

Reportable

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

1) W.P.(C) No. 3642-57 of 2005

Reserved on: January 14, 2009.

Pronounced on: April 02, 2009.

Shri Yogender Singh & Others

. . . Petitioners

through :

Mr. M.S. Ganesh, Sr. Advocate with
Mr. Devendra Singh, Advocate.

VERSUS

Govt. of NCT of Delhi & Others

. . . Respondent

through

Ms. Jyoti Singh, Advocate with
Mr. Amandeep Joshi, Advocate.

2) W.P.(C) No. 14933-48 /2004

Shri Karam Vir & Other

. . . Petitioners

through :

Mr. M.S. Ganesh, Sr. Advocate with
Mr. Devendra Singh, Advocate.

VERSUS

Govt. of NCT of Delhi & Others

. . . Respondent

through

Ms. Jyoti Singh, Advocate with
Mr. Amandeep Joshi, Advocate.

3) W.P.(C) No. 14914-29/2004

Shri Karam Vir & Other

. . . Petitioners

through

Mr. M.S. Ganesh, Sr. Advocate with
Mr. Devendra Singh, Advocate.

VERSUS

Govt. of NCT of Delhi & Others

. . . Respondent

through

Ms. Jyoti Singh, Advocate with
Mr. Amandeep Joshi, Advocate.

CORAM :-

**THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SURESH KAIT**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. Identical issue arises in all these three writ petitions and for this reason, these petitions were heard together and can be disposed of by this common judgment. For the sake of clarity and to avoid confusion, we may start with the narration of facts appearing in Writ Petition (Civil) No. 3642-57/2005.
2. The petitioners herein belong to Delhi Administration Subordinate Service (DASS). This service was constituted in the year 1967 vide Notification dated 10.02.1967. In the year 1968-69, amendment to these Rules was made by inserting Clause (bb) whereby Stenographers in Grade of Rs.210-530/- were also included as a feeder grade for the purpose of promotion to Grade-I Ministerial Service. Another amendment in these Rules was introduced vide Notification dated 22.05.1972, as per which, certain ex-cadre posts of the Horticulture Assistant, Plant Protection Assistant, Extension Officers, SDA, Demonstrators, etc. were also included in feeder line for promotion to Grade-I of DASS cadre. These Rules were amended again on 04.12.1980. Effect of this amendment was to merge two

services known as Ministerial and Executive Services of DASS into single service known as Subordinate Service of Delhi Administration.

3. The petitioners herein joined different posts in the Development Department between 1983 to 1987. At that time, cadre had not been unified by merging into single service. For promotion to the post of Grade-I, five years service in Grade-II is required. On that reckoning, the petitioners claim that they became entitled to be considered for promotion in the year 1989, 1990 and 1991 respectively. The petitioners, however, were not considered for promotion. It appears that a move was initiated in the department proposing to review the continuation of posts occupied by the petitioners in DASS service. A letter dated 09.10.1992 was written in this behalf stating that the then Chief Secretary had observed that a large number of specialized/technical posts to which the petitioners also belong had been included in the feeder channel of DASS cadre, which was affecting the promotional prospects of the regular incumbents in the said cadre, *viz.*, Ministerial Cadre. Suggestions were, therefore, made to take these technical posts out of DASS cadre. This led to the modifications and amendment in the DASS Rules once again vide Notification dated 02.11.1992. As per this, no posts of Specialized/Technical nature in any department were to be included in the feeder channel for promotion to organized cadre, i.e.,

DASS/DANICS. In this behalf, amendment to Rule 6 was carried out in the following manner:

“Amendment of rules 6 - In the Delhi Administration Subordinate Service Rules, 1967, in rule 6 under item no. 1 (Recruitment to Grade-I) for existing Clause (b), the following shall be substituted as under:-

“Notwithstanding anything contained in sub-rules (a)/Stenographers in the scale of pay of Rs.1440-2300 who have been appointed in a regular manner in accordance with the recruitment rules & have 5 years regular service in the grade shall also be eligible to be considered for promotion to Grade-I of the services on the basis of method of selection prescribed in the Notification F. 3 (75)/79-S-II dated the 4th December, 1980.

As a result of it, technical posts of Development Department were deleted from the feeder channel of Grade-I. As a result of this amendment now, only two categories in the feeder channel for promotion of Grade-I DASS are Grade II (DASS) and Stenographers.

As a consequence of exclusion of technical cadre from the feeder channel for the Grade-I (DASS), the technical officials in the Development Department were granted promotion in their own department to the higher technical post available in the scale of Rs.5500-9000/-.”

4. The persons like the petitioner objected to their exclusion from DASS service and certain representations in this behalf were made for inclusion of these technical posts once again as a feeder channel for promotion to the post of Grade-I. One of the grievances of these persons was that because of their exclusion, they were not given any promotion ever since their appointment and in the process they were stagnating in the same post for 13 to 17 years. These representations bore fruits as, on 02.06.2000, an order was issued in respect of 19 persons i.e. these petitioners, who belong to ex-cadre posts, were to be included in the feeder line, Grade-I (DASS) cadre. This was

followed by the Notification dated 21.01.2002 in exercise of powers inserted a proviso to Clause (bb) to Sub-rule (1) of Rule 6 giving statutory flavour to the earlier orders to 02.06.2000. As a result, Rule 6 was again amended specifically including the 19 petitioners herein only who were working on ex-cadre posts for making them eligible for promotion to Grade-I, DASS and promoting them to the said post from the date they became eligible for such promotion.

5. Since it is this amendment, which was challenged by the private respondents by filing OA before the Tribunal, it would be necessary to reproduce the text of this Notification dated 21.01.2002 in its entirety:

“No. F.55/52/2001/S.I – In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, read with the Govt. of India, Ministry of Home Affairs Notification No. F.27/59-Him (i) dated the 13th July, 1959 and all other powers enabling him in this behalf, the Lt. Governor of the National Capital Territory of Delhi is pleased to make the following rules further to amend the Delhi Administration Subordinate Services Rules, 1967 framed vide notification No. F.3(16)/66-Services dated the 10th February, 1967 as mentioned from time to time, namely:-

Short title: 1. These rules may be called the Delhi Administration Subordinate Service (Amendment) Rules, 2002.

Amendment of Rule 6: In the Delhi Administration Subordinate Services Rules, 1967, in rule 6, in sub-rule (1), to clause (bb), the following proviso shall be inserted namely:-

“Provided that the 19 officials working on certain ex-cadre posts of Development Department who were included in the feeder line for promotion to the post of Grade-I (DASS) vide this Government’s Notification No.

F.10(25)/67-Services-II dated the 19/22 May, 1972 and excluded F.2(34)/88-S.II dated the 2nd November, 1992, but were otherwise eligible for promotion to Grade-I (DASS) as on 2nd November, 1992 and have been brought back in the feeder channel for promotion vide this Govt.'s order No. F.2(34)/88-S.II/Vol. II/1735-58 dated the 2nd June 2000 shall be promoted to the posts of Grade-I DASS from the date they become eligible for such promotion."

6. Delhi Administration Employees Federation (Regd.) and others filed two OAs, i.e., OA No. 2937/2001 & OA No. 1286/2002. They challenged the aforesaid orders dated 02.06.2000 and Notification dated 21.01.2002. These OAs were allowed by the Tribunal *inter alia* on the following grounds:

"14. Even the first part of the notification provides that the private respondents who are described as 19 officials working in certain ex-cadre posts in the development Department and were excluded vide the notification of 02.11.1992 should be eligible to Grade-I DASS. We have already referred to above that the Government order of 02.06.2000 was not a notification issued and should not have much legal force. We do not dispute that the Administrator will have power to exclude or include certain cadre posts from the zone of consideration. The posts on which the private respondents were working were excluded to be considered for promotion in Grade I DASS. If the private respondents were excluded, it was in pursuance of the amendment to Rule 6 of the Delhi Administration Subordinate Service Rules, 1967. The notification was issued on 02.06.1992. Certain posts, cadres etc. were excluded. Induction of only private respondent, therefore, would not stand scrutiny. Either a cadre or post should have been included in terms of Rule 6 or the same should not be in the zone of consideration. Picking of 19 persons who are private respondents does not appear to be logical conclusion. The decision in the case of L.N. Mishra Institute of Economic Development and Social Change (*supra*) will have little impact in the present case. The reason given that they were otherwise eligible for promotion to Grade I DASS cannot be justified because eligibility is one thing not co-related (sic. co-related) with a particular cadre, post or service to be considered for inclusion in the feeder cadre for Grade I DASS. -

29Therefore, we have not hesitation in holding that the impugned order deserves to be quashed.

15. For these reason, we allow the present applications and quash the impugned order dated 02.06.2000 and 21.02.2002. No costs."

7. The petitioners have filed Writ Petition Nos. 14914-29/2004 & 14933-48/2004 challenging the aforesaid orders.
8. In the meantime, after the decision of the Tribunal dated 19.09.2003, the Government issued orders dated 06.09.2004 directing the reversion of the petitioners to the Office of Development Commissioner. Against this move, the petitioners filed OA No. 2973/2004 before the Tribunal. In this OA, they have challenged earlier notification date 02.11.1992 on the ground that before issuing this notification, UPSC has not been consulted which is mandatory requirement. That OA has been dismissed by the Tribunal vide orders dated 18.02.2005 holding that the same is barred by the principles of *res judicata* and assailing this order Writ Petition (C) No. 3642-57/2005 has been filed by the petitioners. Thus all these three writ petitions by the same petitioners virtually raise the same grievance.
9. The aforesaid factual narration would bring out the following zig-zag decision making on the part of the official respondents insofar as amendment in DASS Rules is concerned. When the service was constituted in the year 1967, posts which are being held by the petitioners and ascribed as technical posts were not included as

feeder grade for promotion to Grade-I DASS in Ministerial service. However, in 1972 their posts were included in the feeder line for promotion to Grade-I of DASS cadre. By amendment dated 09.10.1992, such technical posts were again excluded from DASS cadre. When these 19 petitioners raised grievance against the same, by amendment vide notification dated 21.01.2002, only these 19 persons specifically by name were again included in the DASS cadre and given promotion to Grade-I.

10. It is also clear from the above that whereas the persons belonging to Ministerial service were agitated by the move of the official respondents in issuing orders dated 02.06.2000 formalizing the same vide notification dated 21.01.2002 relating to the notification of the petitioners in which DASS service, the petitioners were agitated by their exclusion from DASS service in the year 1992 when Rules were amended vide notification dated 02.11.1992. We may also state, at this stage, itself that insofar as official respondents are concerned, before us the stand was that they accepted the judgment of the Tribunal and according to them, the amendment vide notification dated 21.01.2002 was bad in law and these 19 persons holding technical posts should not be included in the DASS service.
11. Before adverting to the issues at hand, we may take note of some more events which were highlighted by the learned counsel for the petitioners. The petitioners herein were appointed between

1983-1987, as mentioned above, on *ad hoc* basis initially. They had led their claim for regularization and the matter in this respect had gone up to the Supreme Court. Appeal filed by these petitioners was allowed by the Supreme Court vide orders dated 08.10.1996, directing that the petitioners were entitled to regularization subject to the official orders that may be filed in the Writ Petition (Civil) No. 1128/1989 which was filed by the Government of Delhi. This writ petition was filed by the Government against the decision of the Tribunal. The High Court vide its judgment dated 06.12.1996 dismissed the writ petition. Hence, in accordance with the orders of the Supreme Court, the petitioners were appointed on regular basis to the posts of Horticulture Assistant, Plant Protection Assistant, Extension Officers, SDA, Demonstrators, etc. w.e.f. 01.08.1984, 10.08.1984 and 01.09.1984. Orders dated 17.01.1997 were issued to this effect. The effect of these orders was that from their initial appointment, the petitioners were treated as appointed on regular basis. It is because of this reason that they claim that they were entitled to be considered for promotion to Grade-I DASS after five years of service from their appointment, i.e., after 1989. Though in the year 1989, they were included in the DASS cadre by virtue of amendment of 1972 which still held the ground, at that time they were not considered for promotion as they were treated as *ad hoc* employees. They got the status of regular employees, from the date

of their initial appointment but only after the orders dated 17.01.1997 were passed by the Government on the basis of the aforesaid judicial pronouncements. However, by that time DASS rules had again been amended on 02.11.1992 and the petitioners were excluded from DASS cadre. The petitioners had thus made representation dated 13.06.1997 against the amendment made in Rule 6 by DASS Amendment Rules, 1992 on 02.11.1992. This representation was forwarded for fresh consideration pointing out that prejudice has been caused to the petitioners by earlier notification dated 02.11.1992. Therefore, to remove the said prejudice and give benefit to the petitioners who were stagnating in their positions ever since from their appointment from the year 1984 to 1987, orders date 02.06.2000 were issued giving benefit to only these 19 petitioners which was followed by amendment in the DASS Rules vide notification dated 21.01.2002 as mentioned above. Pursuant thereto the petitioners with other eligible employees were considered for promotion to Grade-I post for a duly constituted DPC and orders dated 08.08.2002 were passed giving promotions to these persons in the scale of Rs.6500-10500/-.

12. Mr. Ganesh, learned Senior counsel appearing for the petitioners made a fervent plea that good governance demands issuing of mandamus giving promotions to the petitioners who were earlier even promoted when the Department realized that injustice was

being done to them. He relied upon the judgment of the Supreme Court in the case of *Raghava Rajgopalachari Vs. State of Assam* 1972 S.L.R. (SC) 915 where he particularly referred the following passage from there:

“17. The writ was brought to challenge this order. No such petition, even if it be competent, was filed by the State itself. The respondent to a writ petition filed cannot be allowed to attack its own order as a respondent.”

13. He also submitted that official respondents were taking extreme positions under the pressure put up by the Federation of the Employees belonging to the Ministerial cadre and even when they understood that the petitioners were entitled to promotion and for this purpose orders dated 02.06.2000 and notification dated 21.01.2002 were passed, after the judgment of the Tribunal striking down those orders, they had taken somersault in their attitude. He pointed out that initially after receiving the judgment of the Tribunal dated 19.09.2003, view was taken by the Lieutenant Governor to challenge that order. Since the notification was struck down only on technical grounds, it was also decided to remove the said anomalies. However later on, under the pressure of the Federation of Employees, the official respondents decided to go back on those decisions which act was totally unfair and arbitrary on the part of the respondent. The learned counsel, in these circumstances, argued that proper relief can be given by the Court having regard to the judgment of Bombay High Court in *State of Bombay Vs. Laxmidas*,

AIR 1952 Bombay 468 which has been affirmed by the Supreme Court in a recent judgment in the case of *Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttaranchal & Others.*, 2007 (8) SCC 418.

14. Learned counsel for the respondents on the other hand pointed out that such persons in the category of the petitioners were not only the petitioners (19 in number), but there were 40 such ex-cadre employees. Therefore, it was realized that the notification dated 21.01.2002 giving benefit only to those 19 persons was discriminatory. It was further submitted that initially there was no notification to include these technical posts in the cadre after these were excluded vide amendment dated 02.11.1992. At the same time, it was also felt that the petitioners were stagnating. Therefore, only to give benefit to these petitioners, the notification dated 21.01.2002 was passed. However, when it was realized that if portion of the notification specifically giving benefit to the petitioners is deleted, then all technical posts would again be included in the cadre, which was never intended. Therefore, consensuous decision was taken to accept the judgment of the Tribunal and not to take any further steps in this behalf.
15. We have given our due considerations to the respective submissions and have also minutely perused the records including the original record which we had summoned. Before dealing with the core issue we deem it proper to first address ourselves to the question of

constructive *res judicata* as on this principle the Tribunal has passed orders dated 18.02.2005 dismissing OA No. 2973/2004.

Re: Constructive Res Judicata:

16. Necessary facts have already been taken note of by us. To recapitulate them briefly, technical posts which were included in the feeder cadre for promotion to Grade-I of DASS cadre by amendment dated 22.05.1972 were excluded subsequently vide amendment dated 02.11.1992. Thereafter orders dated 02.06.2000 were passed followed by notification dated 21.01.2002 amending the Rules once again, but limiting the benefit to only 19 persons, i.e., the petitioners herein. This was challenged by the Employees of Ministerial Cadre by means of two OAs. Those OAs were allowed by the Tribunal vide judgment dated 19.03.2003. Acting on this judgment, the Government passed orders dated 06.09.2004 reverting the petitioners to the Office of the Development Commissioner. At this stage, these petitioners filed OA No. 2973/2004 challenging amendment dated 02.11.1992 by which they were excluded from the DASS cadre. The Tribunal has held that such a challenge is not permissible at this stage as the petitioners did not take any steps to challenge those amendments on an earlier occasion and therefore, principles of constructive *res judicata* shall apply. To arrive at such a conclusion, the Tribunal has been swayed away by the consideration that the petitioners did not challenge the validity of notification dated 02.11.1992 in the earlier two OAs, which

were filed by the Ministerial Federation/Staff. It is clear from the following discussion in the judgment dated 18.02.2005:

“20. At this stage, it would be appropriate, therefore, to sum up the above said conclusions. Where the constructive *res judicata* is a special and artificial form of *res judicata*, it is a technical aspect but basis on which said rule rests is founded on consideration of public policy. It is not possible to have any hard and fast rule on the question but it depends on the facts and circumstances of the case. However, one important aspect is that if a matter could have been set up as a ground of defence in the former suit and its introduction into that suit was necessary for a complete and final decision, it will be deemed in the subsequent suit to have been decided and principle of constructive *res judicata* would apply. There is no distinction made between a claim or defence actually made or which might and ought to have been made. By fiction of law the latter also is deemed to have been directly and substantially in issue in the former suit.

21. Reverting back to the facts of the present case, we have already noticed above that this question should have been raised in the earlier litigation but was not raised. At that time, the applicants did not deem it appropriate to challenge the Notification of the year 1992. In fact they supported it. It could have been raised in the previous litigation and once it is not raised, the principle of constructive *res judicata* squarely applies to the facts of the case. Therefore, it is too late in the day for the applications to rake up this plea.

17. We may also point out that in the process, the Tribunal has taken note of various judgments of the Apex Court and High Courts explaining the doctrine of principles of constructive *res judicata*. On that basis, legal position is rightly summed up in Para No. 20 extracted above. However, it is the application of this principle on the facts of present case where we find ourselves in disagreement with the view taken by the Tribunal. The question is as to whether the petitioners had the occasion to challenge the notification of 1992 in the earlier proceedings but they omitted to do so. It is because of

the provisions contained in Explanation IV of Section 11 of Code of Civil Procedure, which has been relied upon by the Tribunal and the same reads as under:

“Explanation IV – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The Tribunal has held that challenge to the Notification of 1992 could have been raised in previous litigation and once it is not raised, the principles of *res judicata* squarely applies. However, it has missed certain important facts on the basis of which one can safely conclude that there was no such occasion to challenge notification of the year 1992 in the previous litigation. We are making these comments in view of following pertinent aspects:

- a) Earlier two OAs were filed by the private respondents herein, viz., Federation/Employees of Ministerial Staff. The subject matter of challenge was the orders dated 02.06.2000 and Notification dated 21.01.2002. By these orders and notification, the petitioners herein were granted the relief by the department itself, administratively. Therefore, the scope of controversy was the validity of those notifications which were to the benefit of the petitioners. The petitioners in a matter like this who were earlier respondents in those OAs were only supposed to defend those orders/notification.

- b) With the issuance of notification dated 21.01.2002 whereby Rule 6 of DASS Service Rules was amended, 1992 notification had ceased have any effect insofar as the petitioners are concerned. It is because of the reason that by this amendment position/existence prior to 1992 had been restored, nullifying the effect of the notification of 1992 qua the petitioners. Therefore, the petitioners had no occasion to challenge those orders.
- c) Amendment in the Rules incorporated vide notification dated 02.11.1992 and excluding the technical posts was made at the time when matter regarding regularization of the petitioners was still pending. No doubt, the petitioners had succeeded before the Labour Court, writ petitions was preferred by the Delhi Administration, which was pending in the Delhi High Court. After the decision of the Supreme Court and consequent to the dismissal of writ petition of the High Court, the department issued orders dated 17.01.1997 regularizing the services of the petitioners w.e.f. their initial date of appointment. Immediately thereafter, the petitioners made representation against the amendment notification dated 02.11.1992 and got redressal departmentally as their representations found favour with the official respondents culminating in the Notification dated 21.01.2002. In this

backdrop, when notification dated 21.01.2002 was the subject matter of challenge, we fail to appreciate how in the OAs challenging the said notifications, the petitioners were supposed to challenge the earlier notification of 1992.

18. We may, at this stage, refer to two judgments which were relied upon by the respondents. First is the case of *Ekta Shakti Foundation Vs. Govt. of NCT of Delhi*, (2006) 10 SCC 337 and another judgment on which reliance was placed is *R.R. Verma & Ors. Vs. The Union of India & Ors.*, AIR 1980 SC 1461.

Thus we also hold that the OA No. 2973/2004 preferred by the petitioners herein could not have been dismissed on the ground of constructive *res judicata* as that is not applicable.

19. In such circumstances, normally, we would have referred to the matter back to the Tribunal for fresh adjudication. However, having regard to the fact that other two writ petitions have to be decided on merits and the issues are inter-twined, we accepted the request for all the parties that this writ petition be decided along with other two writ petitions. For this reason, arguments on merits were also heard.
20. With this note, we revert back to the core issue regarding amendments in the Rules from time to time.

Re: Validity of Orders dated 02.06.2000 & Notification dated 21.01.2002.

21. As far as judgment dated 19.09.2003 passed by the Tribunal quashing the above two orders are concerned, the same would pose much problem. We have already noted above that the Tribunal found that insofar as Government Order dated 02.06.2000 is concerned, it was not the notification issued under Proviso to Article 309 and was clearly contrary to the legal position prevailing at that time which was arrived at by the amendment to the Rules vide Notification dated 02.11.1992. Thus, as per Rule 6 existing at that time, ex-cadre officials to which petitioners belong to, stood excluded. In spite thereof, treating 19 persons specifically as part of the cadre would be contrary to the said Rules. It would, therefore, be apposite to reproduce the Orders by the Tribunal at this juncture, which are as follows:

“The Hon’ble Lt. Governor is pleased to order that under mentioned 19 employees of Development Department who belong to ex-cadre posts and were included in the feeder line for promotion to Gr. I DASS Cadre vide notifications dated 22.05.72 and were delinked from the same vide notification No. 2(34)/88-S.II dated 2.11.1992, are reverted back to their old position with immediate effect as it existed prior to 2.11.1992.

The above is subject to the condition that this order will not be treated as precedent and no other post of specialized and technical nature in any department shall be allowed to be included in the feeder channel of the organized cadre of Gr. I DASS. No further recruitment will be made against the post vacated by these employees.

Sl. No.	Name of the official & Designation
1.	Sh. Karamvir, TA
2.	Sh. Ashok Kumar, HA
3.	Sh. R.C. Rana, HA
4.	Sh. Harbir Singh, HA
5.	Sh. Rajpal Singh, HA
6.	Sh. Dilip Singh, SI

7. Sh. Bajendra Singh, PPA
8. Sh. Satya Kumar, HA
9. Sh. Yognendra Singh, HA
10. Sh. S.C. Sharma, HA
11. Sh. Rajendra Singh, HA
12. Sh. Mishri Lal Yadav, HA
13. Sh. Somvir ARya, BO (A)
14. Sh. Rav Avtar Gupta, HA
15. Sh. Devender Kumar, PPA
16. Sh. Suresh Kumar, HA
17. Sh. Amar Singh Kardam, HA (SC)
18. Sh. Murali Dhar Sharma, EO (A)
19. Sh. Nepal singh, EO(A) (SC).

The above order will cease to be effective after the promotion of above 19 officials as Gr. I (DASS).

Sd/-
(U.R. KAPOOR)
ADDL. SECRETARY (SERVICES)"

The Tribunal thus rightly noted that by an administrative order, such an exercise was not permissible.

22. So far as Notification dated 21.01.2002 is concerned, it has already been reproduced above. What is noted by way of amendment is that proviso to Rule 6 in Sub-rule (i) to Clause (bb) is added, bringing back these 19 ex-cadre officials in the feeder channel for promotion for whom earlier orders dated 02.06.2000 were passed. However, the submission is that offending portion from there could be omitted, namely, the words "that 19 Officials working on certain posts i.e., the Horticulture Assistant, Plant Protection Assistant, Extension Officers, SDA, Demonstrators, ect." If this is excluded, then ex-cadre posts of Development Department would stand included in the feeder line for promotion without specific reference to these 19 officials and such an

action would perfectly be legitimate, was the submission of the learned Senior counsel.

23. The matter, however, is not as simple as tried to be projected by Mr. Ganesh, learned Senior Counsel. Submission of the official respondents was that the Department never wanted to include entire ex-cadre of the Development Department in the feeder line for promotion to the post of Grade-I, DASS. Therefore, if those words are omitted and fresh notification is issued, it will lead to the consequences not acceptable to the Department. For this reason, argued the learned counsel, such a suggestion of the petitioners cannot be accepted.
24. To appreciate the respective contentions, at this juncture, we will have to take note of the reasons for exclusion of technical posts in the year 1992 and giving benefit specifically to 19 officials, viz., the petitioners herein in the year 2000/2002. For this purpose, we had summoned the record and perused the same. As per the record, policy decision was taken in the year 1992 to exclude specialized/technical posts from the feeder channel for promotion to the organized cadre i.e. DASS/DANICS as it was found that their inclusion was adversely affecting the overall efficiency of the organized cadre. Because of the reason that officials with very little expertise outside their limited fields of operations have entered these generalized cadres where they were called upon to perform field

assignments of various nature and had to act as *quasi judicial* like Assessing Authorities in Sales Tax Department, Food & Supplies Offices, etc. It was also recorded that the department also suffered in the process as they were bereft of expert knowledge and specialized training of such officials on their promotion to generalized cadres. Further, there were ample promotional opportunities available to the technical officers in the Development Department. With the amendment, technical posts were deleted from the feeder channel of Grade-I. Thus, technical officials in the Development Department continued to avail promotion of their own department to the higher technical posts.

25. In the year 2000, representations were made by these petitioners for inclusion of technical posts once again as a feeder channel in Grade - I, DASS. These representationists stated that they were earlier included in the DASS cadre vide notification dated 01.06.1972 and 04.12.1980 on the ground that they did not have adequate chances for their own line. Their representation was examined and as per the noting in the file, it was found that after delinking of the posts from DASS cadre in the year 1992, those officials could not get any promotion. Justifying their inclusion following recommendation was given by the Additional Secretary:

“The employees of Development Department were thus delinked from DASS Cadre and at the same time no efforts were made at any time to find avenues for promotion for these employees. Till date none of these 19 employees who were delinked from DASS Grade-I could get any promotion. A

perusal of the record shows that those employees who were promoted in 1992 had been in Grade -II DASS Cadre since 1981 and since these 196 employees were recruited in 1983 they could not find place in the promotion orders issued in 1992. But the present position is that the employees who entered Grade - II in 1992 have been promoted to Grade-I whereas these employees should belong to 1983 could not get any promotion at all. If these posts had not be de-linked from DASS Cadre, these employees would have been promoted some time in 1993-94 but they are still stagnating on the same post.

Another notable point is that when these employees were recruited in 1983 they were a part of Grade - II DASS and, therefore, they had the chances of promotion which were available to all Grade-II DASS employees. However, in 1992 the benefit of promotion was taken away from them and the posts of BDO which was earlier a departmental post and the post to which these employees could be promoted was made a part of DANICS. These employees, therefore, were deprived of promotions as a part of Grade - II DASS cadre and also as a departmental candidates since the higher post was included in the DANICS to which these employees could not be promoted. The 19 employees have, therefore, no chance of promotion either in department or in DASS Grade - I.

It is also interesting to know that in 1992 when the notification for de-linking of these posts was issued. The Chief Secretary had categorically desired (58/N) that the references be made to UPSC in this regard. However, no such reference was ever made to UPSC and these were simply de-linked and not considered for the promotions which took place later. This is an administrative error but now if the posts are again linked to DASS Cadre, there will be no need of referring the matter to UPSC.

The post on which these employees are working are also diminishing cadre posts as no recruitment is being made on these posts. It is only a matter of consideration for these 19 employees and there shall be no more cases of same nature in future. The Development Department has been recommending the inclusion of these posts in DASS Grade - II (115/C). The Pr. Secretary (Services) while dealing with the case (88/N) had stated that there is ample justification to include these incumbents against appropriate post in the organized cadre because a decision has already been taken up at the level of L.G. to wind up agricultural set up of Development Department in the phased manner. The vacancies caused in the cadre are not being filled up at the initial/entry level and the promotion posts available in these cadres have already been included in DANICS.

In view of the points mentioned above, these 19 employees of Development Department can only be given relief if they are reverted back to their old position as it existed at the time they joined their services and the same promotional avenues are made available to them. The file may, therefore, be put up to the L.G. with the advice that in respect this diminishing cadre we may open up the avenues of promotion by including them in DASS Cadre.

26. On the aforesaid basis, Office Orders dated 02.06.2000 was issued, which was later on followed by Notification dated 21.01.2002. After the judgment of the Tribunal dated 19.03.2003 quashing the aforesaid order and notification on technical grounds, matter was again examined by the Department. Initially, view was taken to challenge the said judgment and to issue revised notification. Further, when the matter was posted before the Chief Secretary, she pointed out in her note on 30.12.2003 questioning the rationale for revised notification for the following reasons:

- “(i) There still remain 16 officials in the Development Department who hold technical posts and are working on regular basis since 27.01.1988. If the 19 officials are inducted as proposed by Services Department the exclusion of these 16 officials from the feeder line for promotion to Grade-I posts of DASS would be arbitrary and amount to discrimination. In case these officials take legal recourse it will be difficult to defend the proposed notification in a court of law.
- (ii) It is not that these 19 ex-cadre officials who possess technical qualifications have no avenues of promotion in the Development Department. In fact they are eligible for promotion to the post of Fruit and Vegetable Specialist, Deputy Director (Horticulture), Horticulturist, Senior Demonstrator, etc.
- (iii) The argument that these 19 officials who were appointed to various technical posts in the Development Department in the year 1983 had not been promoted until 2000 whereas DASS Grade - II employees had been promoted to Grade-I

DASS is fallacious, as the Government cannot guarantee uniform promotion prospects for posts in different cadres.

- (iv) It seems anomalous that ex-cadre posts in Development Department carrying pay-scale of Rs.4500-7000 and 5500-9000 have both been put in the feeder line for promotion to Grade -I DASS cadre posts. Within the Development Department posts carrying pay-scale of Rs.4500-7000 are in feeder line for promotion to the posts in the pay-scale of Rs.5000-9000 (*sic.* Rs.5000-8000).
- (v) Ex-cadre posts exist in almost all the departments of Delhi Government and there will be requests from officials manning these posts to bring their posts also in the feeder line of promotion to Grade-I posts of DASS cadre."

27. The matter was examined by the Law Department all over again and the Secretary (Law, Justice & LA) concurred with the Chief Secretary. When the matter was placed before the Lt. Governor, he, however, took the view that the judgment of the Tribunal should be challenged and fresh Notification be issued removing technical infirmities pointed out by the Tribunal. It would be important to reproduce in entirety, the observations dated 06.05.2004 in the Note of the Lt. Governor:

"I find that CAT has assailed the notification dated 22.01.2002 not on merits but mainly on technical grounds, that it (i) pre-determines the eligibility of the 19 officials for promotion to Grade I DASS retrospectively from 1992, without their case being considered by a DPC, which is a pre-requisite under the rules and that (ii) logically only posts/cadres could be included in Grade I cadre by way of an amendment in the DASS rules, and not individuals as reflected in the notification. I understand that 16 officials (out of the total 19) of the Development Department, were, in fact, promoted to Grade I in August 2002 on the recommendations of a properly constituted DPC which had considered their eligibility, seniority etc. with reference to rules along with other Grade II officials. The promotions were given effect not from 1992 but prospectively from the date of the meeting of the DPC. Therefore, the apprehensions expressed in CAT's order are not borne out by facts.

The substantive issue is whether or not certain ex-cadre posts in the Development Department, on which these 19 officials had been working since 19983, should be included as feeder posts for promotion to Grade I DASS. These post were included in DASS cadre in 1972 with the consent of UPSC after the post of BDO, which till that time was a promotion post for these posts, had been included in DANICs cadre. In November 1992 these posts were delinked from DASS (without reference to UPSC) because these were technical in nature, on the clear understanding that promotional avenues would be found for them in the Development Department itself. It seems no effort was made in that direction thereafter and these officials kept making repeated representations to provide adequate channels of promotion for them. It was only after considering all aspects of the matter, that a conscious decision was taken in June 2000 to revert to the position that existed prior to 02.11.1992, when despite being eligible for promotion to Grade I DASS the posts held by these officials were abruptly delinked from DASS. I do not see any reason whatsoever necessitating a change in that position especially in the absence of adequate career promotion avenues for these posts in the Development Department. I also understand that some technical posts, such as, Stenographer Grade III and Kanungos are also feeder posts fro Grade II DASS. Besides, it would be unfair to revert these 16 officials after a lapse of about two years. The technical infirmities in the notification dated 21.02.2002, may be rectified by issuing a revised notification, which should be properly worded and given effect to from the date the earlier notification was issued. The decision of CAT quashing the notification dated 22.01.2002 and the promotion order dated 08.08.2002 will also have to be challenged in the High Court.

As for certain other officials working in the ex-cadre posts in the Development Department since, 1988, these may also be included as feeder posts for promotion to Grade I DASS, for which the Services Department should formulate a concrete proposal in consultation with Development Commissioner in a time bound manner. I may be kept informed of the progress after one month.

28. Notwithstanding the above, the Chief Secretary again referred the matter to the Law Secretary for advice, as observations of Lt. Governor were different from that of the Law Department. On this, the matter was looked into by the Joint Secretary (Law & Justice) and thereafter by the Secretary (Law, Justice & Legislative Affairs),

who reiterated their earlier decision. Law Secretary also stated that in case the Department was still interested in challenging orders of the CAT, administrative decision should be taken without delay so that delay should not come in the way of filing the writ petition. On this, matter was again placed before the Chief Secretary recommended that order of the Tribunal be not challenged. However, at the same time, it stated that "Service Department would now be asked to look into the issue of encadrement of ex-cadre technical officials of all departments in DASS Cadre and to frame a policy that is just, fair and in public interest as well".

29. Two things which clearly emerge from the aforesaid discussion are as under:

- (i) Notwithstanding, the decision of the Lt. Governor for challenging the CAT orders and for inclusion of ex-cadre posts in the Development Department as feeder posts for promotion to Grade - I DASS cadre, officers subordinate to him took contrary view but did not place the same before the Lt. Governor for approval.
- (ii) Even when Chief Secretary also asked the Service Department to look into the issue of encadrement of ex-cadre technical posts in DASS cadre and to frame a policy, nothing appears to have been done.

30. The aforesaid notings in the file would clearly indicate that there has not been proper consideration to the problem of the petitioner and

other ex-cadre technical officials. It is not in dispute that the petitioners have been languishing in the same grade to which they were appointed and have not earned any promotion, only promotion which was given was after passing orders dated 02.06.2000 and notification dated 21.01.2002 which also stands withdrawn on quashing of the said order/notification by the Tribunal. No doubt, the manner in which it was done is not proper and there have been technical infirmities. At the same time, the plight of the petitioners, because of this, has not been addressed properly. There has been no serious attempt in that direction. It is for the Department to frame a particular policy in order to assuage sufferings of the petitioners where that is to be done by including them in the DASS cadre or otherwise is the functioning of the Department. Fact remains that the Lt. Governor had passed orders for inclusion thereof in the DASS cadre. Though difficulties are expressed, fact remains that the matter was not placed before the Lt. Governor again with those difficulties persuading him to change the orders dated 06.05.2004. On the other hand, the grievance of the Ministerial cadre is that there is acute stagnation in their progression in the service and inclusion of ex-cadre posts was creating lot of problem for them. It was also pointed out that technical cadre was excluded in the year 1992 and Stenographers were also included in the year 2002. If the persons like petitioners are included, there may be demand of Stenographers for

the inclusion and it would adversely affect the service prospects of the Ministerial cadre. Other reasons because of which the technical posts were excluded, viz., it was affecting the working of the Department, was also stressed. However, this was the matter for the Department to look into and the Department should come out with a proper solution balancing the interest of all concerned.

31. Since policy decision has to be taken by the Department, we are of the opinion that the Service Department should look into the respective points of views and decide about the feasibility or otherwise regarding encadrement of ex-cadre technical officials in DASS cadre and/or to frame appropriate policy for ex-cadre officials which is just and fair to all concerned. Matters in this behalf shall be brought to the notice of Hon'ble Lt. Governor as well for taking final view in the matter.

32. We, thus, dispose of these writ petitions with direction to the Department to undertake the aforesaid exercise within a period of four months from today. However, there shall be no order as to costs.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

April 02, 2009
pmc