates seniority for refixation and to remove any anomaly by 15.02.2006. Applicants made representations for refixation of seniority and for restoring their earlier seniority before the issue of revised Seniority List dated 1.05.2006.

9. The respondents having not responded to the representations of the applicants led to filing OA 1719/2006 before the Tribunal where directions were issued on 27.07.2007 quashing the revised Seniority List and directing the respondents to re-examine the seniority.

10. The respondents sought extension of time for implementation of the directions and thereafter in compliance of this Tribunal's order in OA 1719/2016 issued an order dated 21.02.2008 whereby they have reiterated the seniority position, in which private respondents have been shown as senior to the applicants.

11. The applicants being aggrieved filed the Contempt Petition No.59/2008 before the Tribunal which was dismissed on 10.09.2008 giving liberty to the applicants to file a fresh OA.

12. The applicants filed OA 2196/2008 before the Tribunal challenging order dated 21.02.2008 and seniority list of JRO of even date. The Tribunal though took into consideration the decision of the Hon'ble Apex Court in **Nani Sha and others Vs. State of Arunachal Pradesh and others**, 2007 (7) SCALE (521) but in the light of DoP&T OM of 3.03.2008 and its proviso therein

where the seniority already fixed was directed not to be disturbed, the OA of the applicants was dismissed.

13. The applicants being aggrieved filed WP(C) 1993/2010 before the Hon'ble High Court of Delhi assailing the order passed by the Tribunal in OA 2916/2008. The Hon'ble High Court by an order dated 11.09.2012 allowed the Writ Petition vide Annexure A-13 and set aside the order passed by the Tribunal as well as the order passed by the respondents on 21.02.2008 and directed the respondents to pass a fresh order keeping in light the directions contained in OA 1719/2006 and also to re-examine the aspect of seniority between the direct recruits and promotes in the light of decision of the Hon'ble Supreme Court in the case of Nani Sha (supra).

14. The applicants contend that the respondents in utter disregard to the directions issued by Hon'ble High Court passed the impugned order dated 29.10.2012 in which the decision in Nani Sha (supra) was wrongly construed and interpreted and seniority assigned to the applicants vide order dated 21.02.2008 has been found to be in accordance with Government instructions.

15. Being aggrieved by relegation of seniority in the Seniority List and the promotion order of private respondents Nos.3 and 4, the present OA has been filed with the following prayers:

"8.1 To set aside the Seniority List dated 21.02.2008 of JRO at Annexure A-1 and direct the respondents to correct the seniority of the applicant as figured in the seniority list dated 1.01.2001 in the grade of JRO and to restore

back the seniority of the applicants over and above the private respondents for all purposes.

- 8.2 To set aside the promotion order of respondents No.3 and 4 made vide Annexure A-2 and to direct the respondents to consider the applicants for promotion as R.O. Group 'A' with effect from January 2009 with all consequential benefits.
- 8.3 To set aside the impugned order passed by the respondents on 29.10.2012 at Annexure A-3.

16. The legal issue raised by the applicants is that the Hon'ble Supreme Court in **Nani Sha and others Vs. State of Arunachal Pradesh and others**, 2007 (7) SCALE 521 has laid down the proposition that a promotee who is promoted subsequently irrespective of delay in promotion as well as non-holding of DPC cannot claim retrospective seniority over and above the direct recruits who had been working earlier to the applicants. It is stated by the learned counsel that the aforesaid proposition is also clarified by the Department of Personnel and Training (DoP&T) OM dated 3.03.2008 in which availability of vacancies has been clarified for the purpose of seniority for a promotee being the date of joining the promotional post. Learned counsel for the applicants also referred to the following judgments of the Hon'ble Supreme Court and the ratio laid down thereunder:

- a. **Ajit Kumar Versus State of Orissa** 1999 IX Apex Decision (Supreme Court) page 595

"Service-Seniority-direct Recruits and promotees – whether seniority be counted from the "date of vacancy" or from "date of appointment"? The latter.

b. **State of Uttaranchal & another Versus Dinesh Kumar Sharma.**

"In a recent judgment of this Court in Uttaranchal Forest Rangers Association (Direct Recruit) & others Versus State of U.P. 2006 SCALE 577, (Dr. A.R. Lakshmanan & Tarun Chatterjee) this Court was of the view that seniority has to be decided on the basis of rules in force on the date of appointment, no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre. Similar view was taken by this Court in the case of KC Joshi Versus Union of India 1992 Supp (1) SCC 272.

In State of Bihar & Others Versus Akhouri Sachidananda Nath & others 1991 Supp (1) SCC 334, this Court observed that: In the instant case, the promotees respondents 6 to 23 were not borne in the cadre of Assistant Engineer in 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 borne 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."

c. **Vinodanand Yadav & Others Versus State of Bihar** 1994 Supp (2) SCC 44

Held: On an issue regarding the inter se seniority among the direct recruits and promotees the Court applying the ratio of State of Bihar Versus Akhouri Sachidananda Nath held that the appellants who were direct recruits shall be considered senior over the promotees not borne on the cadre when the direct recruits were appointed in service. Hence the gradation list drawn under which promotees were given over direct recruits could not be sustained and was thereby set aside.

d. **R.K. Bohra & others Versus Union of India etc:** 2003(3) A T J PAGE 618

“Seniority – determination of seniority in the cadre of Inspector of Income Tax-seniority has to be counted from the date of joining – year of recruitment is not relevant for the purpose of determining the seniority. Even it is also not material that the recruitment was against the vacancies of earlier years”.

17. Regarding the present case, the applicants state that in the year 1997, the Union Public Service Commission (UPSC) had issued an advertisement inviting applications for the post of JRO in Defence Ministry. At that time, the applicants were working as Senior Technical Assistant (STA). This was an opportunity for them to become direct recruits in the post of JRO without waiting for their turn for promotion from STA to JRO. Both remained successful and applicant no.1 joined as JRO as a direct appointee on 9.09.1998 and applicant no.2 on 15.01.1999. The seniority list of JRO shows both the applicants senior to private respondents 3 to 9. Respondents no.3 to 9 were promoted from the post of STA to JRO on 13.12.2000. Before that date of 13.12.2000, they were working on the post of STA except Shri Rastogi i.e. respondent no.3 as he was promoted with effect from 28.09.1999. Thus all the respondents 3 to 9 were promoted as JRO from the post of STA later than the applicants who became direct recruits on 9.09.1998 and 15.01.1999 respectively. It is argued that if the DPC has been delayed or has not been held and in the meanwhile the direct recruits have joined after following the legal process as per statutory rules, then the promotee by virtue of his promotion later i.e. after joining of the direct recruits, the promotion on notional basis cannot entail seniority which has to be reckoned from the date of

substantive appointment. It is pointed out that in case of private respondents, the seniority assigned to them is from the date when they were not even borne in the cadre and especially when the applicants were already working on the cadre posts. It is stated that the above proposition has been laid down by the Hon'ble Supreme Court in **Hardev Singh Vs. Union of India**, 2011 (10) SCC 121 and in **Pawan Pratap Singh Vs. Reevan Singh**, 2011 (3) SCC 267.

18. It is further stated that in the matter of promotion from retrospective date, the same has to be in exceptional circumstances and even after the notional promotion, it will not entail retrospective seniority and the seniority shall be reckoned from the date of substantive appointment when the incumbent has taken charge of the promotional post as held in **Amarjit Singh Vs. Devi Ratan**, 2010 (1) SCC 417.

19. It is reiterated by the applicants that in Nani Sha (supra), irrespective of the rules and instructions, the ratio *deci dendi* laid down by the Hon'ble Supreme Court was to the effect that in retrospective promotion, seniority of direct recruits who have been appointed and working in the post earlier to the promotions shall not be relegated.

20. It is stated that while disposing of the Writ Petition, the Hon'ble High Court had set aside the order passed by the Tribunal in OA 2196/2008 (supra) including findings of the OM dated 3.03.2008 issued by the DoP&T modifying the interpretation of the word available that it shall not apply to the

private respondents meaning thereby that the OM has applicability and the seniority of the applicants should not have been relegated. Moreover, the Hon'ble High Court has directed the respondents to reexamine the seniority of the applicants vis-à-vis promotees in the light of Nani Sha (supra). It is the case of the applicants that despite specific direction of the Hon'ble Supreme Court to consider Nani Sha's case (supra), the respondents have misconstrued the ratio laid down in the said case and with a closed mind reiterated their earlier decision of 21.08.2008.

21. The impugned order dated 29.10.2012 is in reference to Writ Petition No.1993/2010 and OA 2196/2008. In compliance of the Hon'ble High Court's judgment, the respondents reexamined the issue keeping in view the principles laid down by the Hon'ble Supreme Court in Nani Sha (supra). We reproduce below the relevant portion of the order dated 29.10.2012 as it contains the stand of the respondents as well as what view they have taken on the directions of the Hon'ble High Court:

"the Recruitment rules of the post of Junior Research Officer (JRO) were revised vide SRO 106 dated 17.05.95. This SRO 106 dated 17.05.95 had rendered most of the seniormost eligible STAs (as per the old RRs) ineligible for promotion to the grade of JRO as it made possession of Diploma in Foreign Language mandatory for promotion. The existing incumbents in the feeder grade were therefore, sponsored to undergo course in Foreign Language. A DPC Meeting was held on 20.09.99 for promotion to the grade of JRO wherein Shri HO Rastogi and Shri JP Mahto were empanelled for the DPC years 1995-96 and 1996-97 respectively. Shri Rajeev Sharma, who was junior to Shri Mahto filed a case in the CAT against the empanelment of Shri Mahto on the ground that, during the vacancy year, Shri Mahto

was not yet eligible and Shri Sharma himself was eligible for promotion. The Hon'ble Tribunal had allowed the OA and directed the department to hold a review DPC Meeting. Shri Rajeev Sharma was then promoted in respect of the vacancy year 1996-97. Also, review DPC for the years 1997-98, 1998-99, 1999-2000, 2000-01 and 2001-02 were held in May 2002. Although, Shri PK Paul was eligible for promotion for the year 1997-98, however, his name was not considered for promotion as he had already resigned from service at the time of DPC.

5. Whereas a Seniority List was drawn on 01.05.2005 in the grade of Junior Research Officer with respect to date of joining of each officer. Accordingly, Shri PK Paul and Shri MS Yadav were placed above Shri HO Rastogi and Shri Rajeev Sharma. However, Shri Rastogi and Shri Sharma represented against that Seniority List. The case was then referred to DOP&T. DOP&T had clarified vide their note dated 23.09.05 that in the case of Departmental promotes, seniority is fixed with reference to the panel year of promotion and in the case of Direct Recruits, grant of antedated seniority with reference to vacancy year was done away with vide OM dated 03.07.86. Direct Recruits are to be assigned seniority with reference to the year in which the particular batch of DRs joined the service/post. Accordingly, the Seniority List in JRO grade was redrawn and Shri PK Paul and Shri MS Yadav were placed below the promotees of vacancy years 98-99.

6. Whereas Shri PK Paul's name could have been considered for DPC year 1997-98. However, since he had already tendered technical resignation from the grade of STA and is serving in the grade of JRO as Direct Recruit candidate, his seniority could not be assigned with respect to his promotion as JRO at present. His seniority position was to be fixed with respect to his selection in the grade of JRO on Direct Recruitment basis. DOP&T had already opined to fix the seniority of Direct Recruits with reference to the year of joining of first batch candidates and fix seniority of promotees with reference to their panel year.

7. As per Hon'ble Delhi High Court directions on 11.09.2012 to re-examine the aspect of seniority in the light of Hon'ble Supreme Court's decision in Nani Sha's case, it is found that the case is not exactly similar to that of PK Paul's case. In Nani Sha's case the basic issue involved was about the department's mistake in making appointments by promotions

retrospectively and that effecting it from a date even when the rule governing it, didn't exist. In the PK Paul's case, a DPC was convened for earlier years as it couldn't be held at that time, though due, because of administrative reasons. Further, in the PK Paul's case the department made promotions on a later date not owing to amendment in rules but due to administrative reasons. It did give effect to promotions from a retrospective date but not from a date on which the rules governing their appointment didn't exist. The rules of appointment were same on both the date of DPC and the date from which promotions were effective. The delay in promotions was purely due to administrative reasons, hence, the promotees couldn't have been put in a disadvantageous position for no fault of theirs/rules position.

8. Now therefore having carefully gone through the judgment of Hon'ble Tribunal and the Hon'ble High Court in the instant case and the judgment of Hon'ble Supreme Court in Nani Sha & Ors Vs State of Arunachal Pradesh & Ors taking the facts into consideration, it is concluded that seniority assigned to Shri PK Paul and Shri MS Yadav in the Seniority List issued vide Note No.A/22885/SL/2007/CAO/P-2 dated 21 Feb 2008 is correct in accordance with the Govt. instructions.

9. This order is being issued in compliance with the directions of the Hon'ble High Court dated 11.09.2012 given in WP 1993/2010.

10. Shri PK Paul and Shri MS Yadav may be informed accordingly."

22. From the above, it will be seen that the department held the view that the applicants case is not exactly similar to that of Nani Sha (supra). The department has argued that in Nani Sha (supra), the basic issue involved was about the department making mistake in making appointment by promotion retrospectively and effecting it from a date even when the rules governing it did not exist. In the applicants case, a DPC was convened for earlier years as it could not be held at the relevant time though due, because of administrative reasons. Further, in

the applicants case, the department made promotion on a later date not owing to amendment in rules but due to administrative reasons. It did give promotion from a retrospective date but not from a date on which the rules governing their appointment did not exist. The rules of appointment were same on both the dates of DPC and the date from which promotions were effective. Since the delay in promotion was purely due to administrative reasons hence, the department took a view that promotees could not have been put in disadvantages position for no fault of theirs/rule position. Arguing on these lines, having distinguished Nani Sha (supra), learned counsel for the applicants stated that the department came to the conclusion that Nani Sha's case will not apply in the case of the applicants and the seniority list showing the private respondents as senior to the applicants was held to be incorrect in accordance with the government instructions.

23. The learned counsel for the applicants also referred to OM dated 4.03.2014 of DoP&T which was issued after examining the question of inter-se-seniority of direct recruits and promotees in pursuance of the judgment of the Hon'ble Supreme Court in **Union of India and others Vs. N.R. Parmar and others**, Civil Appeal Nos.7514-7515/2005. In para 5 of this OM, DoP&T has communicated its decision that the manner of determination of inter-se-seniority of direct recruits and promotees would be as under:

- "a) DoPT OM No. 20011/1/2006-Estt.(D) dated 3.3.2008 is treated as non-existent/withdrawn *ab initio*;
- b) The rotation of quota based on the available direct recruits and promotees appointed against the vacancies of a Recruitment Year, as provided in DOPT O.M. dated 7.2.1986/3.07.1986, would continue to operate for determination of inter se seniority between direct recruits and promotees;
- c) The available direct recruits and promotees, for assignment of inter se seniority, would refer to the direct recruits and promotees who are appointed against the vacancies of a Recruitment Year;
- d) Recruitment Year would be the year of initiating the recruitment process against a vacancy year;
- e) Initiation of recruitment process against a vacancy year would be the date of sending of requisition for filling up of vacancies to the recruiting agency in the case of direct recruits; in the case of promotees the date on which a proposal, complete in all respects, is sent to UPSC/Chairman-DPC for convening of DPC to fill up the vacancies through promotion would be the relevant date;
- f) The initiation of recruitment process for any of the modes viz. direct recruitment or promotion would be deemed to be the initiation of recruitment process for the other mode as well;
- g) Carry forward of vacancies against direct recruitment or promotion quota would be determined from the appointments made against the first attempt for filling up of the vacancies for a Recruitment Year;
- h) The above principles for determination of inter se seniority of direct recruits and promotees would be effective from 27.11.2012, the date of Supreme Court Judgment in Civil Appeal No. 7514-7515/2005 in the case of N.R. Parmar Vs. UOI & Ors;
- i) The cases of seniority already settled with reference to the applicable interpretation of the

term availability, as contained in DoPT O.M. dated 7.2.86/3.7.86 may not be reopened.”

24. Drawing our attention to the above provisions, learned counsel for the applicants stated that this clarifies that the recruitment year would be the year of initiating the recruitment process against a vacancy year and initiation of recruitment process against a vacancy year would be the date of sending of requisition for filling up of vacancies to the recruiting agency in the case of direct recruits; in the case of promotees the date on which a proposal, complete in all respects, is sent to UPSC/Chairman-DPC for convening of DPC to fill up the vacancies through promotion would be the relevant date. It is stated that the above principles for determination of inter-se-seniority of direct recruits and promotees would be effective from 27.11.2012, the date of judgment in N.R. Parmar (supra). It was further clarified that the cases of seniority already settled with reference to the applicable interpretation of the term availability, as contained in DoP&T OM dated 7.02.1986/3.07.1986 may not be reopened. In fact, as would be noted, the DoP&T OM dated 3.03.2008 is treated as non-existent/withdrawn *ab initio* and that the DoP&T OM dated 7.02.1986/3.07.1986, would continue to operate for determination of inter-se-seniority between direct recruits and promotees. It is argued by the learned counsel for the applicants that, therefore, the OM dated 3.03.2008 need not be considered at all. The initiation of recruitment process for promotees would be the date on which proposal is sent to the

UPSC/Chairman-DPC for convening of DPC and even as per this OM, therefore, retrospective benefit could not have been given to the private respondents.

25. Learned counsel for the respondents drew our attention to para 2 of their reply in which it has been clarified as follows:-

"A DPC was held on 20.09.99 and Shri HO Rastogi and Shri JP Mahto were empanelled for the DPC years 1995-96 and 1996-97 respectively. Shri Rajeev Sharma who was junior to Shri JP Mahto filed a case in the CAT against the empanelment of Shri Mahto on the ground that, during the vacancy year, Shri Mahto was not yet eligible and Shri Sharma himself was eligible for promotion. The Hon'ble Tribunal allowed the OA and directed the department to hold a review DPC. Shri Rajeev Sharma was then promoted in respect of the vacancy year 1996-97. Also, review DPC for the year 1997-98, 1999-2000, 2000-01 and 2001-02 was held in May 2002. Although Shri PK Paul was eligible for promotion for the year 1997-98, however, his name was not considered for promotion as he had already resigned from service at the time of DPC."

It is further clarified:

"it is submitted that a Seniority list was drawn on 01.05.2005 in the grade of Junior Research Officers with respect to date of joining of each officer. Accordingly, Shri PK Paul and Shri MS Yadav were placed above Shri HO Rastogi and Shri Rajeev Sharma. However, Shri HO Rastogi and Shri Rajeev Sharma represented against this Seniority List. The case was then referred to DOP&T. DOP&T clarified vide their note dated 23.09.05 that in the case of Departmental promotees, seniority is fixed with reference to the panel year of promotion and in the case of direct recruits grant of antedated seniority with reference to vacancy year was done away with vide OM dated 03.07.86. Direct Recruits are to be assigned seniority with reference to the year in which the particular batch of DRs joined the service/post. Accordingly, the seniority list in JRO grade was redrawn and Shri PK Paul and Shri MS Yadav were placed below the promotees of vacancy years till 98-99."

26. It is further submitted by the learned counsel that the guidelines issued in 2008 in respect of seniority of promotees are not applicable in this case as the seniority of all promotees which has been challenged by the applicants were fixed much before the issuance of this order. The promotion orders of all respondents and the Seniority List in question was issued before 3.03.2008.

27. Learned counsel for the respondents relied on the judgment of the Hon'ble Supreme Court in N.R. Parmar (supra) and stated that the order of the Hon'ble Supreme Court in this case would apply. In this regard, he referred to para 33 of the judgment, which we reproduced below:

"33.....The facts only reveal that the examination and the selection process of direct recruits could not be completed within the recruitment year itself. For this, the modification/ amendment in the manner of determining inter-se seniority between the direct recruits and promotees, carried out through the OM dated 7.02.1986, and the compilation of the instructions pertaining to seniority in the OM dated 3.07.1986, leave no room for any doubt, that the "rotation of quotas" principle, would be fully applicable to the direct recruits in the present controversy....."

28. In N.R. Parmar (supra) the dispute was with regard to inter-se-seniority between direct recruit and promotee Income Tax Officers of Income Tax Department. The Hon'ble Supreme Court held that the direct recruits have to be interspaced with promotees of the same recruitment years as it held that the manner of determining inter-se-seniority between direct recruits and promotees as per OM dated 7.02.1986 and 3.07.1986 leaves

no room for any doubt that the rotation of quotas principles will be applicable to the direct recruits. Learned counsel for the respondents stated that, therefore, in view of the judgment in N.R. Parmar (supra), OM dated 3.07.1986 has attained finality and the respondents have simply followed this OM.

29. On behalf of private respondent no.4, Shri Rajeev Sharma, learned counsel Shri Padma Kumar S. stated that he was eligible for promotion in the year 1996-97 itself. However, the DPC was delayed in order to enable some employees, who were not eligible at that time, eligible. His argument is, therefore, that he should not be deprived of his rightful claim for promotion from the date he was eligible. He also reiterated the argument put forth by the learned counsel for the respondent-UOI that vide its judgment in N.R. Parmar (supra), the Hon'ble Supreme Court has categorically held that OM dated 3.07.1986 would stand and the clarification dated 3.03.2008 also is relevant. In this regard, he drew our attention to OM dated 3.03.2008 and we reproduce below relevant portion thereof:

"2. Para 2.4.1 and 2.4.2 of the OM dated 3.7.1986 contains the following provisions :-

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

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

3. Some references have been received seeking clarifications regarding the term 'available' used in the preceding para of the OM dated 3.7.1986. It is hereby clarified that while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quota of vacancies, the year of availability, both in the case of direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/ selection and completion of pre-appointment formalities as prescribed. It is further clarified that when appointments against unfilled vacancies are made in subsequent year or years either by direct recruitment or promotion, the persons so appointed shall not get seniority of any earlier year (viz. year of Vacancy/panel or year in which recruitment process is initiated) but should get the seniority of the year in which they are appointed on substantive basis. 81 DoP&T's O.M. No.20011/1/2008-Estt.(D) dated 11th November 2010 The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch of promotees joins the post/service.

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

30. Learned counsel argued that as regards para 2.4.1 and 2.4.2 of OM dated 3.07.1986, no change was contemplated and they still hold good i.e. the relative seniority of direct recruits and of promotees shall be determined according to the rotation of quota's between direct recruits and promotees, which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

31. Learned counsel argued that what OM dated 3.03.2008 seeks to do is to clarify while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quota of vacancies, the year of availability, both in the case of

direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/ selection and completion of pre-appointment formalities as prescribed. It was further argued that when appointments against unfilled vacancies are made in subsequent year or years either by direct recruitment or promotion, the persons so appointed shall not get seniority of any earlier year (viz. year of vacancy/panel or year in which recruitment process is initiated) but should get the seniority of the year in which they are appointed on substantive basis. The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch of promotees join the post/service.

32. It is argued that in case of respondent no.4, the quota was available and as per OM dated 3.07.1986, the respondent no.4 will also get benefit of seniority.

33. We have heard the learned counsel for the parties, gone through the pleadings available on record and perused the judgments cited by either side.

34. As is clear, the OM dated 3.03.2008 need not be considered by us as it is withdrawn and treated as *void ab initio*. In N.R. Parmar (supra), the Hon'ble Supreme Court has held that OMs dated 7.02.1986 and 3.07.1986 will apply in case of inter-se-seniority between direct recruits and promotees. This is basically the rotation of quota system. In Nani Sha (supra), the ratio laid down by the Hon'ble Supreme Court is that the year in

which the vacancy arises cannot be relevant for the purpose of determining seniority irrespective of the fact when the persons were recruited. The Hon'ble Supreme Court also took note of the fact that the appellants were not even borne in the cadre from the date when they were given seniority.

35. To our mind, there is no contradiction involved. In N.R. Parmar (supra), the Hon'ble Supreme Court has held that rotation of quota system as envisaged in OM dated 3.07.1986 has to be followed and direct recruitment would have to be interspaced with promotees of the same recruitment year. Question, therefore, is what is the recruitment year? This has been made abundantly clear and now reiterated in OM dated 4.03.2014 that recruitment year would be the year of initiating the recruitment process against a vacancy year. Admittedly, the applicants became direct recruits in the year 1998-1999. Due to some administrative reasons, the promotion quota could not be filled up and it was subsequently filled up but definitely the recruitment year for the promotees viz-a-viz private respondents was later than the recruitment year for the direct recruits. Therefore, there is no question of applying rota quota system simultaneously. The DPC was held on 20.09.1999 by which time both the applicants have been promoted as direct recruit – applicant no.1 on 19.09.1998 and applicant no.2 on 15.09.1999. Moreover, as has been pointed out by the learned counsel for the applicants that ratio in Nani Sha (supra) is that retrospective effect cannot be given for promotion. We agree with this contention and clearly the judgments of the Hon'ble Supreme

Court in Nani Sha (supra) and N.R. Parmar (supra) are not in conflict at all. The respondents have erroneously overlooked the ratio deci dendi of Nani Sha (supra) and tried to distinguish it on facts. In our opinion, the ratio laid down in Nani Sha (supra), quoted above, will squarely apply in the facts and circumstances of the case. The error committed by the respondents is 'travelling back in time' for the promotees through granting promotion from a retrospective date and then treating the applicants (DRs) and private respondents (promotees) as belonging to the same recruitment and applying N.R. Parmar (supra) and OM dated 3.07.1986, without realizing that this 'travelling back in time' is hit by ratio of Nani Sha (supra).

36. The OA, therefore, succeeds and the impugned order dated 29.10.2012 is set aside along with seniority list dated 21.02.2008 with a direction to the respondents to issue revised seniority list showing both the applicants as senior to the private respondents. Time frame of three months is fixed for the respondents to complete this exercise. No costs.

(Dr. Brahm Avtar Agrawal)
Member (J)

(P.K. Basu)
Member (A)

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