

Union of India and Anr. Vs. Sudhanshu Kumar Khare and Ors.

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Court : Delhi

Decided On : Nov-17-2014

Judge : S.Ravindra Bhat

Appellant : Union of India and Anr.

Respondent : Sudhanshu Kumar Khare and Ors.

Advocate for Pet/Ap. : Ms. Supriya Juneja, Ms. Roshni Namboodiry, Ms. Boudh Prabha, Ms. Boudh Prabha, Ms. Supriya Juneja, Ms. Roshni Namboodiry

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

31. 07.2014 Pronounced on:

17. 11.2014 + W.P.(C) 7370/2010, C.M. NOS.6770/2014, 8140/2014, 8169/2014 UNION OF INDIA AND ANR. Petitioners Through: Sh. Sanjay Jain, ASG with Sh. Jasmeet Singh, Sh. Ruchir Mishra and Sh. Mukesh Kumar Tiwari, Advocates, for UOI. Versus SUDHANSHU KUMAR KHARE AND ORS. Respondents Through: Respondent No.1 in person. Sh. Sidharth Luthra, Sr. Advocate with Ms. Supriya Juneja and Sh. Viraj Gandhi, Advocates, for Resp. Nos.5 and 7. Sh. G.D. Gupta, Sr. Advocate with Sh. Piyush Sharma, Advocates, for Resp. No.4. Sh. Naresh Kaushik, Advocate, for Resp. No.8/UPSC. Sh. Darpan Wadhwa, Sh. Arun Khatri and Ms. Roshni Namboodiry, Advocates, for Sh. D.S. Shukla/Applicant. Sh. Tarun Sharma with Ms. Boudh Prabha, Advocates, for Resp. Nos. 14, 33, 41, 47,

73 and 84. + W.P.(C) 7371/2010, C.M. NO.6771/2014 BHUPINDER KUMAR AND ORS. Petitioners Through: Sh. Tarun Sharma and Ms. Boudh Prabha, Advocates. Versus UNION OF INDIA AND ORS. Respondents Through: Sh. Sanjay Jain, ASG with Sh. Vikram Jetly, Sh. Ruchir Mishra and Sh. Mukesh Kumar Tiwari, Advocates, for UOI. W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 1 Sh. Naresh Kaushik, Advocate, for UPSC. Sh. G.D. Gupta, Sr. Advocate with Sh. Piyush Sharma, Advocates, for Resp. No.7. Sh. Sidharth Luthra, Sr. Advocate with Ms. Supriya Juneja and Sh. Viraj Gandhi, Advocates, for Resp. Nos. 8 and 10. Respondent No.4 in person. Sh. Darpan Wadhwa, Sh. Arun Khatri and Ms. Roshni Namboodiry, Advocates, for Sh. D.S. Shukla/applicant. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE VIPIN SANGHI MR. JUSTICE S. RAVINDRA BHAT % 1. In these writ proceedings, the common grievance of the petitioners (the "UOI", (referred to as such), in W.P.(C) 7370/2010 and the promotees (referred to as such), in W.P.(C) 7371/2010) is with regard to the order of the Principal Bench of the Central Administrative Tribunal (hereafter referred to as "the CAT") passed in O.A. No.1281/2000, on 1.7.2010 . The respondents in these proceedings were applicants before the CAT. They are hereafter referred to as "the direct recruits".

2. The controversy is with regard to the inter se seniority of promotees and direct recruits in the Central Bureau of Investigation (CBI), established under the Special Police Establishment Act, 1952 ("the Act") in the cadre of Deputy Superintendent of Police (DSP). The Special Police (Executive Staff) Recruitment Rules, 1963 (hereafter referred to as "the 1963 Rules") were framed for appointment to various posts in the CBI, W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 2 with effect from 02.03.1963. Rule 3 provided for the classification, scale of pay, qualifications and other matters relating to the posts, in accordance with the provisions contained in the Schedule. The relevant entry pertaining to the DSPs provided for 22 posts, classified them as "Non-Ministerial Gazetted" and stated that the method of recruitment was: (a) not exceeding 15% of the sanctioned strength from promotion from Dy. SP with at least 8 years service in the grade; (b) The remaining 85% by transfer or deputation from amongst suitable officers of state police force.

3. This position continued; by an amendment with effect from 27.12.1972, a change was brought about in the manner of recruitment. The quota provided for recruitment through promotion was increased from a maximum of 15% to 30%; the transfer/deputation quota was reduced to 50%. In either category, if the quota could not be filled, direct recruitment would be resorted to; independently, a 20% direct recruit quota "in consultation with the UPSC" was provided for. The relevant extracts of the amendments are as follows: "The Gazette of India: January 6, 1973, PAUSA-1, 1894 New Delhi, the 27th December, 1972 G.S.R.2--In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the President hereby makes the following rules further to amend the Special Police Establishment (Executive Staff) Recruitment Rules, 1963, namely:- W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 3 1. (1) These rules may be called the Special Police Establishment (Executive Staff) (Amendment) Rules, 1972. (2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Schedule to the Special Police Establishment (Executive Staff) Recruitment Rules, 1963, for the existing entries in Columns 10 and 11 relating to the post of Deputy Superintendent of Police, the following shall respectively be substituted, namely:- Column 10: "(a) Promotion - 30 percent failing which by transfer on deputation failing both by direct recruitment. (b) Transfer/deputation - 50 percent failing which by direct recruitment. (c) Direct recruitment - 20 percent in consultation with the Union Public Service Commission."

Column 11: "Promotion: Inspector of Police in the Central Bureau of Investigation with 5 years service in the grade rendered after appointment thereto on a regular basis. Transfer/deputation: Suitable officers of the State or Central Government Department who are holding equivalent posts or who, though holding posts in the next lower grade, are officers approved for promotion to equivalent posts. Deputation: W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 4 Deputationist Inspector in the Central Bureau of Investigation who have put in at least 5 years service in the rank in the State/Central Bureau of Investigation out of which at least 3 years is in the Central Bureau of Investigation. (Period of deputation - ordinarily not exceeding 5 years)."

4. On 31.03.1987, the rules were amended yet again (hereafter referred to as "the 1987 amendment"). These amendments stipulated that the number of posts were 157; and that the DSP post was to be a "General Central Services Group-B Gazetted Non-ministerial" one and that it was a "Selection Post". Columns 10 and 11 provided for the method of recruitment and the grades from which promotion/deputation are to be made. Here, the pre-existing quota for promotions and transfer by deputation were maintained. The rule, while spelling out the quota (of 20%) for direct recruitment, provided that such appointment would be through the Civil Services Examination conducted by the UPSC. The relevant extracts of Columns 10 and 11 read as follows: Method of recruitment whether by direct recruitment or by promotion or by deputation/transfer and percentage of the vacancies to be filled by various methods In case of recruitment by promotion/deputation/transfer, grades from which promotion/deputation/transfer to be made 10 11 W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 5 (i) 30% by promotion, Promotion: failing which by transfer on Inspector of Police in the Central deputation. Bureau of Investigation with 5 (ii) 50% by transfer on years' regular service in the grade. deputation/transfer. (iii) 20% by direct Transfer of Deputation/transfer, recruitment through the Civil Services Examination Officers under the Central/State conducted by the Union Police Organisations: Public Service Commission. (a)(i) holding analogous posts on a regular basis; or (ii) Inspectors of Police with 5 years' regular service in the grade or equivalent; and (iii) possessing experience in investigation of criminal cases. Note:

(1) Departmental Inspectors of Police in the Central Bureau of Investigation with 5 years service as Inspector, including service as Inspector in the parent organization, shall also be eligible for appointment as Deputy Superintendent of Police but their appointment shall be adjusted against the deputation quota. (2)The departmental officers in the feeder category who are in the W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 6 direct line of promotion will not be eligible for consideration for appointment on deputation. Similarly, deputationists shall not be eligible for consideration for appointment by promotion. Period of deputation including period of deputation in another ex-cadre post held immediately preceding this appointment in the same organisation/department shall not exceed 5 years, but may be extended for a further maximum period of 5 years in the case of

persons who have developed special aptitude for Central Bureau of Investigation work and whose retention on extended tenure is considered to be in the public interest.

(3) The post will be treated as a tenure post when on deputation by officers of the Central/State Government.

(4) The provisions of Notes

(1) and

(2) shall be reviewed after three years. W.P.(C) 7370/2010 & W.P.(C)7371/2010
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5. With effect from 31.03.1997, a fresh set of rules, titled "Central Bureau of Investigation Senior Police Posts Recruitment Rules, 1996 (hereafter referred to as "the 1996 Rules") were brought into force; they replaced the 1963 Rules. Column 11 provided the relative method of entry into the post of DSP which reads as follows:

11. 50% promotion failing which by transfer on deputation. 30% transfer on deputation/transfer 20% direct recruitment Note 1-Above percentage shall apply to posts and not to vacancies. Note 2- The regular incumbents of the post of Deputy Superintendent of Police in the scale of pay of Rs.2000-3500 in (Rs.650-1200 pre-revised) (Gr.B. Gazetted) on the date of notification of the revised rules, will be deemed to have been appointed to the post of Deputy Superintendent of Police in the scale of pay of Rs.2200-4000 (Group A Gazetted) at initial Constitution.

6. On 06.08.1999, the CBI published a Seniority List of DSPs as on 01.01.1999; the list contained 193 names of incumbents holding the post as on date. The direct recruits/respondents in these proceedings filed O.A. No.1281/2000 before the CAT, claiming the quashing of the Seniority List. A direction to prepare a fresh seniority list of DSPs, placing the promotees from Sl. Nos. 89 to 175 in the said impugned list, below the direct recruits, W.P.(C) 7370/2010 & W.P.(C)7371/2010
Page 8 and preparation of year-wise roster in the ratio of 2:3 till 1997 and 2:5 after 1997, with a consequential direction to hold a review DPC to grant promotion to

the direct recruits, was sought. It was contended that the CBI was bound to follow the Office Memorandum dated 22.12.1959, governing the determination of seniority - in terms of which (para No.2.4.4) the promotees were to be treated as regular only to the extent of direct recruitment vacancies that were reported, (in a situation of under-reporting or suppression of vacancies for direct recruitment), and that excess promotions would be treated as ad-hoc appointees. It was contended by the direct recruits that the CBI violated its rules as well as the instructions of the Government. The applicants also alleged that the CBI had sought for diversion of 11 vacancies from direct recruitment quota. The application further stated that out of 170 promotee Group-B DSPs, only 86 promotees were regular, holding that post within the 30% quota and could be upgraded as DSP Group-A as on 31.01.1997, and that the balance DSPs were promotees without any vested legal right. The UOI objected to the proceedings before the CAT, stating that the promotees are likely to be affected. It is contended that the Seniority List of DSPs disclosed that a large number of incumbents had been promoted on regular basis which would result in unsettling a duly settled matter. The UOI stated that prior to 1988, there was no direct recruitment of DSPs and that the UPSC used to sponsor candidates on request of the CBI from the left-over IPS officers. Furthermore, the UOI's stand was that during the period 1983 to 1985, out of 51 vacancies, 27 were W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 9 utilized by the promotees in accordance with a relaxation communicated by the UPSC to CBI on 27.04.1984. Similar approval for relaxation of rules to divert vacancies in the direct recruitment quota for promotion was given on 16.02.1988, 29.08.1990 and 09.11.1993. It was submitted that these events showed that there was, in fact, no violation of the Rules resulting in promotees exceeding the quota allocated to them. The UOI also stated that - of the 50 posts of DSP filled during the period 1988-90, the substantial part of the direct recruitment quota was filled through promotion on account of non-availability of the direct recruits. Over that, though the UPSC sponsored the number of candidates to join as direct recruits, at the same time, a large number of candidates did not join; resultantly, the CBI was compelled to fill the vacancies from available promotees after due approval of DOPT and the UPSC.

7. On 28.01.2002, the CAT, by its initial order, dismissed the direct recruits' application as unmerited. They accordingly approached this Court by filing W.P.(C) 1823/2002. On 27.05.2009, this Court remitted the matter for fresh consideration after noticing that the promotees likely to be affected had not been impleaded and that the CAT, in its earlier order of 28.01.2002, did not consider the direct recruits' contention that the 1987 Rules did not empower the CBI to relax its provisions and divert the vacancies. It was in these circumstances that the matter was taken-up for consideration. W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 10 8. The CAT, by its impugned order, dealt firstly with the issue of power to relax. The UOI contended that even though express powers to relax the rules did not exist in the 1987 Rules, such power could be inferred by virtue of Section 21 of the General Clauses Act. Although the CAT did not expressly state so, it rejected the Union's contention with respect to its power to relax, holding that there was no such power under the 1987 Rules. It was also noticed that the power to relax was included for the first time in 1996 Rules. The CAT also agreed with the contention that only promotees upto Sr. No.87 could be said to have been recast in Group-A as a result of the notification of the 1996 Rules, and that promotee incumbents shown after that position ought to have been treated as ad-hoc appointees in excess of their quota. The CAT rejected the contention of breakdown of quota. Its operative directions in the impugned order reads as follows:

"5. On the basis of above consideration, the OA succeeds. The impugned seniority list of Dy. SPs as on 1.01.1999 is set aside to the extent that the Applicants have been placed below the promotee Dy.SP from serial number 89 to 175 in the aforesaid seniority list. The official Respondents would take steps to reconstitute the seniority list by following the prescribed roster in the Rules of 1987 and Rules of 1996. The aforesaid exercise would be completed within a period of four months from the receipt of a certified copy of this order. The Applicants would be eligible for all consequential benefits occurring from the amendment of the aforesaid seniority list of Dy. SPs as on 1.01.1999. There will be no order as to costs."

W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 11 Contention of UOI and the Promotees 9. It is submitted by the petitioners (i.e. the UOI and the promotees) that the CAT erred in holding that promotions were made in excess of the quota, in

the circumstances of this case. It was submitted that between 1987 and 1996, the DOPT sanctioned 122 posts of DSPs to cater to national exigencies, to meet urgent requirements of handling important and sensitive investigations such as assassination of Shri Rajiv Gandhi, Babri Masjid demolition etc. The UOI states that, ".the CBI could not afford to resort to the process of direct recruitment through the UPSC as that was a very time consuming process. Moreover, the response was uncertain and even if people were appointed they did not have the experience to handle such investigations as against available Inspectors in the promotee quota who had experience in investigations. Therefore, resort to direct recruitment would have defeated the very purpose of creating these posts to set up Special Investigating Cell to investigate cases as mentioned above. In fact, 24 posts of DSPs was created on 18.12.1992 for investigation into the case of Babri Masjid at Ayodhya and 65 posts were created to look into the assassination of late Prime Minister Sh. Rajiv Gandhi. Likewise, there were other serious scams like Animal Husbandry Scam in Bihar for which 3 posts were created."

10. It was argued by the petitioners that the CAT was unduly swayed by the direct recruits' submissions with regard to underreporting of their vacancies, to the UPSC. It was argued firstly that as a matter of fact, this finding is untenable because 24 vacancies had been notified during the period 1990-95; the CAT W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 12 itself noted in para 9 of its order - that for the period 1989-1995, as against 58 candidates sponsored by UPSC in the direct recruit quota, only 41 had joined (of them 25 between the period 1996-98) and 17 did not join. Consequently, the finding of suppression or under-reporting was factually untenable.

11. It was submitted that the CAT's reliance on para 2.4.4 of the Office Memorandum dated 03.07.1986 was misconceived. All the facts and circumstances pointed to the application of para 2.4.2 which stated that in case the direct recruits are not available in any particular year, representation of quota to determine seniority would be only to the extent of available direct recruits and promotees. Stating that para 2.4.2 elaborately provided for the method of determining inter se seniority in the eventuality of one or the other category of recruits being unavailable, the CAT should not have proceeded to reject the

petitioner's contentions.

12. It was next argued that the direct recruits could not have questioned the four orders diverting the vacancies for filling up by the promotees. It was submitted that besides the fact that when the actual diversion of the posts to be filled-up by promotion occurred, none of the applicant/direct recruits were in the cadre, they entered it subsequently after 1995. The last of the orders on diversion was made in 1993, recognizing the concurrent realities and having regard to the prevailing urgency to staff the newly created vacancies as well as those which had arisen previously. The procedure adopted for filling-up those vacancies through promotion was transparent; The DOPT's approval was sought and W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 13 granted after which the UPSC cleared the proposal. It was only thereafter that eligible Inspectors who were already working in the CBI for 8 years or more were promoted in accordance with the provisions of the rules by selection. Their entry into the cadre of DSPs, therefore, could not have been characterized as irregular or contrary to the rules. The direct recruit applicants did not even question the four relaxations/diversion orders - they could not have done so, since they were appointed to the grade after 1995. In the circumstances, the CAT's findings with regard to the legality of such orders was uncalled for. Learned counsel also submitted that the CAT's order with regard to the lack of power of the UOI or the CBI to relax the provisions of the 1987 Rules for lack of express power in that regard as juxtaposed with the provision for relaxation in the 1996 Rules - was again erroneous. Learned counsel highlighted that the CAT did not deal with the UOI's contentions with regard to the applicability of Section 21 of the General Clauses Act. It was emphasized in this context that the rules framed under proviso to Article 309 of the Constitution are law, and, therefore, Section 21 would apply. In the present case, the UOI had adopted the method of consulting the DOPT and thereafter obtaining the clearance of the UPSC - which would have been the method adopted for amendments and relaxing the conditions, at the relevant time. In these circumstances, since the applicant direct recruits could not have claimed any manner of right towards such posts, their application alleging violation of the quota-rota rule ought to have been rejected. W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 14 13. The petitioners relied upon the decisions of the Supreme Court reported as Direct recruit Class-II

Engineering Services Association v. State of Maharashtra, 1990 (2) SCC715 and Mohd. Risul v. Gokul, AIR 2010 SC3064 in making these submissions. Contention of the direct recruits 14. The direct recruit applicants submit that the impugned order does not call for any interference and contend that the recruitment rules as they stood on 31.03.1987 indicated that there were 157 posts of DSPs. 47 fell to the promotee quota and 32 for the direct recruits. With the gradual increase in the number of vacancies by 1995, the total sanctioned strength had swelled to 289. Only 86 posts could be filled by the promotees and 59 by the direct recruits. 170 promotions were made.

15. Mr. Siddharth Luthra, learned senior counsel for direct recruits and Mr. Khare, one of the applicant/direct recruits, contend that with the promulgation of the 1996 Rules on 31.1.97, the quota for promotees was increased to 50% and 145 posts fell in their quota and 59 posts fell in the direct recruitment quota of 20%. The direct recruits contend that they have no grievance in respect of 86 promotee officers at serial No.2 to 87 of the said seniority list who were promoted within their quota of 30%. 84 promotees from Sl. No.89 to 175 (except DRs at Sl. Nos. 95, 125 and 126), they allege, were promoted in excess of their quota during the years 1991 - 1996, and are adhoc and fortuitous and cannot be placed senior to the direct recruits. W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 15 16. It is argued that in terms of Clause II of the 1996 Rules, Clause VI of the said Rules would be applicable only in cases of persons who are holding Gr. 'A' posts in the CBI. Clause II of the 1996 Rules provides that these rules shall apply to posts specified in Col. 1 of the said rules. Since the post of DSP has been reclassified as Gr.'A' under these rules, the provision regarding 'power to relax' and the consequent deemed relaxation would be applicable only in the case of members who are holding Gr.'A' posts. It would not be applicable to the excess Gr.'B' promotees DSP and they cannot be deemed to be regularized. Further, the direct recruits point out to Note 2 of Column 11 of the rules which specifically mentions that "The regular incumbents of the post of Deputy Superintendent of Police in the scale of Rs.2000-3500 in (Rs.650-1200 pre revised) (Gr.B. Gazetted) on the date of notification of the revised rules, will be deemed to have been appointed to the post of Deputy Superintendent of Police in the scale of pay of Rs.2200-4000 (Group A Gazetted) at initial Constitution."

As such, the deemed relaxation of rules for appointment as Gr.'A' can only be in favor of the regular incumbents of the post of DSP Gr. 'B' as stipulated in the Rules. Had the intention been to give the benefit of deemed relaxation for appointment as DSP Gr.'A' to all the appointees holding the post of DSP Gr.'B', whether regular or adhoc, there would have been no need to specify the term 'regular incumbents' and the word 'incumbents' would have sufficed.

17. That, further, under the 1987 and 1996 Rules there is no 'failing clause' in the mode of recruitment as regard the 20% W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 16 posts of DSP for direct recruits. In the absence of the 'failing clause' there can be no deemed relaxation of the rules in favor of the promotees to fill these posts.

18. The direct recruits urge that there is no power to relax under the 1963 Rules and the 1987 Rules. The power to relax for the post of DSP came into effect for the first time on 31.1.97, i.e. the date on which the 1996 Rules came into force and cannot have retrospective effect. It would not be applicable to the excess promotions which took place during the years 1991-1996 and the excess promotees cannot be deemed to be regularized. The direct recruits also submit that even UPSC had treated the excess promotees as ad-hoc promotees while giving the concurrence for diversion of 11 vacancies falling under the direct recruitment quota to the promotion quota vide its letter No.F.11/2/88-All-IV dated 16.2.88. This was dealt in paras 6 and 7 of CAT's order dated 1.7.10. In support of the submission that rules can be relaxed only if provided in the recruitment rules and on the terms and conditions stipulated therein, reliance is placed on the judgments of the Supreme Court reported as Suraj Prakash Gupta and Others v. State of J&K 2000(7) SCC56 Keshav Chandra Joshi v. Union of India 1992 Supp (1) SCC272 and Syed Khalid Rizvi v. Union of India 1993 Supp.(3) SCC575 19. Refuting the arguments of the promotees and UOI, it is submitted that Section 21 of the General Clauses Act does not bestow any inherent power on the Central Government to relax service rules, since it only provides that where the government W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 17 has the authority to enact rules or issue orders or notifications, it also has the authority to amend, add or vary the rules or orders or notifications. However, for relaxation of service rules,

an express provision of the clause 'power to relax' should be made in the relevant recruitment rules.

20. The direct recruits submit that the quota rule has not broken down in this case and rely on the findings in paras 8 to 20 of the impugned order. A provision for direct recruitment through Civil Services Examination was made for the first time in the 1987 RRs which came into force on 31.3.1987. However, adequate vacancies were not sent by CBI to UPSC for direct recruitment and excess promotions continued to be made against the quota of direct recruitment and deputation even though the relevant recruitment rules did not permit diversion of the vacancies/quota of the direct recruits/deputation for promotion. The direct recruits rely on a table given by the official respondent at page 18 of the writ petition, to say that 34 direct recruits were taken in the years 1991, 1992, 1994, 1996, 1997, 1998, 1999 and 2000 whereas 118 promotions were made during the years 1990-1996. This shows that many promotees were promoted on adhoc basis outside their quota of 30%. These facts, emphasize the direct recruits, do not disclose a case of break-down of the quota rule as direct recruitment and promotion both took place, but it is a case of suppression/under reporting of the vacancies of direct recruitment to UPSC and inaction/lethargy on the part of the Govt./Department to induct direct recruits through the Civil W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 18 Services Examination. The said table, relied on by the direct recruits, is extracted below:

Year	Total No. of posts as DRs	Number of vacancies sent to posts of per 20% service as UPSC DSP	Quota of DSP	DRs
1987	157	32	1	Nil
1988	162	33	1	Nil
1989	165	33	1	2
1990	172	34	1	5
1991	182	36	2	Nil
1992	206	41	3	5
1993	226	45	3	5
1994	266	53	5	5
1995	289	59	5	10
1996	289	59	5	10
1997	289	59	6	11
1998	289	59	18	12
1999	2013 to	236	24	

(Quota Either Nil reduced to promoted 10%) or left service W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 19 21. The direct recruits rely on the rulings of the Supreme Court in a number of judgments that mere inaction/lethargy on the part of the government/employer to induct direct recruits would not amount to breaking down of the quota rule, i.e. N.K. Chauhan and Ors. v. State of Gujarat and Ors. (1977 (1) SCC308; U.P. Secretariat U.D.A. Association and Ors. v. State of U.P. and Others (1999 (1) SCC278; M.S.L. Patil and Others v. State of Maharashtra and Others (1996 (11) SCC361; State of Maharashtra and Anr. v. Sanjay Thakre

and Others (1995 Supp. (2) SCC22 407 and Suraj Prakash Gupta (supra). Lastly, the direct recruits impeach the authenticity of the data submitted by the UOI in WP. 7370 of 2010 by Annexure No.P-5 (Colly) regarding the number of vacancies sent to the UPSC for recruitment of direct recruit DSPs during the year 1990 to 1993. They argue that these appear doubtful in view of the reply dated 9.7.2010 to the RTI application of the first respondent, (where the department stated that the concerned records regarding vacancies sent to the UPSC for recruitment of DSPs in CBI during the period 1988 to 1993 had been destroyed). Further, as per UPSC letter No.F.11/2/88-All-IV dated 16.2.88 the total strength of DSP cadre was 161 out of which 32 posts fell under the direct recruitment quota against which 3 direct recruits were in place. The same meant that 29 vacancies were existing under the direct recruitment quota on 16.2.88 out of which concurrence was given for diversion of 11 vacancies to the promotion quota. As such, 18 vacancies still remained for the direct recruitment quota. However, in terms of the letter dated 6 W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 20 Nov., 1990, only 05 backlog vacancies under 'Direct Recruitment' quota vacancies were notified to be filled on the basis of Civil Services Examination, 1991, under intimation to the UPSC by. This is, according to the direct recruits, a clear-cut case of nonreporting/suppression of the vacancies for direct recruitment because of which the quota rule cannot be said to have broken down. The direct recruits point out to principle 2.4.4 of the Govt. of India instructions on Seniority as contained in Do PT O.M. dated 7.2.1986, in this regard, that "with a view to curbing any tendency of under reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees."

Analysis and Conclusions 23. As can be seen from the above narration of facts, the 1963 rules understandably visualized and provided for recruitment to the extent of 85% through deputation/transfer because the organization was at its infancy; the balance 15% was through promotion. This position changed in 1972,

with the amendment increasing the quota for promotees to 30%. For the first time, a direct recruitment channel (20%) after consultation with the UPSC was provided. However, no further details were prescribed. The 1987 amendment saw status quo with respect to W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 21 the quota for promotees and direct recruits. The only change it brought about was that direct recruitment was to be from amongst candidates to the Civil Services Examination. Post 1997, the quota for promotees swelled to 50%; the ratio for direct recruits remained unchanged and the balance was to be filled by transfer/deputation. Two notes were added; they read as follows: "Note 1-Above percentage shall apply to posts and not to vacancies. Note 2- The regular incumbents of the post of Deputy Superintendent of Police in the scale of pay of Rs.2000-3500 in (Rs.650-1200 pre-revised) (Gr.B. Gazetted) on the date of notification of the revised rules, will be deemed to have been appointed to the post of Deputy Superintendent of Police in the scale of pay of Rs.2200-4000 (Group A Gazetted) at initial Constitution."

Another new feature was the introduction of the power to relax the rules- which was not expressly provided in the original rules or any amendment prior to 1997. Under-reporting of direct recruit vacancies 24. Now the facts discussed above show that about 132 posts were created between 1987 and 1996. At this stage itself, the direct recruits' argument on this aspect needs to be dealt with. Their contention is: given the quota (20%) falling to their share which is post based- their share in the cadre would be 59. This argument, in the court's opinion, is flawed. The post based vacancy concept was introduced for the first time in Note 1 to the 1996 Rules (with effect from 1997); that note stated that "Above W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 22 percentage shall apply to posts and not to vacancies". This note could not have been applied retrospectively. It is no one's case that this provision - which provides that the quota is to be worked on post based vacancy cadre - existed previously. This is apparent from the decision of the Supreme Court in State of Punjab & Others vs. Dr. R.N.Bhatnagar & Anr 1999 (2) SCC330 where it was held that: " It has, therefore, to be appreciated that when posts in a cadre are to be filled in from two sources whether the candidate comes from the source of departmental promotees or by way of direct recruitment once both of them enter a common cadre their birth marks disappear and they get completely integrated in the common cadre. This would be in consonance with the

thrust of Article 16(1) of (the Constitution of India. No question of exception to the said general thrust of the constitutional provision would survive as Article 16 (4) would be out of picture in such a case. Consequently the decision rendered by the Constitution Bench in R.K. Sabharwal 's case (supra) in connection with Article 16(4) and the operation of roster for achieving the reservation of posts for SCs, STs and BCs as per the scheme of reservation cannot be pressed in service for the present scheme of Rule 9(1) is not as per Article 16(4) but is governed by the general sweep of Article 16(1). The attempt of learned counsel for the respondent to treat a quota rule as reservation rule would result in requiring the State authorities to continue the birth-marks of direct recruits and promotees even after they enter the common cadre through two separate entry points regulating their induction to the cadre. Therefore, the roster for 3 promotees and one direct recruit is to be continued every time a vacancy arises and there is no question of filling up a vacancy arising out of a retirement of a direct recruit by a direct recruit or on the retirement W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 23 vacancy of a promotee by a promotee. Consequently, the question of rotating the vacancies as posts or for treating the posts mentioned in the rules of recruitment as necessarily referable to total posts in the cadre at a given point of time in the light of .R..K. Sabharwal's judgment (supra), therefore, cannot survive for in the case of a quota rule between direct recruits and promotees the same is to be judged on the touchstone of Article 16(1) and the statutory rules governing the recruitment to the posts of Professor constituting the Punjab Medical Education Service (Class-I) and not on the basis of Article 16(4). The Division Bench in the impugned judgment with respect wrongly applied the ratio of R.K. Sabharwal's case (supra) governing Article 16(4) to the facts of the present case which are governed by Article 16(1)."

(emphasis given) This view was also followed in All India Federation of Central Excise vs. Union of India and Others, 1999 (3) SCC384 Resultantly, there is a fallacy in the direct recruit officers' argument. This means that for direct recruits, there was a far smaller number of posts than 59. If one were to calculate these on the basis of the number of posts between 1987 and 1997, it would be about 26. The tabular statement relied on by the direct recruits during the hearing demonstrates that in fact, till 1995, 32 vacancies (many of them unfilled and possible repeat vacancies) were notified to the UPSC. This undermines their

argument about under-reporting (of vacancies). The period subsequent to 1995 (1996-98), saw 33 vacancies in the cadre of DSPs being reported to UPSC and advertised. Intrinsically connected with these facts is the fact that several DSP posts (about

122) were created, during W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 24 the period 1990-93 to cater to national emergencies and events such as Babri Masjid demolition, the Bombay blasts, scams which were unearthed, etc. Yet, before it is accepted and turned into a finding, a closer scrutiny is necessary. There is no doubt that the 1996 rules came into force with effect from January 1997. There is nothing in the express terms of these rules that they operate from a retrospective date. If such is the inference from the plain terms of the 1997 rules, there is no reason to retro fit their application - or for that matter, the amendment of 1987 to previous periods. While drawing seniority lists, the administrators have to keep in mind the quota position which prevailed during the various periods when the rules underwent changes. Thus, for the period 1963 onwards, the quota for promotees was 15%; at the time there was no quota for direct recruitment. There is material on record to suggest that in 1972 an amendment, introducing a direct recruitment quota was brought in, to the extent of 20%, for the first time. However the important feature of this amendment was that it never indicated the mode of filling up those vacancies; apparently sporadic attempts were made to fill them and the UPSC on certain occasions forwarded names of candidates who had appeared in the Civil Services exams but could not be selected to the IPS. This process was last undertaken in 1978.

25. As noticed before, till 1987, there was no fixed or constant direct recruit quota in the grade of DSP, in the CBI. As and when requisitions were made to the UPSC, candidates interested to join the organizations were forwarded; those W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 25 candidates apparently had applied for and appeared, but could not be selected to the Indian Police Service. The 1987 Rules changed this; the recruitment was to be through the Civil Services examination. This aspect is significant, because the four letters of 1988, 1990, 1991 and 1992- which sought for relaxation of rules/ diversion of posts from the direct recruit quota, assume that such a quota was inflexible. The materials and

evidence on the record however, do not suggest this; yet the Court has to proceed with the prevailing understanding within the organization at the time, that such vacancies (i.e. those which were diverted) should have been filled by direct recruits. As discussed earlier, the 1987 rules suggest that there were 157 sanctioned posts in the cadre of DSP as on that date. The CBI contends that 122 posts were created after the 1987 rules; the direct recruits also urge that the 1996 Rules showed that there were a total of 289 posts in the grade of DSPs. The disputed letters placed on record by the UOI show that apparently, about 26 candidates were selected and sponsored by UPSC. The direct recruits contested these letters on the ground that they were produced for the first time in these proceedings and that the reply to their RTI query stated that those records were not available. Even if this new material is to be ignored, several candidates accepted the offer and reported for work till 1997. 32 vacancies were reported to the UPSC concededly, at the relevant period. In the opinion of this Court, even keeping aside the issue of whether these vacancies were reported, the chart relied upon, and produced before the CAT itself, reproduced in para 9 of its order suggests that 26 candidates were in fact W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 26 sponsored for the period 1989-1995, against which 16 joined; 10 did not join. The seniority list contains 193 incumbents in the post of DSP. The applicant direct recruits do not challenge the list up to Sl. No.53.

26. If these facts are kept in mind, especially that the direct recruitment quota - though defined, was not resorted to, and was conditional upon the CBI filling it after consultation with UPSC, the background of the facts of this case become clearer. The direct recruitment quota, in a sense crystallized (or became fixed) after the 1987 Rules. The materials suggest that 26 direct recruit vacancies were in fact notified; yet 10 went a-begging as the selected candidates did not report for duty. If one were to keep the block period 1987-1996 in mind (in fact supported by the applicant direct recruits who do not question the promotion of DSPs upto Sl. No.53), the vacancies with which the CAT had to deal were 139. Twenty per cent of that number is in fact 28. The CATs finding about under-reporting or suppression of direct recruit vacancies which arose therefore, was clearly erroneous. Power to relax 27. The direct recruits case is premised upon Note 2, of Column 11 in respect of the entry pertaining to DSPs. The argument here is that

only regular entry would be respected for seniority. The first submission in this regard is that the diversion of vacancies to the promotee quota is unauthorized, because the rules did not admit of a power of relaxation and the second is that the filling up of vacancies on account of diversion W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 27 is contrary to the rules and the incumbents cannot be treated as regular officers.

28. There is no doubt that the 1963 Rules did not contain a power to relax; this was introduced for the first time in 1997 through the 1996 amendment. The argument on behalf of the Union and promotees is that though such power was introduced later, the general power of modification or alteration of notification, orders, etc. exists under Section 21 of the General Clauses Act, 1897. That provision reads as follows:

Section 21 : "Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions if any, to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued..

There is no dispute that Rules framed under proviso to Article 309 of the Constitution of India are statutory in character and have the force of law. *Ram Autar Pandey v. State of Uttar Pradesh* (1962) ILLJ148All (Full Bench) - is authority for the proposition that under Article 309 of the Constitution of India read with Section 21 of the General Clauses Act, the Governor is competent to alter the rules regulating conditions of service of Government servants from time to time; alteration of the rules to be carried out under the same conditions under which original rules can be framed. In *Mohd. Yunus Saleem v. Shiv Kumar Shastri and Ors* AIR 1974 SC1218 1974 (4) SCC854 the date before which election was to be completed, was notified by the W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 28 Election Commission. Those dates were sought to be altered. The argument made was that the Commission did not possess the power to extend the date in certain constituencies, because Section 153 provided for extending "the time for completion of any election by making necessary amendments in the notification

issued by it under Section 30 Section 30(e) dealt with "the date before which the election shall be completed". The last date for completion of the election was fixed by the appropriate notification to be 15th March, 1971 and the altered date of poll in this case from 3rd to 9th March is within the last date for completion of the poll under Section 30(e). Negating the contention about the Commissions lack of power to alter the date, it was held, by the Supreme Court, that:

The Election Commission in this case exercised power under Section 30 of the Act and issued the notification appointing the various dates mentioned therein for the purposes specified. Once this power is conferred under Section 30 upon the Election Commission, the power to amend the same, which will include alteration of the dates of poll, can be exercised under section 21 of the General Clauses Act. There is, therefore, no merit in the contention that the Election Commission had no power or jurisdiction to alter the date of poll from 3rd March to 9th March, 1971, in the remaining constituencies in this case.

This court notices that Mohd. Yunus Saleem (supra) was overruled, though not on this point of law, by Umed Singh v. Raj Singh, AIR 1975 SC43, (1975) 1 SCC76 On Section 21, General Clauses Act, Umed Singh held that: W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 29

41. We are, therefore, of the view that the words "to withdraw or not to withdraw from being a candidate" in Clause (a) of Sub-section (1) (A)of Section 123 refer to the stage of withdrawal of candidature under Section 37 and they do not apply to a situation where a contesting candidate announces that he does not wish to contest the election or declares his intention to sit down after the last date for withdrawal of candidatures under Section 37 is past and a list of contesting candidates is published under Section 38 Mohd. Yunus Saleem's case, (supra) in so far as it takes a different view, must be regarded as wrongly decided.

Jayantbhai Manubhai Patel and Ors v Arun Subodhbhai Mehta and Ors. AIR1989 SC1289 was a case where the Mayor of a Corporation altered the date of a meeting. Rejecting the contention that he lacked power to do so, it was held that:

In our view, the power of the Mayor conferred under Clause 1 of Chapter II of the said Schedule must be regarded as a statutory power as distinguished from the powers of directors of a company which are derived strictly from the Articles of Association of the Company which are contractual in nature. There appears to be no reason to take the view that the principles underlying Section 21 of the Bombay General Clauses Act would not apply to the said powers of the Mayor. In our view, appellant No.1, the Mayor of respondent No.5, Corporation, had the power to cancel the notice convening the meeting before the commencement of the meeting with a view to convene the meeting on a later date. The question, however, whether he has exercised the power within its true ambit is a different question altogether. In this regard, in our opinion, although the Mayor had the power to cancel the notice convening the meeting and W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 30 to direct the secretary to issue a notice to that effect, the said power could be exercised only bona fide and for a purpose or purposes within the scope of the said Act. If the power was exercised mala fide or for a collateral purpose, the exercise of the power would certainly be bad. In the present case, there is considerable factual Controversy as to whether, even on the footing that appellant No.1 had, the power to cancel the notice convening the meeting, that power was exercised bona fide for a purpose within the scope of the said Act or whether it was exercised for collateral or impermissible purposes. 29. In the present case, considering the circumstances under which the posts were created, the consultation between UPSC and the concerned departments of the Union of India revealed compelling public interest for filling the vacancies. Furthermore, as discussed earlier, repeated requisitions were made to the UPSC; apparently they did not elicit whole hearted enthusiastic response from direct recruit candidates. It thus cannot be said that the invocation of power under Section 21 was precluded, or unreasonable. The insertion of the power to relax through a later amendment would at best be considered clarificatory. Not engrafting a relaxation power under the Rules till 1997 did not mean that recourse to Section 21 of the General Clauses Act was barred. In this case, the diversion of vacancies was justified on the basis that a large number of new posts were sanctioned, on account of national exigencies and consequently the UPSCs prior approval to fill them by promotion was sought and granted, given the imperative need to fill them

expeditiously. Considering that the posts were to be filled normally after consultation with UPSC, whether for direct recruitment or promotion, the W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 31 consultation process through which approval for the move was given in this case, itself constituted sufficient compliance with Section 21. The findings of the CAT that the power of relaxation did not exist, and could not have been resorted to, are therefore, erroneous. Whether the promotee quota was exceeded 30. The issue of how vacancies are to be dealt with when the quotas for two channels of recruitment cannot be consistently filled evenly, was considered in the light of prevailing instructions of the Central Government, in Union of India v. N.R. Parmar, (2012) 13 SCC340 The Supreme Court took note of the OMs of the Central Government, dated 22.12.1959, 07.02.1986, 03.07.1986 and 03.03.2008 and held as follows: "The O.M. dated 7.2.1986, was followed by another Office Memorandum issued by the Government of India, Department of Personnel and Training, dated 3.7.1986 (hereinafter referred to as, "the O.M. dated 3.7.1986"). The purpose of the instant O.M., as the subject thereof suggests, was to consolidate existing governmental orders on the subject of seniority. Paragraphs 2.4.1 to 2.4.4 of the O.M. dated 3.7.1986 dealt with the issue of inter se seniority between the direct recruits and promotees. The same are accordingly being reproduced hereunder:"

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 W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 32 and promotion respectively Recruitment Rules. in the 2.4.2 If adequate number of direct recruits do 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. In other words, to the extent direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct

recruitment for the total number according to the usual practice. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional, direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year. W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 33

ILLUSTRATION: Where the Recruitment Rules provide 50% of the vacancies of a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the year 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

1986. 1. P1 2. D1 3. P2 4. D2 5. P3 6. D3 7. P4 8. P5 1987 9. P1 10. D1 11. P2 12. D2 13. P3 14. D3 15. P4 16. D4 17. P5 18. D5 19. D6 20. D7

2.4.3 In order to help the appointing authorities in determining the number of vacancies to be filled during a year under each of the methods of recruitment prescribed, a Vacancy Register giving a running account of the vacancies arising and being filled from year to year may be maintained in the proforma enclosed.

2.4.4 With a view to curbing any tendency of under-reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 34 the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share failing to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees."

(emphasis is ours) The following conclusions have been drawn by us from the O.M. dated 3.7.1986:(a) If adequate number of direct recruits (or promotees) do

not become available in any particular year, "rotation of quotas" for the purpose of determining seniority, would stop after the available direct recruits and promotees are assigned their slots for the concerned recruitment year. (b) To the extent direct recruits were not available for the concerned recruitment year, the promotees would be bunched together at the bottom of the seniority list, below the last position upto which it was possible to determine seniority, on the basis of rotation of quotas. And vice versa. (c) The unfilled direct recruitment quota vacancies for a recruitment year, would be carried forward to the corresponding direct recruitment vacancies of the next year (and to subsequent years, where necessary). And vice versa. In this behalf, it is necessary to understand two distinct phrases used in the OM dated 3.7.1986. Firstly, the phrase "in that year" which connotes the recruitment year for which specific vacancies are earmarked. And secondly, W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 35 the phrase "in the subsequent year" which connotes carried forward vacancies, filled in addition to, vacancies earmarked for a subsequent recruitment year. (d) The additional direct recruits selected, against the carried forward vacancies of the previous year, would be placed en-bloc below the last promotee. And vice versa. It is, therefore, apparent, that the position expressed in the O.Ms. dated 7.2.1986 and 3.7.1986, on the subject of inter se seniority between direct recruits and promotees, was absolutely identical. This is indeed how it was intended, because the OM dated 3.7.1986 was only meant to "consolidate" existing governmental instructions, on the subject of seniority XXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX25 Reference necessarily needs to be made to yet another office memorandum issued by the Government of India, Department of Personnel and Training, dated 3.3.2008 (hereafter referred to as, "the OM dated 3.3.2008". In view of the emphatic reliance on the OM dated 3.3.2008, during the course of hearing, the same is reproduced hereunder, in its entirety: "New Delhi, dated the 3rd March, 2008 OFFICE MEMORANDUM Subject: Consolidated instructions on seniority contained in DOP&T O.M. No.22011/7/1986-Estt.(D) dated 3.7.1986 Clarification regarding W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 36 The undersigned is directed to refer to this Department's consolidated instructions contained in O.M. No.22011/7/1986-Estt.(D) dated 3.7.1986 laying down the principles on determination of seniority of persons appointed to services/posts under the Central Government.

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

2. 4.1 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees, which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules. 2.4.2 If adequate number of direct recruits does not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of available direct recruits and the promotees.

3. Some references have been received seeking clarifications regarding the term "available" used in the preceding para of the OM dated 3.7.1986. It is hereby clarified that while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quota of vacancies, the year of availability, both in the case of direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/selection and completion of pre-appointment formalities as prescribed. It is further clarified that when appointments against unfilled vacancies are made in subsequent year or years, either by direct recruitment or promotion, the persons so appointed shall not get W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 37 seniority of any earlier year (viz. year of vacancy/panel or year in which recruitment process is initiated) but should get the seniority of the year in which they are appointed on substantive basis. The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch of promotees joins the post/service.

4. Cases of seniority already decided with reference to any other interpretation of the term "available" as contained in O.M. dated 3.7.1986 need not be reopened. The following conclusions, in our view, can be drawn from the OM dated 3.3.2008: (a) The OM dated 3.3.2008 is in the nature of a "clarification", to the earlier consolidated instructions on seniority, contained in the OM dated 3.7.1986 (referred to and analysed, in paragraph 21 above). (b) The term "available" used in para 2.4.2 in the OM dated 3.7.1986 has been "clarified" to mean, both in case of

direct recruits as well as promotees, for the purpose of fixation of seniority, would be the actual year of appointment "after the declaration of the result/selection", i.e., after the conclusion of the selection process, and after the "completion of the preappointment formalities" (medical fitness, police verification, etc.). (c) As per the OM dated 3.7.1986, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would "not" get seniority with reference to the year in which the vacancy arose, or the year in which the recruitment process was initiated, or the year in which the selection process was conducted. W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 38 (d) As per the OM dated 3.3.2008, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would get seniority of the year in which they are appointed "on substantive basis. XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXX33 Having interpreted the effect of the OMs dated 7.2.1986 and 3.7.1986 (in paragraphs 20 and 21 hereinabove), we are satisfied, that not only the requisition but also the advertisement for direct recruitment was issued by the SSC in the recruitment year in which direct recruit vacancies had arisen. The said factual position, as confirmed by the rival parties, is common in all matters being collectively disposed of. In all these cases the advertised vacancies were filled up in the original/first examination/selection conducted for the same. None of the direct recruit Income Tax Inspectors herein can be stated to be occupying carried forward vacancies, or vacancies which came to be filled up by a "later" examination/selection process. The facts only reveal, that the examination and the selection process of direct recruits could not be completed within the recruitment year itself. For this, the modification/amendment in the manner of determining the inter-se seniority between the direct recruits and promotees, carried out through the OM dated 7.2.1986, and the compilation of the instructions pertaining to seniority in the OM dated 3.7.1986, leave no room for any doubt, that the "rotation of quotas" principle, would be fully applicable to the direct recruits in the present controversy. The direct recruits herein will therefore have to be interspaced with promotees of the same recruitment year.

31. As held earlier, the contention- and consequent finding- about underreporting of vacancies cannot be sustained. Here, the direct recruits argument is that promotees were not regular W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 39

officers, because their promotions were in excess of the quota. One part of this argument has been dealt with and the Court has concluded that the general power to relax, under Section 21 of the General Clauses Act, 1897 could have been invoked in the circumstances of the case. This part of the discussion relates to the submission that the filling of diverted vacancies really amounted to promotions in excess of the quotas. Here, the direct recruits rely on the decisions reported as N.K. Chauhan and Ors. (supra); U.P. Secretariat U.D.A. Association (supra); M.S.L. Patil (supra); K.C. Joshi (supra) etc. Each of those decisions concerned itself with ad-hoc promotions of a set of candidates, in excess of the quota set apart for the other category (direct recruits). It was held that regularization did not mean that those promotees who secured unjustified benefits at the cost of the other category, could also secure seniority. The Supreme Court ruled that for seniority the promotees would have to wait in queue for their turn in accordance with the rules. N.R. Parmar (supra) is the latest decision on the subject; it had occasion to deal with all instructions and Office Memoranda prevailing up to the point of the decision. The Supreme Court summarized its conclusions on the reading of Para 2.4.2 and Para 2.4.4 of the Office Memorandum of 03.07.1986 and the subsequent OM of 2008 in the following terms:

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

(a) The OM dated 3.3.2008 is in the nature of a "clarification", to the earlier consolidated instructions W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 40 on seniority, contained in the OM dated 3.7.1986 (referred to and analysed, in paragraph 21 above).

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

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

etc.). (c) As per the OM dated 3.7.1986, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would "not" get seniority with reference to the year in which the vacancy arose, or the year in which the recruitment process was initiated, or the year in which the selection process was conducted. (d) As per the OM dated 3.3.2008, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would get seniority of the year in which they are appointed on substantive basis.

32. In Suraj Prakash Gupta (supra) the Supreme Court held that: W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 41 we therefore hold that the ad hoc/stop gap service of the promotees cannot be treated as non-est merely because P.S.C. was not consulted in respect of continuance of the ad hoc/stop gap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no 'rota' rule applicable. The 'quota' rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota, after due regularisation. Such service outside promotee quota cannot count for seniority. Service of promotees which is regularised with retrospective effect from date of vacancies within quota counts for seniority. However, any part of such ad hoc/stop gap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of promotees or transferees is to be fixed as per quota and from date of commencement of probation/regular appointment as stated above. Seniority of direct recruit is from the date of substantive appointment. Seniority has to be worked out between direct recruits or promotees for each year. We decide point 3 accordingly. Point 4 : direct recruits cannot claim appointment from date of vacancy in quota before their selection : We have next to refer to one other contention raised by the respond-ents- direct recruits. They claimed that the direct recruitment appointment can be antedated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 42 recruitment was made. Once they were

so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under direct recruitment quota. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in Service Jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service. This principle is well settled. In *N.K. Chauhan v. State of Gujarat*, [1977]. 1 SCC308(at p.321) Krishna Iyer, J.

stated : "later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service."

Again, in *A. Janardhana v. Union of India*, [1983]. 2 SCR936 it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in *A.N. Pathak v. Secretary to the Government*, [1987]. Suppl. SCC763(at p.767) that slots cannot be kept reserved for the direct recruits for retrospective appointments.

33. In *Parmar* (supra) the Supreme Court no doubt clarified and explained the meaning and effect of the two office memoranda; yet, it would be essential to again extract Para 2.4.2 of the OM of 03.07.1986, with its illustration, which is telling for the purpose of this case:

2.4.2 If adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 43 take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to

the usual practice. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional, direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year. ILLUSTRATION: Where the Recruitment Rules provide 50% of the vacancies of a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the year 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

1986. 1. P1 2. D1 3. P2 W.P.(C) 7370/2010 & W.P.(C)7371/2010 1987 9. P1 10. D1 11. P2 Page 44 4. D2 5. P3 6. D3 7. P4 8. P5 34.

12. D2 13. P3 14. D3 15. P4 16. D4 17. P5 18. D5 19. D6 20. D7 A proper application of the above condition, as explained by the subsequent OM of 3.3.2008 would mean that the vacancies permitted to be filled through promotion (by the UPSC) are actually so filled after following the conditions prescribed for promotions (eligibility conditions, and criteria for promotion etc). As found earlier, the creation of these vacancies was to cater to national exigencies and they had to be filled quickly and manned by experienced personnel having some background in investigation. The channel of promotion adopted to fill them was not irregular or illegal. At the same time, the CBIs inability to fill vacancies to the direct recruit quotas meant that there were unfilled vacancies in that channel, which kept getting rolled over and re-advertised. Interestingly, the seniority list impugned by the direct recruits reveals that earlier direct recruits were interspersed on the basis of the same principle -at Sl. Nos 95, 125 and 126. The entry of direct recruits - contesting respondents in these proceedings - at a later date therefore meant that rotation of vacancies could be resorted to the extent their numbers permitted it for the

concerned year or years when the direct recruits joined the services; as far as others were concerned, they had to be W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 45 bunched together, below the promotees who entered the cadre earlier. Bunching or en-bloc placement of one or the other category of recruits (promotees or direct recruits) ipso facto cannot be condemned, as is evident from the illustration to Para 2.4.2 and the subsequent clarification. Therefore, the reasoning and order of the CAT in the impugned order cannot be sustained.

35. In view of the foregoing reasons, the impugned order of the CAT is set aside. The writ petitions are accordingly disposed of, without any order as to costs. S. RAVINDRA BHAT (JUDGE) VIPIN SANGHI (JUDGE) NOVEMBER17 2014 W.P.(C) 7370/2010 & W.P.(C)7371/2010 Page 46

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