

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.NO.333 OF 2013

New Delhi, this the 10th day of May, 2018

CORAM:

HON'BLE SHRI RAJ VIR SHARMA, JUDICIAL MEMBER

AND

HON'BLE MS.PRAVEEN MAHAJAN, ADMINISTRATIVE MEMBER

.....

1. Yeshpal Gupta,
s/o late Shri Rattan Lal Gupta,
Assistant Engineer (E&M),
Presently resident of E-202, Pandav Nagar,
Delhi 110091
2. Yash Prakash,
s/o Shri Jagbir Singh,
Assistant Engineer (E&M),
Presently resident of 73A, Kundan Nagar,
Delhi 110092
3. Rakesh Dutt Yogi,
S/o late Shri Amar Singh,
Assistant Engineer (E&M),
Presently resident of
9/7527, Street No.4,
Amar Mohalla, Old Selampur,
Delhi 110031
4. V.K.Gupta,
S/o Shri K.L.Gupta,

Assistant Engineer (E&M),
Presently resident of
C-8/263, Yamuna Vihar,
Delhi 110053Applicants

(By Advocate: Mr.Shaurya Sohay for Mr.Amit Kumar)

Vs.

1. Govt. of NCT of Delhi through
Chief Secretary,
Delhi Secretariat,
ITO,
New Delhi.
2. Delhi Jal Board,
Through its Secretary,
Delhi Sarkar, Varunalaya,
Phase II, Karol Bagh,
New Delhi.
3. Chief Executive Officer,
Delhi Jal Board,
Delhi Sarkar, Varunalaya,
Phase II, Karol Bagh,
New Delhi.
4. The Member Administration,
Delhi Jal Board,
Delhi Sarkar, Varunalaya,
Phase II, Karol Bagh,
New Delhi.
5. Delhi Subordinate Services Selection Board,
Through its Secretary,
Institutional Area,
Behind Karkardooma Courts Complex,
Shahdara, Delhi.
6. Mr.Sandeep Kapoor,
S/o Sh.S.K.Kapoor,
R/o F-29, Double Storey,

Municipal Flats, Lodhi Colony,
New Delhi 110003

Respondents

(By Advocates: Ms.Shakshi Popli for Respondents 2 to 4-DJB; and Mr.R.K.Jain with Mr.D.S.Mahendur for Respondent 6)

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ORDER

Per RAJ VIR SHARMA, MEMBER(J):

The applicants have filed this Original Application seeking the following reliefs:

- “a) Quash the Office Orders No.221 dt.17.10.2012 Delhi Jal Board (Annexure A/1) appointing Respondent No.6 against direct recruitment quota post of Assistant Engineer (E&M) in the pay scale of 6500-10500 (pre-revised), below Shri K.C.Meena and above Shri Islam Khan w.e.f. 28.10.1999;
- b) Quash the office order No.231 dated 26.10.2012 issued by Delhi Jal Board (Annexure A/2) further promoting Respondent No.6 to the post of Executive Engineer in PB-3 of Rs.15,600-39,100 plus grade pay of 6600/- and usual allowances on ad hoc basis;
- c) pass such further order or orders as it may deem fit and facts and circumstances of the case.”

2. We have carefully perused the pleadings of the parties, and have heard Mr.Shaurya Sohany with Mr.Amit Kumar, learned counsel appearing for the applicants, and Ms.Shakshi Popli for respondent nos.2 to 4-DJB, and Mr.R.K.Jain with Mr.D.S.Mahendur for private respondent no.6.

2.1 We have also perused the written notes of submissions filed on behalf of the applicants, the respondent-DJB, and respondent no.6.`

2.2 Respondents no.1-Government of NCT of Delhi and no.5-Delhi Subordinate Services Selection Board (DSSSB) have neither appeared nor filed any counter reply.

3. Brief facts of the case, which are relevant for the purpose of deciding the controversy and are not disputed by either party, are as follows:

3.1 Applicant nos.1, 2 and 4 are Diploma Holders in Engineering, and applicant no.3 is a Degree Holder in Engineering. Applicant no.1 joined the erstwhile Delhi Water Supply & Sewage Disposal Undertaking (DWSSDU), now Delhi Jal Board (DJB), as a Junior Engineer on 23.1.1981. Applicant no.2 joined the DWSSDU as a Junior Engineer on 26.10.1981. Applicant no.3 joined the DWSSDU as a Junior Engineer (E&M) on 11.10.1983. Applicant no.4 joined the DWSSDU as a Junior Engineer on 27.1.1981.

3.2 Respondent no.6, a Degree Holder in Engineering, joined the DWSSDU as a Junior Engineer on 14.9.1989.

3.3 The Recruitment Rules provide 50% of the vacancies in the grade of Assistant Engineer (E&M) to be filled by promotion and the remaining 50% by direct recruitment.

3.4 In the year 1992-93, two vacancies in the grade of Assistant Engineer (E&M) occurred, i.e., one under General (UR), and the other under SC category. In the year 1994-95, one vacancy in the grade of Assistant Engineer (E&M) occurred under General (UR) category. In the year 1995-96, one vacancy in the grade of Assistant Engineer (E&M) occurred under OBC category. Thus, a total 5(five) vacancies in the grade of Assistant Engineer (E&M) arose during the years 1992-93, 1994-95 and 1995-96.

3.5 The erstwhile DWSSDU (now DJB), by circular dated 13.3.1996 (Annexure A/3), invited applications from eligible persons for filling up 5 posts (UR-02, SC-01, OBC-01 and ST-01) available in the grade of Assistant Engineer (E&M) under direct recruitment quota during the years 1992-93, 1994-95 and 1995-96 as aforesaid. Subsequently, the erstwhile DWSSDU, by its letter dated 7.10.1997 (Annexure A/4), also sent a requisition to the respondent-DSSSB to conduct the selection process for filling up the aforesaid 5 posts (UR-02, SC-01, OBC-01, and ST-1) of Assistant Engineer (E&M) falling under direct recruitment quota. Accordingly, the respondent-DSSSB issued Advertisement, dated 31.7.1998, inviting applications from eligible persons for selection and appointment to the said five posts of Assistant Engineer (E&M), the breakup of which was UR-02, SC-01, OBC-01, and ST-1, falling under direct recruitment quota.

3.6 Applicant no.3 and respondent no.6, who are Degree Holders in Engineering, applied for selection and appointment to the grade of Assistant Engineer (E&M) on direct recruitment basis. After conducting the selection process, the respondent-DSSSB, by letter dated 28.5.1999 (Annexure A/7), recommended five candidates in order of their merit to the respondent-DJB for their appointment against the said five vacancies in the grade of Assistant Engineer (E&M) falling under direct recruitment quota.

3.6.1 The names of applicant no.3 and of respondent no.6 were not included in the list of candidates recommended for appointment to the grade

of Assistant Engineer (E&M) against the said five vacancies falling under direct recruitment quota during the years 1992-93, 1994-95 and 1995-96.

3.7 All the five persons recommended by the DSSSB were duly appointed as Assistant Engineers(E&M) against the five vacancies falling under the direct recruitment quota by September 1999.

3.8 Respondent no.6 filed Civil Writ Petition No.401 of 2000 before the Hon'ble High Court of Delhi, challenging the aforesaid selection. Respondent no.6 also filed CM No.2288 of 2000 in Civil Writ Petition No.401 of 2000, seeking a direction to the respondent-DJB not to fill up any post of Assistant Engineer (E&M) by way of promotion. The interim order of stay passed on CM No.2288 of 2000 was subsequently vacated by the Hon'ble Court on 27.3.2000.

3.9 While CWP No. 401 of 2000 was pending, respondent no.6 again filed WP (C) No. 2931 of 2000 before the Hon'ble High Court of Delhi, seeking a direction to the respondent-DJB to fill up six posts of Assistant Engineer (E&M) falling under direct recruitment quota as per the recommendation received from the respondent-DSSSB pursuant to the selection conducted on the basis of the aforesaid Advertisement dated 31.7.1998.

3.10 The learned Single Judge of the Hon'ble High Court of Delhi, by order/judgment dated 25.5.2000, declined the applicant's claim raised in WP (C) No. 2931 of 2000. LPA No.333 of 2000 filed by the private respondent no.6 against the learned Single Judge's order dated 25.5.2000

was rejected by the Division Bench of the Hon'ble High Court of Delhi, vide order dated 24.9.2001.

3.11 Respondent no.6 again filed CM No.12831 of 2001 in CWP No.401 of 2000 praying for a direction to the respondent-DJB to fill up 6 posts of Assistant Engineer (E&M) pursuant to the selection process conducted by the respondent-DSSSB, vide Advertisement (ibid). The Hon'ble High Court, by order dated 9.10.2001, dismissed CM No.12831 of 2001.

3.12 While so, the applicants were promoted to the grade of Assistant Engineer (E&M) on 2.3.2009, 2.3.2009, 3.5.2012 and 2.3.2009 respectively.

3.13 The Hon'ble High Court of Delhi, vide order dated 21.5.2009, dismissed CWP No.401 of 2000 for non-prosecution.

3.14 The Hon'ble High Court of Delhi, by order dated 3.3.2010, restored and transferred CWP No.401 of 2000 to the Tribunal. Accordingly, CWP No.401 of 2000, on transfer, was registered as TA No.22 of 2010 on the file of the Tribunal.

3.15 The coordinate Bench of the Tribunal disposed of TA No.22 of 2010 by order dated 11.10.2011, which is reproduced below:

“This transfer application (TA for short) was originally filed before the Hon'ble High Court of Delhi as CWP No.401 of 2000. On conferring jurisdiction on service matters of the respondents-Delhi Jail Board has been transferred to this Tribunal.

2. Today when the matter was taken up for consideration the learned counsel for the parties have submitted that the issue involved in this case is being considered by the

Mediation Committee appointed by the respondents. The applicant's case has also been considered by the said Committee on 6.9.2011. According to them, the Committee would submit its recommendations very soon for the final approval of the competent authority.

2. Since the matter is already under the consideration of the Mediation Committee, we only direct the respondents to ensure that the Mediation Committee shall take appropriate decision in the matter at earliest but in any case, within one month from the date of receipt of a copy of this order. Therefore, the competent authority shall consider the same and take decision within another six weeks and the same shall be communicated to the applicant. It goes without saying that the applicant will have the liberty to challenge the decision of the respondent so taken, if so advised, through appropriate proceedings.

3. The O.A. is accordingly disposed of. No costs."

3.16 CP(C) No. 355 of 2012 filed by respondent no.6 for alleged non-compliance of the Tribunal's order dated 11.10.2011 (ibid), was disposed of by the Tribunal, vide order dated 18.10.2012 which is reproduced below:

"This CP has been filed for the alleged non-implementation of the orders of this Tribunal dated 11.10.2011 in TA No.22/2010. Today when the matter was taken up, learned counsel for the respondent-Delhi Jal Board, Shri Nishakant Pandey, has produced a copy of office order no.221 dated 17.10.2012 (copy taken on record) issued pursuant to the aforesaid order. Learned counsel for the applicant has submitted that he is satisfied with the aforesaid order.

2. In terms of the aforesaid position, this CP is closed. Notices issued to the respondents are discharged."

3.17 The Office Order No.221 dated 17.10.2012(Annexure A/1), referred to by the Tribunal in its order dated 18.10.2012 (ibid), is reproduced below:

"Whereas Hon'ble Central Administrative Tribunal vide its order Dated 11.10.11 & 08.05.12 in the matter CP (C) 355/2012 vide TA No.22/2012, has directed DJB to take

appropriate decision in the matter and communicate to the petitioner Shri Sandeep Kapoor.

Whereas the matter was examined by the Departmental Mediation Committee vide its minutes dated 01.12.11 and it was found the representation of Shri Sandeep Kapoor is justified for his appointment to the post of AE (E&M) against UR vacancy under direct Quota as per DOPT guidelines.

Whereas the matter was again examined in consultation with DSSSB and the same was placed before the competent authority for his appointment to the post of AE (E&M) w.e.f. 28.10.99 notionally subject to furnishing of an Undertaking that he will not prefer any claim regarding financial benefits etc. retrospectively.

Whereas consequent upon the approval by the competent authority Shri Sandeep Kapoor AE (E&M) on CDC is hereby appointed to the post of AE(E&M) in the pay scale of Rs.6500-10,500/- (pre-revised) w.e.f. 28.10.99 notionally. His placement will be just below Shri K.C.Meena s/o Shri R.K.Meena at S.No.26A & S.No.03A above Shri Islam Khan whose name appears at S.No.04 of seniority list of AE(E&M) circulated vide No.DJB/AC(T)/AE(E&M)/SEN/09-65083 to 65236 dated 09.07.09 vide No.DJB/AC(T)/AE(E&M)/SEN/2012-78546 to 712 dated 25.07.2012 respectively.”

3.18 Thereafter, the respondent-DJB promoted respondent no.6 to the grade of Executive Engineer (E&M) on *ad hoc* basis in PB-3 of Rs.15,600-39,100/- plus grade pay of Rs.6600/-, vide office order No.231 dated 26.10.2012 (Annexure A/2).

3.19 The aforesaid Office Orders No.221 dated 17.10.2012 (Annexure A/1) and No.231 dated 26.10.2012 (Annexure A/12) have been challenged by the applicants in the present O.A.

4. In the above context, it has been contended by the applicants that when 5(five) vacancies were notified in the Advertisement, and as per the recommendation of the respondent-DSSSB, the respondent-DJB appointed five selected persons, the selection process came to an end. The

vacancy in the grade of Assistant Engineer (E&M) arising in 1997-98 under direct recruitment quota (against which the private respondent no.6 was appointed with effect from 28.10.1999, vide impugned order dated 17.10.2012) was not included in the advertisement for being filled in accordance with the Recruitment Rules. The Mediation Committee was not authorized and empowered to make any recommendation regarding appointment to the grade of Assistant Engineer (E&M) under the Recruitment Rules. The Hon'ble High Court of Delhi had already rejected the respondent no.6's claim for appointment to the grade of Assistant Engineer (E&M) against the aforesaid vacancy. Therefore, the respondent-DJB acted arbitrarily and illegally in appointing respondent no.6 against the aforesaid vacancy with effect from 28.10.1999 (vide order dated 17.10.2012) pursuant to the selection process conducted by the respondent-DSSSB for filling the five vacancies which arose during 1992-93, 1994-95 and 1995-96, solely on the basis of the recommendation of the Mediation Committee, and in further promoting respondent no.6 to the post of Executive Engineer on ad hoc basis (vide order dated 26.10.2012) thus and thereby adversely affecting the interests of the applicants who were senior to the respondent no.6 in the grade of Junior Engineer and were promoted to the grade of Assistant Engineer (E&M) on 2.3.2009, 2.3.2009, 3.5.2012 and 2.3.2009 respectively.

5. *Per contra*, it has been contended by the respondent-DJB that when there are several persons senior to the applicants in the grade of Junior Engineer/Assistant Engineer (E&M) and none of them has objected to the

appointment of the private respondent no.6 to the grade of Assistant Engineer (E&M) under direct recruitment quota with effect from 28.10.1999 as well as to his *ad hoc* promotion to the grade of Executive Engineer with effect from 26.10.2012, and when such appointment and *ad hoc* promotion of the private respondent no.6 do not adversely affect their interest, the applicants have no *locus standi* to challenge respondent no.6's appointment to the grade of Assistant Engineer (E&M) under direct recruitment quota with effect from 28.10.1999 and *ad hoc* promotion to the post of Executive Engineer on 26.10.2012. When applicant no.1 has already retired from service, and when applicant nos. 2, 3 and 4 have all been promoted to the grades of Assistant Engineer (E&M) and of Executive Engineer, the issue has become academic and the present proceedings have become infructuous and, therefore, the applicants should not be allowed to pursue this O.A. as a public interest litigation which is not maintainable in service matters before the Tribunal. It has also been contended by the respondent-DJB that a mistake had crept in the requisition sent by it in not including the 6th vacancy in the grade of Assistant Engineer (E&M) under direct recruitment quota for General (UR) category, and, consequently, the said vacancy was not notified in the advertisement issued by the respondent-DSSSB. While recommending five candidates for appointment to the grade of Assistant Manager (E&M) against the five advertized vacancies, the respondent-DSSSB had also recommended and prepared an additional panel of five candidates, wherein the name of the applicant was at Sl.no.1. Therefore, the

Mediation Committee accepted the respondent no.6's claim and recommended his appointment against the aforesaid 6th vacancy in the grade of Assistant Engineer (E&M) on the basis of the additional panel prepared by the respondent-DSSSB. Accordingly, the respondent-DJB corrected its mistake in not including the 6th vacancy in the grade of Assistant Engineer (E&M) under direct recruitment quota in the requisition sent to the respondent-DSSSB and by appointing the private respondent no.6 to the grade of Assistant Engineer (E&M) on the basis of the recommendation of the Mediation Committee. The 6th vacancy in the grade of Assistant Engineer (E&M) under direct recruitment quota, which arose in the year 1997-98 and against which the respondent no.6 was appointed with effect from 28.10.1999, was for General (UR) category as per the reservation policy/rules. Having fulfilled the eligibility criteria laid down in the Recruitment Rules and having topped the additional panel prepared by the respondent-DSSSB pursuant to the selection conducted on the basis of the advertisement (ibid), and as per the reservation policy/rule, the 6th vacancy being for General (UR) category, the private respondent no.6 was appointed to the grade of Assistant Engineer (E&M) against the said vacancy. The non-inclusion of this 6th vacancy in the advertisement being in clear violation of the rules would not vitiate the appointment of the private respondent no.6 to the grade of Assistant Engineer (E&M). Thus, there was no irregularity or illegality in appointing the respondent no.6 against the 6th vacancy in the grade of Assistant Engineer (E&M) under direct recruitment

quota with effect from 28.10.1999 pursuant to the selection conducted by the respondent-DSSSB on the basis of advertisement notifying 5 vacancies in the grade of Assistant Engineer (E&M). By virtue of his appointment to the grade of Assistant Engineer (E&M) on direct appointment basis with effect from 28.10.1999, the private respondent no.6 being senior to the applicants in the grade of Assistant Engineer (E&M) and being otherwise eligible for promotion to the grade of Executive Engineer, the applicants' challenge to the ad hoc promotion of the private respondent no.6 to the grade of Executive Engineer is baseless.

5.1 In support of its contentions, the respondent-DJB has mainly relied on the following decisions:

5.1.1 **Dr.Duryodhan Sahu and others vs. Jitendra Kumar Mishra and others**, AIR 1999 SC 114, wherein a three-Judge Bench of the Hon'ble Apex Court has held that in service matters, PILs should not be entertained.

5.1.2 **Malik Mazhar Sultan and another vs. UP Public Service Commission and others**, 2006 (9) SCC 507, wherein the U.P. Public Service Commission (for short 'PSC') was informed by letter of Government of U.P. dated 23rd November, 2002 that it was decided to make appointment of 347 candidates on the basis of competitive examination for recruitment to the post of Civil Judge (Junior Division) in U.P. Judicial Service in three phases of 100 + 100 + 147 candidates. The PSC was requested to take prompt action and after completion of selection, send its recommendations to the Government by 31st March, 2003. By another requisition dated 29th

July, 2003 the Government informed PSC that the recruitment be conducted in two phases, first for 174 posts and later for 173 posts in second phase for which another requisition would be sent. By this requisition, PSC was asked to advertise 174 posts in accordance with the provisions contained in the Rules as amended. The Rules had been earlier amended by the Government in terms of its Notification dated 19th March, 2003 whereby the existing requirement of the requisite age as on '1st day of January' was substituted by '1st day of July'. By third requisition dated 10th November, 2003 sent by the Government, PSC was informed that on the basis of recommendations of the High Court, it had been decided to hold selection together for 347 posts on the basis of competitive examination. Thus, the proposal for phased recruitment in the earlier requisitions was given up. An advertisement dated 22-28th November, 2003 was issued by PSC for holding examination to select candidates to fill 347 vacancies in the post of Civil Judges (Junior Division). In respect of age limit, clause 5 of the advertisement stated that the candidates must have attained the age of 22 years and must not have attained the age of more than 35 years on 1st July, 2004, i.e., they must not have been born before 2nd July, 1969 and not later than 1st July, 1982, but for Scheduled Caste of U.P., Scheduled Tribe of U.P. and Other Backward Class candidates of U.P., the age limit shall be five years more. In the same manner, it was stated that for dependants of freedom fighters of U.P., and for Ex-army Personnel of U.P., the age limit would be five years more. It was further stated in the advertisement that those candidates, who were within

age on 1st July, 2001 and 1st July, 2002 shall be treated within age for this examination. Clause 12 of the advertisement stated that the Commission might allow any candidate provisionally on summary checking of application, but in later stages if it was found that the candidate was not eligible or his application was not fit for admission or he should have been rejected at initial stage, his candidature would be cancelled and the recommendation shall be withdrawn even if he was recommended. The preliminary and main examinations were held and the successful candidates were called for interview between 14th April, 2005 and 26th April, 2005. A learned Judge of Hon'ble Allahabad High Court, who was presiding over one of the Interview Boards, in a letter dated 26th April, 2005 sent to the Chairman of PSC, expressed the opinion that the age requirement benefit of period during which examination could not be held, could be given only if statutory rules provide determination of vacancies every year on a particular date and this issue might be examined before declaration of the result. The PSC, after examining the issue, came to the conclusion that the provision of relaxation in age limit given in the advertisement seemed to have been done due to misinterpretation of Rules and, therefore, on 18th May, 2005, it took the following decision:

“(1) Due to non-availability of relaxation in age limit on 1st July, 2004, the candidature of the candidates who are over age on 1st July, 2004 are rejected.

(2) Result of the selection from examination be declared excluding the aforesaid candidates.”

On 2nd May, 2005, the result of the U.P. Judicial Service, Civil judge (Junior Division) was declared excluding the candidates in terms of the aforesaid decision. The aforesaid decision led to filing of various writ petitions by the excluded candidates before the Hon'ble High Court. The Hon'ble High Court held that the basic initiation of the recruitment process was when the first requisition dated 23rd November, 2002 was sent and, thus, the recruitment year would be 1st July, 2002 to 30th June, 2003. Further it was held that for determining whether a candidate was eligible in that recruitment year, it should be assumed that an advertisement pursuant to the requisition dated 23rd November, 2002 was issued before 31st December, 2002. In this view, it was held that all candidates who were less than upper age limit according to their category (reserved or unreserved) on 1st July, 2003 would be eligible to appear at 2003 recruitment. However, the candidates who had crossed the upper age limit according to their respective categories up to 30th June, 2003 would not be eligible under the Rules. Those who stood excluded from consideration, though within age limit as per the advertisement, were one set of candidates who questioned the correctness of the impugned judgment. The correctness of the judgment was also challenged by PSC and those candidates who were eligible from the age criteria as on 1st July, 2004. In the above backdrop, the Hon'ble Supreme Court, after examining the relevant provisions of the UP Judicial Service Rules, 2001, observed and held thus:

“ The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1st July, 2001 and 1st July, 2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules.

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Now, to the present case, the only dispute is in respect of the age requirement. The resolution of the dispute would depend upon implementation of Rule 10 of the Rules. According to the main part of Rule 10, the minimum and maximum age requirement has to be as on 1st July next following the year in which the notification for holding the examination by PSC inviting applications is published. That publication inviting applications is dated 22-28th November, 2003. The next following year is '2004'. Therefore, on the plain reading of the main part of Rule 10, the age requirement is to be seen as on 1st July, 2004.

The 'year of recruitment' has been held by High Court as 1st July, 2002 to 30th June, 2003 after rightly coming to the conclusion that subsequent second and third requisitions were in continuation of the first requisition dated 23rd November, 2002. The process of recruitment was initiated by the appointing authority on 23rd November, 2002. The year of recruitment has thus been rightly determined as 1st July, 2002 to 30th June, 2003, having regard to Rule 4(m). Now, let us examine the second proviso to Rule 10. It stipulates that where candidate was eligible in age to appear at the examination in any year of recruitment in which no such examination was held, he shall be deemed to be eligible in age to appear in the next following examination. The benefit of proviso comes into

operation if examination in any year of recruitment is not held so as to give relief to those candidates who would have been otherwise eligible in age but for not holding of the examination. There are two different categories dealt with under Rule 10 for the purpose of eligibility from age viewpoint. One under main part of Rule 10 and two under second proviso of Rule 10. Under first part, the determining factor for age is date of advertisement. Under second part, determining factor for age is as on year of recruitment. The age requirement under main part of Rule 10 is on the requisite date following the year in which Notification for holding examination inviting application is published. The expression 'Notification' in the context means issue of advertisement inviting applications. Under the first part, therefore, the relevant date for determining age would be 1st July, 2004, the advertisement having been issued on 22-28th November, 2003. The proviso, however, makes eligible, from the viewpoint of age, even those candidates to appear in the next following examination, who were eligible in age if examination was held in year of recruitment. That is the reason that under second proviso for determining age, the relevant fact is not the publication of notification as in main part of Rule 10, but is age of a candidate to appear at the examination in any year of recruitment in which examination was not held. The candidate shall be deemed to be eligible in age to appear in the next following examination. The year of recruitment has been held to be 1st July, 2002 to 30th June, 2003. The examination in year of recruitment was not held. The examination was held in March, 2004. In such a situation, candidates would be entitled to benefit of age requirement in terms of second proviso.

According to Rule 4(m), the year of recruitment means a period of twelve months commencing from the first day of July of the calendar year in which the process of recruitment is initiated by the Appointing Authority. The Appointing Authority within the meaning of the Rules means the Governor of Uttar Pradesh, in other words, the State Government of Uttar Pradesh. As already noted above, the process of recruitment was initiated on 23rd November, 2002. The determination of vacancies and procedure for recruitment to the service has been provided for in Rule 15. After the vacancies are determined, the same are required to be intimated to the Commission to be filled in during the year of recruitment. That process

commenced by sending communication dated 23rd November, 2002. The second and third communications dated 29th July, 2003 and 11th November, 2003 by the Government to PSC were in continuation of the first one. The advertisement was published on 22-28th November, 2003 after the third communication. The relevant year for main part of Rule 10 is the one next following the year in which the publication for holding the examination is published. It would be 1st July, 2004. For the purpose of the proviso, the recruitment year is 1st July, 2002 to 30th June, 2003 and age requirement therein would be as on 1st July, 2002 in view of Rule 4(m) read with Rule 10 second proviso. Thus, those who were of requisite age as on 1st July, 2002 would be eligible under second proviso and also those who were of requisite age as on 1st July, 2004 as per main part of Rule 10. However, it seems difficult to comprehend how candidates of requisite age on 1st July, 2001 would be eligible for the recruitment in question. Though Rule 10 is not happily worded yet we find it difficult to sustain the conclusion of the High Court that the advertisement issued on 22-28 November, 2003, can be assumed to be issued before 31st December, 2002. The interpretation of Rule 10 placed by us is also in accord with the object of the Rules. On harmonious consideration of the Rules, it seems evident that Rule 10, its main part and the second proviso read with Rule 4(m), cater for two category of candidates. The later makes those eligible who are eligible in the recruitment year in which process of recruitment is initiated by the appointing authority. In this category, in the present case, would fall those who were eligible as on 1st July, 2002. In main part of Rule 10, those who become eligible on 1st July, 2004, would be eligible. In this view, those candidates who were eligible on 1st July, 2002 and also those who were eligible on 1st July, 2004 would be eligible to be considered for appointment to the posts of Civil Judge (Junior Division).”

5.1.3 State of Punjab & others vs. Anita and others, Civil Appeal Nos.7983-7986 of 2009, decided on 24.9.2014, wherein the private respondents were selected against the six advertised posts, by the Managing Committee of the school. Despite their selection and consequential

appointment, the State Government did not accord its approval. The private respondents, i.e., the selected JBT/ETT teachers issued a legal notice dated 1.2.2004, wherein they sought approval of the State Government, as also wages for the period they had been discharging their duties. Since they did not receive any response to the legal notice dated 1.2.2004, the private respondents approached the Hon'ble High Court of Punjab and Haryana by filing Civil Writ Petition No.6789 of 2004. Rather than examining the merits of the controversy, the Hon'ble High Court, by its order dated 27.04.2004, required the State Government to take a decision on the legal notice issued by the private respondents. The District Education Officer passed an order dated 04.4.2005 declining the claim of the private respondents. It was held by the DEO that the private respondents had been appointed in violation of the statutory rules regulating appointments to privately managed recognized schools. It was also indicated that the selection process was not in consonance with the statutory rules. The order passed by the DEO dated 04.4.2005 was assailed by the private respondents before the Hon'ble High Court by filing Civil Writ Petition. The same came to be allowed by the Hon'ble High Court. Considering the facts and circumstances of the case and the relevant provisions of the statutory Recruitment Rules, the Hon'ble Supreme Court observed and held thus:

“ While examining the advertisement, which has been extracted hereinabove, we are satisfied that applications were not invited from candidates possessing the qualification depicted in the appendix to the 1981 Rules, pertaining to the posts of JBT/ETT teachers. It is also apparent, that none of the

private respondents possess the qualification of JBT/ETT, and as such, none of them can be stated to be possessed of qualifications statutorily prescribed and delineated in the appendix of the 1981 Rules. None of the private respondents was therefore *per se* eligible for appointment to the posts of JBT/ETT teachers. This was one of the pointed reasons why the State Government did not grant its approval to the selection and appointment of the private respondents. In our considered view, no infirmity can be found in the aforesaid determination at the hands of the State Government.”

After following its earlier decisions in **P.M. Latha and another vs. State of Kerala and others**, (2003) 3 SCC 541, and in **Yogesh Kumar and others vs. Government of NCT of Delhi and others** (2003) 3 SCC 548, and referring to the decision in **Jyoti K.K. and others vs. Kerala Public Service Commission and others**, (2010) 15 SCC 596 as well as the Government’s instructions, vide letter No.1/18/95-3Edu-7/20602, dated 14.09.1995, the Hon’ble Supreme Court observed and held that the private respondents did not satisfy the pre-condition of valid appointment expressed in the Government’s letter dated 14.9.1995. The procedure laid down in the Government’s letter dated 14.9.1995(*ibid*) was not adopted in the case on hand. Therefore *per se*, no benefit could flow to the private respondents, from the said Government instructions. The Government’s instructions dated 20.12.1995 were in clear violation of the statutory process of selection and appointment postulated under the 1981 Rules. Even if the above Government’s instructions would have bestowed validity on the selection process, through which the private respondents came to be appointed, the same could not have been acceded to, since Government’s instructions in

violation of the statutory rules were a nullity in law. Accordingly, the Hon'ble Supreme Court set aside the Hon'ble High Court's judgment passed in favour of the private respondents.

5.1.4 **Raminder Singh vs. State of Punjab & another**, Civil Appeal No. 2127 of 2009, decided on 19.9.2016, wherein the Hon'ble Supreme Court, after considering the facts and circumstances of the case and the relevant provisions of the Recruitment Rules, observed that the appellant being an inservice candidate, his case for promotion from the post of Silt Observer/Analyst to the next promotional post of "Research Assistant Grade B" was required to be considered as an inservice candidate as provided in Rule 10 of the Recruitment Rules for the post of Research Assistant Grade B. The appellant was working as a Silt Observer/Analyst and in addition to the duties assigned to this post, he was also performing the duties of Research Assistant Grade B as per the directives of the office. The appellant had admittedly fulfilled the eligibility criteria and qualification prescribed in Rule 10 (1)(b) (i) and (2) as also the qualifications prescribed for appointment to the post in question for direct recruits. The competent authorities had also recommended the case of the promotion of the appellant certifying that the appellant is fit for promotion. The appellant worked on the promotional post and performed the duties assigned to the promotional post from 14.12.2001 till 10.12.2002. Since the Government, despite merging the Grade C post in Grade-B post, did not amend the Rules and on the other hand continued with the un-amended Rules for filling the vacancies

including vacancies by promotion, the case of the appellant had to be considered in the light of the requirement of the Rules. In other words, it was necessary for the State to have made appropriate amendments in the Rules after merger of one post into another, but so long as this exercise was not done by the State, the employees, who had otherwise fulfilled the requirement prescribed in the existing Rules for consideration of their cases for promotion, they could not be denied the benefits flowing from the Rules. Repealing the contention of the respondent-State that the appellant did not possess the requisite qualifications that were necessary for the promotional post as prescribed in the advertisement and hence cancellation of the appellant's promotion was appropriate, the Hon'ble Supreme Court held that the appellant had fulfilled the necessary criteria prescribed in Rule 10 and this was sufficient compliance for the inservice candidate and that anything prescribed in the advertisement, which was *de hors* the Rules was bad in law. Accordingly, the Hon'ble Supreme Court set aside the judgment passed by the Hon'ble High Court whereby the writ petition filed by the appellant challenging the respondent's order cancelling the appellant's promotion was dismissed.

5.1.5 **K.Kumaran vs. The Government of Tamil Nadu**, Writ Petition Nos. 6114 and 7948 of 2011, decided by a learned Single Judge of the Hon'ble Madras High Court on 6.3.2012, wherein the only ground on which the petitioners challenged the decision taken by the respondents to fill up 186 posts of Assistant Section Officers, on the basis of the selection held

in pursuance of the notification dated 15.11.2009, was that the same infringed the rights of thousands of candidates who were not qualified on the date of the notification, viz., 15.11.2009, but who became qualified subsequently when these 186 posts became available for being filled up. In other words, the contention of the petitioners was that after conducting a Recruitment Drive purportedly for filling up 13 posts of Assistant Section Officers in Law Department and 4 posts of Assistant Section Officers in the Tamil Nadu Public Service Commission, it was not open to the respondents to fill up additional 186 posts, without a fresh notification. The filling up of these 186 posts, for which no notification was issued, was opposed by the petitioners on the ground that the same violated Articles 14 and 16 of the Constitution. After analyzing several decisions of the Hon'ble Supreme Court and other High Courts, the learned Single Judge observed in paragraphs 15 and 16 of the judgment as follows:

“15. On a careful scrutiny of the ratio laid down in all the decisions referred to above, the principles of law that emerge, could be summarised as follows:

- (i) that a recruitment could be for existing (or clear) vacancies as well as for anticipated vacancies;
- (ii) that it cannot be for future vacancies;
- (iii) that if the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised, even if a select list of more candidates had been prepared;
- (iv) that the State can deviate from the advertisement and make appointments for more vacancies, in exceptional circumstances

only or in an emergent situation and that too, by taking a policy decision in that behalf;

(v) that the appointment of more number of candidates than the number of posts advertised, would actually alter the norms of selection, after the selection process has started, infringing the rights of persons who qualify after the cut off date prescribed in the first notification; and

(vi) that the filling up of vacancies over and above the number of vacancies advertised, would be violative of Articles 14 and 16.

16. Therefore, three principles emerge, namely:-

(i) that both existing as well as anticipated vacancies can be filled up, but future vacancies cannot be filled up in pursuance of a selection notification;

(ii) that confining the ultimate selection only to the number of posts advertised, with a small variation within tolerance limits, is the rule; filling up more number of vacancies than the number advertised, can be only by way of exception; and

(iii) that to make a case fall under the exception to the rule, there must be an emergent situation and as a consequence, a policy decision ought to have been taken.”

After considering the materials available on record, the learned Single Judge allowed the writ petitions and directed that the selection in pursuance of the notification dated 15.11.2009 shall be confined only to the vacancies notified in the advertisement dated 15.11.2009.

5.1.6 **Amlan Jyoti Borooah vs. State of Assam and others, 2009**

(3) SCC 227, wherein the Director General of Police, Assam published an advertisement inviting applications for 112 vacancies which were likely to arise in the post of Sub-Inspector of Police on or about 6.9.1997. Pursuant

thereto, the appellant as also the private respondents applied therefor. After written test, physical ability test, and interview, the Selection Committee short-listed 1803 candidates in order of merit. Appellant's position in the select list was 750. The life of the said select list was two years. On 2.3.2000, the Inspector General of Police requested the Home Department of the Government of Assam to obtain sanction of the State Level Empowered Committee for appointment of 174 Sub-Inspectors of Police pursuant whereunto the Home Department accorded sanction therefor. Those candidates who were found eligible to be called for physical ability test were asked to appear therein which was held on 19.2.2000. On or about 4.7.2000, 169 candidates who had cleared the physical test/medical test were appointed on the post of Sub-Inspector of Police. The said order, appointing the aforementioned 169 posts was not the subject matter of the challenge before the Hon'ble High Court. During the currency of the life of the select list, the Director General of Police, by a letter dated 21.12.2000, addressed to the Commissioner- Secretary to the Home Department, Dispur, asked for sanction of the State Level Empowered Committee (SLEC) to fill 77 additional vacancies that had arisen from the aforementioned select list. Approval was sought for from the Director General of Police as to whether the said vacancies be filled from amongst the candidates whose names appeared in the aforementioned select list from Serial No.175 onwards as the list had already been acted upon up to serial No.174. The Director General of Police accorded approval for filling 88 vacancies. Pursuant thereto, the

Home Commissioner was requested to sanction 80 posts in the existing vacancies in the State in place of 77 vacancies. The said select list was again published on 8.1.2001. 84 candidates out of the said select list were asked to appear in the physical ability test on 22.1.2001. Three candidates failed to appear in the physical test and four others failed to clear the physical test and thereafter 77 candidates were called to appear for the medical test on 25.1.2001 out of which 75 candidates were found suitable for appointment. The Deputy Secretary to the Government of Assam, Home Department, thereafter by a letter dated 20.2.2001 conveyed the sanction of the SLEC for direct recruitment in respect of 80 vacancies to the post of Sub-Inspector of Police. The appellant and some other candidates thereafter filed a writ petition before the Hon'ble High Court impugning the selection of 84 candidates to the post of Sub-Inspector of Police in February 2001. By judgment dated 12.2.2004 the learned Single Judge, however, set aside the appointment of 54 candidates. Three Writ Appeals were preferred thereagainst. By judgment dated 5.5.2006, a Division Bench of the Hon'ble High Court, while upholding the appointment of the private respondents, set aside and/or modified the judgment of the learned Single Judge directing the remaining 14 vacancies to be filled by holding physical and medical test of the candidates from the select list containing the names of 1803 candidates. Dismissing the Civil Appeals filed against the aforesaid judgments, the Hon'ble Supreme Court, in paragraph 40 of the judgment, observed, *inter alia*, as follows:

"40. The State in an emergent situation would subject to constitutional limitations is entitled to take a decision which subserves a greater public interest. While saying so, we are not unmindful of the fact that the Constitution also demands that candidates who had acquired eligibility for recruitment to the post in the meantime should also be given opportunities to participate in the selection process....."

5.1.7 Gujarat State Dy. Executive Engineers' Association vs. State of Gujarat and Others, 1994 Supp (2) SCC 591, the Hon'ble Supreme Court, while opining that the future vacancies should ordinarily not be filled up from the waiting list and setting aside the judgment of the Hon'ble High Court of Gujarat, did not quash the selection and appointment of the candidates from the waiting list against the future vacancies on equitable considerations, but directed that any candidate who has been appointed in pursuance of the order passed by the Hon'ble High Court shall be deemed to be in service from the date he has joined and his seniority shall be reckoned from that date only.

5.1.8 Bholanath Mukherjee and others vs. R.K.Mission V.Centenary College & others, Civil Appeal No.2457 of 2006, decided on 18.4.2011, wherein the appellants had challenged the appointment of the private respondent as Principal of Ramakrishna Mission Vivekananda Centenary College at Rahara, by filing a writ petition before the Hon'ble High Court. The learned Single Judge of the Hon'ble High Court allowed the writ petition and directed the Governing Body of the College to take steps to fill up the post of Principal either temporarily or permanently in accordance with laws in force. Aggrieved, the Ramakrishna Mission College

went in appeal before the Division Bench of the Hon'ble High Court. The Division Bench set aside the judgment passed by the learned Single Judge. Considering the submission made by the learned counsel appearing for the respondents that the appellants had already retired from service and, therefore, the litigation did not survive, the Hon'ble Supreme Court observed, *inter alia*, that since all the appellants had already retired, the issue became academic, that public interest litigation would not be maintainable in service law cases, and that even if the writ petition was allowed and the appointment of respondent No.3 was declared null and void, none of the appellants could be appointed on the post of Principal. Accordingly, without expressing any opinion on the correctness of the Hon'ble High Court's judgment, the Hon'ble Supreme Court dismissed the appeal only on the ground that the concerned appellants had already retired from service and it would not be in the interest of anybody to go into the merits.

6. The contentions as raised by the respondent-DJB have been adopted by the private respondent no.6.

7. After having given our thoughtful consideration to the facts and circumstances of the case and to the rival contentions, we have found no merit in any of the contentions raised by the respondent-DJB and private respondent no.6.

8. Admittedly, a total five vacancies in the grade of Assistant Engineer (E&M) under direct recruitment quota arose during the years 1992-

93, 1994-95 and 1995-96, the break-up of which was General(UR)-02, SC-01, OBC-01 and ST-01. The respondent-DJB, vide circular dated 13.3.1996 (Annexure A/3), sought to fill the aforesaid five vacancies by inviting applications from eligible departmental employees and by placing requisition with the Employment Exchange to nominate eligible persons registered with them. Thereafter, the respondent-DJB, vide letter dated 7.10.1997(Annexure A/4), also sent a requisition to the respondent-DSSSB to conduct selection for the aforesaid five vacancies. In the said letter dated 7.10.1997, the respondent-DJB stated that the Employment Exchange sponsored the names of 39 candidates (29 General, 6 SC and 4 OBC) with NOC in respect of ST candidates as no ST candidate was available with them. The respondent-DJB also stated that in response to the circular dated 13.3.1996 (Annexure A/3), 23 applications were received from the departmental candidates, out of whom 8 were found overage and 15 were eligible. All those applications were also forwarded to the respondent-DSSSB, along with the letter dated 7.10.1997 and the requisition. Accordingly, the respondent-DSSSB issued Advertisement dated 31.7.1998 inviting applications from eligible persons for selection and appointment to the said five vacancies, fixing 24.8.1998 as the last date for receipt of applications. Applicant no.3 and private respondent no.6, Degree Holders in Engineering, who were otherwise eligible, applied for selection pursuant to the aforesaid circular/advertisement and participated in the selection process. After conducting the selection process, the respondent-DSSSB, vide letter

dated 28.5.1999 (Annexure A/7), selected and recommended five candidates (UR-2, OBC-1, SC-1 and ST-1) for their appointment to the grade of Assistant Engineer (E&M). Accordingly, the respondent-DJB appointed those selected candidates. The private respondent no.6 filed CWP No.401 of 2000 challenging the aforesaid selection process. The interlocutory applications filed by the private respondent no.6 in CWP NO.401 of 2000 seeking interim directions to the respondents were dismissed by the Hon'ble High Court of Delhi. Thereafter, the private respondent no.6 filed CWP No.2931 of 2000 seeking a direction to the official respondents to fill up six posts of Assistant Engineer (E&M) falling under direct recruitment quota as per the recommendations already received by them pursuant to the circular and advertisement issued in 1996 and 1998(ibid). The contention of the private respondent no.6 that there were six vacancies in the grade of Assistant Engineer (E&M) under direct recruitment quota to be filled, and that the respondents were not doing so was rejected by the learned Single Judge of the Hon'ble High Court, vide order dated 25.5.2000. LPA No.333 of 2000 filed by the private respondent no.6 thereagainst was dismissed by the Division Bench of the Hon'ble High Court, vide order dated 24.9.2001. Thus, the question as to whether or not there were six vacancies in the grade of Assistant Engineer (E&M) under the direct recruitment quota to be filled on the basis of the selection pursuant to the circular issued by the respondent-DJB on 13.3.1996 and the advertisement issued by the respondent-DSSSB on 31.7.1998, was not available to be once again raised

by the private respondent no.6 either before this Tribunal or before the Hon'ble High Court or before the respondent-DJB, save and except by way of challenging the aforesaid judgments passed by the learned Single Judge and the Division Bench before the higher forum. The judgments of the learned Single Judge and of the Division Bench of the Hon'ble High Court having attained finality, the claim of the private respondent no.6 that there were six vacancies in the grade of Assistant Engineer (E&M) under direct recruitment quota to be filled by the respondent-DJB on the basis of the selection conducted by the respondent-DSSSB was not available to be entertained and considered either by the Mediation Committee, or, for that matter, by the respondent-DJB. Thus, in our considered view, by appointing the private respondent no.6 to the grade of Assistant Engineer (E&M) vide office order dated 17.10.2012, the respondent-DJB has overreached the Hon'ble High Court of Delhi.

9. Furthermore, it has been the consistent stand taken by the respondent-DJB in their various pleadings before the Hon'ble High Court of Delhi as well as before this Tribunal that there were only five vacancies in the grade of Assistant Engineer (E&M) under direct recruitment quota which were included in its requisition dated 7.10.1997 sent to the respondent-DJB. In its additional affidavit filed before this Tribunal on 21.12.2016, the respondent-DJB has clearly stated that the vacancy in the grade of Assistant Engineer (E&M) under direct recruitment quota, against which the private respondent no.6 was appointed, arose during the year 1997-98. This

advertisement issued by the respondent-DSSSB in the year 1998 was in continuation of the circular dated 13.3.1996 issued by the respondent-DJB. Thus, the contention of the respondent-DJB and of the private respondent no.6 that a mistake was committed by the respondent-DJB in not including the said vacancy in its requisition dated 7.10.1997 to the respondent-DSSSB and was consequently not notified in the advertisement dated 31.7.1998 issued by the respondent-DSSSB, and that the said mistake was corrected by them by appointing the private respondent no.6 to the grade of Assistant Engineer (E&M) under the direct recruitment quota for General (UR) category on the basis of the additional panel prepared by the respondent-DSSSB pursuant to the selection process conducted as per the advertisement dated 31.7.1998 (ibid) is untenable.

10. As regards the additional panel of candidates prepared by the respondent-DSSSB, wherein the name of the private respondent no.6 appeared at sl.no.1, it is found that the said additional panel was prepared by the respondent-DSSSB over and above the main panel of 5 candidates who were selected and recommended for appointment against the five vacancies notified in the advertisement. The respondent-DSSSB did not communicate the said additional panel to the respondent-DJB, while communicating the main panel of 5 candidates selected and recommended for appointment against the five notified vacancies. When the respondent-DSSSB, by its letter dated 24.5.2012, 19.6.2012 and 13.7.2012, requested the respondent-DSSSB to communicate the report of the Selection Board for recruitment to

the grade of Assistant Engineer (E&M) pursuant to the advertisement dated 31.7.1998(ibid), the respondent-DSSSB, vide its letter dated 8.8.2012, sent a copy of the said report to the respondent-DJB which contained the main panel of 5 selected candidates, and additional panel of 5 candidates which included the name of private respondent no.6 at sl.no.1. It is, thus, clear that the said report of the Selection Board saw the light of day only in the year 2012, i.e., about 13 years after the selection and appointment of the selected candidates against the five vacancies notified in the circular dated 13.3.1996 issued by the respondent-DJB and in the advertisement dated 31.7.1998 issued by the respondent-DSSSB. The Mediation Committee considered and acceded to the claim of the private respondent no.6 for appointment to the grade of Assistant Engineer (E&M) under direct recruitment basis with effect from 28.10.1999. Apparently, on the basis of this recommendation of its Mediation Committee, the respondent-DJB, vide order dated 17.10.2012 (Annexure A/1), appointed the private respondent no.6 to the grade of Assistant Engineer (E&M) with effect from 28.10.1999 against the vacancy arising in the year 1997-98 under direct recruitment quota, which was not notified in the circular dated 13.3.1996 issued by the respondent-DJB and in the advertisement dated 31.7.1998 issued by the respondent-DSSSB. The respondent-DJB and private respondent no.6 have not brought to the notice of this Tribunal any provision in the Recruitment Rules or instructions issued by the competent authority stipulating that any vacancy in the grade of Assistant Engineer (E&M) under direct recruitment quota, which arose

subsequent to the advertisement and was not included in the advertisement, could be filled by appointing any candidate who is included in the additional panel over and above the main panel of the candidates selected and recommended for appointment against the notified vacancies and after all the selected candidates are appointed against the notified vacancies. The respondent-DJB and private respondent no.6 have also not brought to the notice of any provision in the Recruitment Rules or any decision of the competent authority whereby any Mediation Committee is authorized and empowered to make any recommendation in the matter of selection and appointment against the vacancy in the grade of Assistant Engineer (E&M) on direct recruitment basis, as has been done in the case of the applicant. Therefore, we have found sufficient force in the contention of the applicants that the Mediation Committee was not authorized and empowered to make any recommendation in favour of the applicant for his appointment to the grade of Assistant Engineer (E&M) against the vacancy in the direct recruitment quota, and that the recommendation made by the Mediation Committee was not available to be acted upon by the respondent-DJB.

11. The additional panel, wherein the name of the private respondent no.6 appeared at sl.no.1, cannot be said to have furnished a source of recruitment to the vacancy in the grade of Assistant Engineer (E&M) under direct recruitment quota which admittedly arose in the year 1997-98 after issuance of the circular dated 13.3.1996(ibid) and the advertisement dated 31.7.1998 and was not included in the said circular and

advertisement. The said additional panel was operative only for the contingency that if any of the selected candidates did not join, then the person from the additional panel might be pushed up and be appointed in the vacancy so caused. The said additional panel could not have been operated for appointment against the vacancy which arose in the year 1997-98 and was never notified for being filled in accordance with the Recruitment Rules.

12. In **Rakhi Ray and others vs. High Court of Delhi and others**, (2010)2 SCC 637, the Hon'ble High Court of Delhi issued an advertisement dated 19.5.2007 to fill 20 vacancies in the cadre of District Judge. Out of these 20 vacancies, 13 were to be filled from the General Category candidates, 3 from Scheduled Castes, and 4 from Scheduled Tribes. The appellants who belonged to General Category, faced the selection process. The result was declared on 3.1.2008. The appellants found place in the merit list but much below. All the 13 vacancies in the said category were filled according to the merit list of General Category candidate. However, two posts reserved for Scheduled Castes candidates and four posts meant for Scheduled Tribes candidates could not be filled for non-availability of suitable candidates. Certain unsuccessful candidates approached the Hon'ble High Court of Delhi by filing Writ Petition Nos. 2688/2008, 2913/2008 and 3932/2008 on the ground that 13 vacancies came into existence between 29.2.2008 and 23.5.2008, i.e., during the pendency of the selection process which could have also been filled from the said select list. The Hon'ble High

Court disposed of all the petitions, vide its judgment dated 3.10.2009, taking a view that only three vacancies came into existence subsequent to the date of Advertisement which could have been filled from the said list. Out of the said three vacancies, two could be offered to General Category candidates and one to the Scheduled Caste candidate and, accordingly, issued direction to appoint two more candidates whose names appeared at Sl.Nos.14 and 15 in General Category Merit List. Hence, the appeals were filed seeking directions to the respondents for offering appointment to the appellants also. Dismissing the appeals, the Hon'ble Supreme Court held thus:

“12. In view of the above, the law can be summarized to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

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24. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment.”

13. In **State of Orissa and another vs. Rajkishore Nanda and others**, (2010)6 SCC 777, applications were invited by an advertisement

dated 25.6.1995 for filling up 15 posts of Junior Clerks. The advertisement made it clear that number of vacancies could be increased. The respondents applied in pursuance of the said advertisement along with large number of persons and written examination was held in accordance with the Orissa Ministerial Service (Method of Recruitment to Posts of Junior Clerks in the District Offices) Rules, 1985. Before the selection process could complete, the number of vacancies was increased from 15 to 33 and as per the requirement of Rules, 1985, a merit list of 66 candidates was published on 6.11.1995. Besides making appointments against the said 33 vacancies, the appellant-State also appointed some more candidates against available vacancies. The respondents, whose names appeared in the merit list and could not be offered appointment, being much below in the merit list, filed applications before the Tribunal praying for a direction to the State to offer them appointments. The Tribunal, vide its judgment and order dated 7.4.2000, came to the conclusion that appointments were to be offered to all the candidates till the entire select list stood exhausted. Therefore, the Tribunal directed to offer appointment to all left over candidates in the merit list of 1995. Being aggrieved, the State preferred the writ petition against the said common judgment and order of the Tribunal before the Hon'ble High Court of Orissa. The Hon'ble High Court, vide judgment and order dated 26.10.2005, modified the order of the Tribunal by issuing direction to the appellants to offer appointment to those persons who had approached the Tribunal. Hence, the appeal was filed by the State of Orissa. Allowing the

appeal and setting aside the judgments and orders of the Tribunal and the Hon'ble High Court, the Hon'ble Supreme Court observed thus:

“15. A Constitution Bench of this Court in *Shankarsan Dash Vs. Union of India*, AIR 1991 SC 1612, held that appearance of the name of a candidate in the select list does not give him a right of appointment. Mere inclusion of candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remain unfilled. The candidate concerned cannot claim that he has been given a hostile discrimination. (see also *Asha Kaul & Anr. Vs. State of J & K & Ors.*, (1993) 2 SCC 573; *Union of India Vs. S.S.Uppal*, AIR 1996 SC 2340; *Bihar Public Service Commission Vs. State of Bihar* AIR 1997 SC 2280; *Simanchal Panda Vs. State of Orissa & Ors.*, (2002) 2 SCC 669; *Punjab State Electricity Board & Ors. Vs. Malkiat Singh* (2005) 9 SCC 22; *Union of India & Ors. Vs. Kali Dass Batish & Anr.* AIR 2006 SC 789; *Divisional Forests Officers & Ors. Vs. M. Ramalinga Reddy* AIR 2007 SC 2226; *Subha B. Nair & Ors. Vs. State of Kerala & Ors.*, (2008) 7 SCC 210; *Mukul Saikia & Ors. Vs. State of Assam & Ors.*, (2009) 1 SCC 386; and *S.S. Balu & Anr. Vs. State of Kerala & Ors.*, (2009) 2 SCC 479).

16. Select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required. It is the settled legal proposition that no relief can be granted to the candidate if he approaches the Court after expiry of the Select List. If the selection process is over, select list has expired and appointments had been made, no relief can be granted by the Court at a belated stage. (Vide *J.Ashok Kumar Vs. State of Andhra Pradesh & Ors.*, (1996) 3 SCC 225; *State of Bihar & Ors. Vs. Md. Kalimuddin & Ors.*, AIR 1996 SC 1145; *State of U.P. & Ors. Vs. Harish Chandra & Ors.*, AIR 1996 SC 2173; *Sushma Suri Vs. Government of National Capital Territory of Delhi & Anr.*, (1999) 1 SCC 330; *State of U.P. & Ors. Vs. Ram Swarup Saroj*, (2000) 3 SCC 699; *K. Thulaseedharan Vs. Kerala State Public Service Commission, Trivendrum & Ors.*, (2007) 6 SCC 190; *Deepa Keyes -Vs.- Kerala State Electricity*

Board & Anr., (2007) 6 SCC 194; and Subha B. Nair & Ors. (supra).

17. The instant case is required to be examined in view of the aforesaid settled legal proposition. The Rules, 1985 provide for determining the number of vacancies and holding competitive examination ordinarily once in a year. Select list prepared so also valid for one year. In the instant case, 15 vacancies were advertised with a clear stipulation that number of vacancies may increase. The authorities had taken a decision to fill up 33 vacancies, thus, select list of 66 persons was prepared. It is also evident from the record that some more appointments had been made over and above the 33 determined vacancies. Thus, once the selection process in respect of number of vacancies so determined came to an end, it is no more open to offer appointment to persons from the unexhausted list. It is exclusive prerogative of the employer/State Administration to initiate the selection process for filling up vacancies occurred during a particular year. There may be vacancies available but for financial constraints, the State may not be in a position to initiate the selection process for making appointments. Bona fide decision taken by the appointing authority to leave certain vacancies unfilled, even after preparing the select list cannot be assailed. The Courts/Tribunals have no competence to issue direction to the State to initiate selection process to fill up the vacancies. A candidate only has a right to be considered for appointment, when the vacancies are advertised and selection process commences, if he possess the requisite eligibility.

19. As the appointments had been made as per the select list prepared in 1995 and selection process came to an end, there was no occasion for the Tribunal to entertain the Applications in 1997, 1998 and 1999 for the simple reason that once the number of vacancies determined are filled, the selection process came to an end, no further appointment could be made from 1995 panel. The purpose of making the list of double of the vacancies determined is to offer the appointment to the persons from the waiting list in case persons who are offered appointment do not join. But it does not give any vested right in favour of the candidates whose names appeared therein.”

14. After having examined the facts and circumstances of the case in the light of the principles laid down by the Hon'ble Supreme Court in **Rakhi Ray and others vs. High Court of Delhi and others** (supra) and in **State of Orissa and another vs. Rajkishore Nanda and others** (supra), we have found substantial force in the contention of the applicants that the respondent-DJB has acted arbitrarily and illegally in appointing the private respondent no.6 against the aforesaid vacancy with effect from 28.10.1999 (vide order dated 17.10.2012) pursuant to the selection process conducted by the respondent-DSSSB for filling the five vacancies which arose during 1992-93, 1994-95 and 1995-96, and in further promoting the private respondent no.6 to the post of Executive Engineer on ad hoc basis (vide order dated 26.10.2012) by taking into account his appointment to the grade of Assistant Engineer (E&M) on direct recruitment basis with effect from 28.10.1999.

15. The applicants were admittedly senior to the private respondent no.6 in the grade of Junior Engineers. They were also promoted to the grade of Assistant Engineers (E&M) on 2.3.2009, 2.3.2009, 3.5.2012 and 2.3.2009 respectively, i.e., much prior to the issuance of the impugned order dated 17.10.2012 (Annexure A/1) by the respondent-DJB appointing the private respondent no.6 to the grade of Assistant Engineer (E&M) on direct recruitment basis with effect from 28.10.1999. In view of this appointment, the private respondent no.6 became senior to the applicants in the grade of Assistant Engineers (E&M), and by virtue of his seniority in the grade of

Assistant Engineers (E&M), the private respondent no.6 was promoted to the grade of Executive Engineer on ad hoc basis with effect from 26.10.2012 [vide order dated 26.10.2012 (Annexure A/2)]. Absence of any objection/challenge to the aforesaid appointment and ad hoc promotion of the private respondent no.6 by any of the persons senior to the applicants in the grade of Junior Engineers/Assistant Engineers (E&M) would not disentitle the applicants or would extinguish their right to challenge the same when their interests/service prospects were adversely affected thereby. Therefore, we have found no substance in the contention of the respondent-DJB and private respondent no.6 that when none of the persons senior to the applicants in the grade of Junior Engineer/Assistant Engineer (E&M) ever objected to the appointment of the private respondent no.6 to the grade of Assistant Engineer (E&M) under direct recruitment quota with effect from 28.10.1999 as well as to his *ad hoc* promotion to the grade of Executive Engineer with effect from 27.10.2012, and when such appointment and *ad hoc* promotion of the private respondent no.6 do not adversely affect their interest, the applicants have no *locus standi* to challenge respondent no.6's appointment to the grade of Assistant Engineer (E&M) under direct recruitment quota with effect from 28.10.1999 and *ad hoc* promotion to the post of Executive Engineer on 26.10.2012. We have also found no substance in the contention of the respondent-DJB and private respondent no.6 that when applicant no.1 has already retired from service, and when applicant nos. 2, 3 and 4 have been promoted to the grades of Assistant

Engineer (E&M) and of Executive Engineer, the issue has become academic and the present proceedings have become infructuous and, therefore, the applicants should not be allowed to pursue this O.A. as a public interest litigation which is not maintainable in service matters before the Tribunal.

16. The vacancy in the grade of Assistant Engineer (E&M) under direct recruitment quota which arose during 1997-98 and was not notified in the circular dated 13.3.1996(ibid) and in the advertisement dated 31.7.1998(ibid) ought to have been filled by the respondent-DJB through a fresh selection process conducted by the respondent-DSSSB. Merely because the private respondent no.6 fulfilled the eligibility criteria laid down in the Recruitment Rules, and because the said vacancy was meant for General (UR) category as per the reservation policy/roster, the respondent-DJB ought not to have appointed the private respondent no.6 against the said vacancy on the basis of the additional panel purportedly prepared by the respondent-DSSSB in the year 1999 which had already spent its force and also on the recommendation of the Mediation Committee which was not authorized and empowered to make any recommendation for appointment to the grade of Assistant Engineer (E&M) on direct recruitment basis under the Recruitment Rules.

17. The decisions relied upon by the respondent-DJB and private respondent no.6, being distinguishable on facts, do not go to support the case of the respondent-DJB and private respondent no.6.

18. No other point worth consideration has been pressed by the learned counsel for the parties.

19. In the light of our above discussions, we hold and declare that the impugned Office Orders No.221 dated 17.10.2012 (Annexure A/1) and No.231 dated 26.10.2012 (Annexure A/12) are unsustainable and liable to be quashed. Accordingly, the same are quashed, and the respondent-DJB is directed to give all consequential service benefits to the applicants within three months from today.

20. Resultantly, the O.A. is allowed. No costs.

(PRAVEEN MAHAJAN)
ADMINISTRATIVE MEMBER

(RAJ VIR SHARMA)
JUDICIAL MEMBER

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