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

% *Judgment Reserved On: 22nd November, 2010*
Judgment Delivered On:29th November, 2010

\+ **W.P.(C) 1724/2010**

UOI & ANR. ..... Petitioners
Through: Mr.A.S.Chandhiok, ASG with Mr.Ritesh Kumar, Mr.Rajshree Mishra and Mr.A.K.Bhardwaj, Advocates

versus

ANAND KUMAR PANDEY & ORS. .....Respondents
Through: Mr.Naresh Kaushik, Advocate with Ms.Amita Kalkal Chaudhary, Ms.Aditi Gupta and Mr.Aditya Vikram, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

For orders, see W.P.(C) No.1188-90/2005.

PRADEEP NANDRAJOG, J.

SIDDHARTH MRIDUL, J.

November 29, 2010
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved On: 22nd November, 2010*
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\+ **W.P.(C) 1188-90/2005**

UOI & ORS. ..... Petitioners
Through: Mr.A.S.Chandhiok, ASG with Mr.Ritesh Kumar, Mr.Rajshree Mishra and Mr.A.K.Bhardwaj, Advocates

versus

VIJENDER SINGH & ORS. .....Respondents
Through: Mr.Naresh Kaushik, Advocate with Ms.Amita Kalkal Chaudhary, Ms.Aditi Gupta and Mr.Aditya Vikram, Advocates

W.P.(C) 1723/2010

UOI & ANR. ..... Petitioners
Through: Mr.A.S.Chandhiok, ASG with Mr.Ritesh Kumar, Mr.Rajshree Mishra and Mr.A.K.Bhardwaj, Advocates

versus

D.K.SHUKLA & ORS. .....Respondents
Through: Mr.Naresh Kaushik, Advocate with Ms.Amita Kalkal Chaudhary, Ms.Aditi Gupta and Mr.Aditya Vikram, Advocates

W.P.(C) 1724/2010

UOI & ANR. ..... Petitioners
Through: Mr.A.S.Chandhiok, ASG with Mr.Ritesh Kumar, Mr.Rajshree Mishra and Mr.A.K.Bhardwaj, Advocates

versus

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ANAND KUMAR PANDEY & ORS. .....Respondents
Through: Mr.Naresh Kaushik, Advocate with Ms.Amita Kalkal Chaudhary, Ms.Aditi Gupta and Mr.Aditya Vikram, Advocates

W.P.(C) 1725/2010

UOI & ANR. ..... Petitioners
Through: Mr.A.S.Chandhiok, ASG with Mr.Ritesh Kumar, Mr.Rajshree Mishra and Mr.A.K.Bhardwaj, Advocates

versus

CPWD ENGINEER ASSOCIATION & ORS. .....Respondents
Through: Mr.Naresh Kaushik, Advocate with Ms.Amita Kalkal Chaudhary, Ms.Aditi Gupta and Mr.Aditya Vikram, Advocates

W.P.(C) 1726/2010

UOI & ANR. ..... Petitioners
Through: Mr.A.S.Chandhiok, ASG with Mr.Ritesh Kumar, Mr.Rajshree Mishra and Mr.A.K.Bhardwaj, Advocates

versus

A.K.SHARMA & ORS. .....Respondents
Through: Mr.Naresh Kaushik, Advocate with Ms.Amita Kalkal Chaudhary, Ms.Aditi Gupta and Mr.Aditya Vikram, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?

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3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. The above captioned 5 writ petitions are being decided by a common judgment and order for the reason issue which arises for consideration in all the writ petitions is identical.

2. Vide W.P.(C) No.1188-90/2005 order dated 13.5.2004 allowing OA No.2710/2003 is under challenge. Vide W.P.(C) No.1723/2010 and W.P.(C) No.1726/2010 the order dated 14.7.2009 allowing OA No.2542/2008 and OA No.220/2009 is under challenge. Vide W.P.(C) No.1724/2010 the order dated 16.7.2009 allowing OA No.1847/2008 is under challenge. Vide W.P.(C) No.1725/2010 the order dated 12.5.2009 allowing OA No.1749/2008 is under challenge.

3. It may be noted that the orders dated 14.7.2009, 16.7.2009 and 25.12.2009 are simply following the reasoning of the order dated 13.5.2004 and thus we would be noting the relevant facts relatable to OA No.2710/2003; decision wherein is the subject matter of challenge vide W.P.(C) No.1188-90/2005.

4. The claimants before the Tribunal i.e. the respondents in all the writ petitions were employed by way of direct recruitment as Junior Engineers under the Central Public Works Department (CPWD). The post available to them for promotion is the post of Assistant Engineer and as per the notified Recruitment Rule requires to be filled up 50% by way of promotion from Junior Engineers having regular service for 8 years; the norm for promotion in this quota is 'seniority subject to fitness'. The remaining 50% posts of Assistant Engineers have to be filled up by a 'Limited Departmental

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Competitive Examination' which can be taken by a Junior Engineer having 4 years' service.

5. For the years 1990-91, 1991-92 and 1992-93, on 20.12.1992 (somewhere date written is 23.12.1992) UPSC conducted the examination to fill up 227 posts of Assistant Engineers (Civil) and 36 posts of Assistant Engineer (Electrical) pertaining to the 'Limited Departmental Competitive Examination' Quota. The result was declared in two stages. At the first stage 149 persons were declared successful to be promoted as Assistant Engineer (Civil) and thereafter 78 persons were declared successful to be promoted as Assistant Engineer (Civil) and 36 as Assistant Engineer (Electrical).

6. Vacancies accrued both in the regular promotion quota as also in the quota for 'Limited Departmental Competitive Examination' for the year 1993-94 and onward till the year 1998-99. Whereas regular promotions were effected, no examination was held to fill up the vacancies required to be filled up through the 'Limited Departmental Competitive Examination' till UPSC initiated the process in the year 1998 to conduct an exam.

7. Fearing that UPSC may conduct the exam by clubbing all the vacancies, Junior Engineers filed 2 Original Applications registered as OA No.2239/1998 and OA No.2526/1998 in which they stated that the proposed exam to be held, pertained to vacancies for the period 1.4.1993 till 31.3.1999 and that the examination was scheduled for 21.2.1999. It was urged that eligibility of 4 years' service as a Junior Engineer had to be applied for the year wise vacancy for otherwise it may happen that persons not eligible for the vacancies pertaining to the year 1.4.1993-31.3.1994 as also the subsequent years may be selected against the vacancy available for the year in question. It was prayed that

directions be issued to fill up the vacancies from amongst the eligible candidates pertaining to the vacancy year. Relevant would it be to note that in the 2 Original Applications no issue was raised pertaining to the vacancies which had been filled up for the year 1990-91, 1991-92 and 1992-93.

8. Vide order dated 15.2.1999 the Central Administrative Tribunal disposed of OA No.2239/1998 and OA No.2526/1998 observing that it was not possible to rule out that ineligible Junior Engineers may successfully clear the examination if vacancies were not segregated. In para 13 of the decision it was observed as under:-

> "In the light of the detailed discussions aforesaid and in the interest of justice and fair play, we do not think it appropriate to apply broken on the wheels of the proposed selection process. For this reason, the OAs deserves to be dismissed and we do so accordingly. However, to take care of some of the reasonable apprehensions to the applicants, it would be appropriate that while conducting the present selection and finalizing the process thereof, respondents shall take precautions in terms of the following:
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> (i) Segregate both vacancies and eligibility year-wise. This is to ensure that an employee after having qualified in the examination does not get the benefit of seniority against the year when he was not even eligible for the same:
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> (ii) Existing rules for filling up the posts meant for reserved category candidates shall be adhered to as prescribed by the DoPT in its OM dated 2.7.97, while communicating vacancies of 391 JEs, respondents have only indicated that the percentage of reservation for SC/ST will be indicated only later on. Since reservation in promotion in such cases are to be ensured as per law laid down, respondents shall strictly follow instructions for maintaining the roster and running account register to look after the interests of backward classes.

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(iii) Vacancies of 391 shall be recalculated to ensure that 1:1 ratio between the two groups for the years from 1993 to 1999 have not been titled to unduly favour one of the two contending groups.

(iv) We are also inclined to agree with the respondents' submission that "present practice or keeping vacant slots for being filled up by direct recruitment of later years thereby giving them unintended seniority over promotes who are already in position could be dispensed with. The above precautions shall be taken before finalizing the present selection process or hand."

9. Relevant would it be to note that though in para 13 it has been observed that the Original Applications deserved to be dismissed and the Tribunal was so doing accordingly, observations were made that for the ensuing exam the department would take the four precautions set out in sub-para (i) to (iv) of para 13.

10. Suffice would it be to state that the applicants before the Tribunal were Junior Engineers who were fairly senior as per the seniority list of Junior Engineers and they feared that their younger brotherin who had joined in the years 1993-94 and the year 1994-95 and by the year 1999 had acquired the requisite 4 years' experience as a Junior Engineer, if allowed to compete against all 336 vacancies of Assistant Engineer (Civil) and 89 vacancies of Assistant Engineer (Electrical), could succeed and this would be to the detriment of the Senior-Junior Engineers.

11. Needless to state if empanelment was done with reference to year wise vacancy, Junior Engineers inducted in the year 1993-94 would be eligible only for the vacancies pertaining to the year 1997-98 and the year 1998-99 and those who were inducted in the year 1994-95 would be eligible

to compete for the vacancies which had accrued in the year 1998-99. Like wise Junior Engineers inducted in the year 1992-93 would be eligible for the vacancies pertaining to the year 1996-97 and onwards; Junior Engineers inducted in the year 1991-92 would be eligible for the vacancies pertaining to the year 1995-96 and onwards; Junior Engineers inducted in the year 1990-91 would be eligible for the vacancies pertaining to the year 1994-95 and onwards and all Junior Engineers inducted up till the year 1989-90 would be eligible for all the vacancies.

12. Observation vide sub-para (iv), though not germane to the controversy which was raised before the Tribunal, finds a reflection probably for the reason the Tribunal had in its mind the seniority to be assigned to those who would be promoted as Assistant Engineer through the 'Limited Departmental Competitive Examination' vis-à-vis those who had earned regular promotions based upon seniority subject to fitness requiring ratio 1:1 to be maintained between the two groups for the obvious reason each had the quota 50%.

13. Happily, the examination was held and result declared in two stages and the posts on the civil and electrical side were filled up. It be noted that the department filled up the posts which had fallen vacant with reference to year wise eligibility of candidates and in relation to the posts which had fallen vacant in the year in question.

14. Respondents of W.P.(C) No.1188-90/2005 Sh.Vijender Singh and others filed a representation that seniority be assigned to the Junior Engineers who were promoted as Assistant Engineers under the 'Limited Departmental Competitive Examination' Quota vis-à-vis those who had been promoted under the 50% quota assigned to seniority-cum-merit in the ratio 1:1 with reference to the

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vacancy year when the posts fell vacant in the two quotas. A seniority list was finalized on 4.6.2002 pertaining to Assistant Engineer (Civil) and it is not in dispute that the seniority was assigned to Assistant Engineer (Civil) who had come up the ladder through the channel of promotion 'seniority subject to fitness' and the channel of promotion through 'Limited Departmental Competitive Examination' in the ratio 1:1 by rotating the vacancies in the quota 50:50. To highlight we may note that Vijender Singh who cleared the examination pertaining to 'Limited Departmental Competitive Examination' in the year 2001 has been shown at serial No.2813 and has been placed between Sh.H.K.Mitra at serial No.2812 and Sh.D.K.Chowdhury at serial No.2814 who earned promotion in the quota 'seniority subject to fitness' on 5.1.1995. Thus, though not by way of a mandate but being the precautions required to be taken by the department and as cautioned by the Tribunal vide its decision dated 15.2.1999 disposing of OA No.2239/1998 and OA No.2526/1998, the department did the needful.

15. Vijender and many others like him who earned promotion through the quota of 'Limited Departmental Competitive Examination' started raising the issue that not only seniority, they should be given all other benefits of notional promotion with effect from the year vacancies accrued in their quota and not from the date they were actually promoted. In other words they demanded to be placed in the pay scale of an Assistant Engineer from a retrospective date and also wanting their qualified service as an Assistant Engineer to be reckoned retrospectively for purposes of their eligibility for promotion to the next higher post i.e the post of Executive Engineer. The department declined the claim and this led to further litigation when

Vijender and others filed OA No.2710/2003 challenging the order dated 4.9.2003 whereunder the department rejected their claim. They prayed:-

> "a) allow this Original Application
>
> b) quash the impugned seniority list dated 4.6.2002;
>
> c) quash the order No.29/7/2002-EC-III dated 4.9.2003 and allow notional seniority to the applicants from the dates and years when vacancies arose with all consequential benefits;
>
> d) direct the Respondents to allow seniority to the applicants w.e.f. the dates and the years in which vacancies against which the applicant have been appointed were available and against which the applicants are shown to have been appointed vide the order dated 16.2.2001.
>
> e) and pass such other or further orders which this Tribunal may deem fit and proper in the facts and circumstance of the case may also be passed in favour of the applicant."

16. Suffice would it be to state, as conceded to by learned counsel for the respondents at the bar during arguments, that the prayers made by Vijender and others are inartistically drafted and do not bring out the real relief they were desiring. As noted by us hereinabove, seniority has been assigned to the persons who were promoted under the 50% 'Limited Departmental Competitive Examination' by interspacing the same on the ratio 1:1 with their brotherin who were promoted under the 50% 'seniority subject to fitness quota' and thus seniority was not in issue. What they were claiming were benefits of eligibility in service for further promotion to the post of Executive Engineer as also the salary.

17. They pleaded that but for the department's inaction in not conducting a timely examination they could have

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earned promotion in the year of the vacancy and would have then earned salary in the scale applicable to the post of Assistant Engineer and further would have acquired requisite eligibility to serve as an Assistant Engineer for being promoted as an Executive Engineer.

18. The claim was opposed by pleading that seniority was rightly assigned and in effect for the purposes of seniority a deemed retrospective promotion was given, but for salary and eligibility for further promotion it was urged that salary could not be paid on the principle of no salary for not shouldering the higher responsibilities of the promotional post and no eligibility for promotion till actual work experience was gained.

19. The Tribunal has held in favour of Vijender and others by holding that the only rational and logical interpretation to the 4 precautions required to be taken as per para 13 of the Tribunal's order dated 15.2.1999 disposing of OA No.2239/1998 and OA No.2526/1998 was that year wise panels had to be drawn and seniority to relate back on notional basis to the date of the year in which persons earned promotion with all consequential benefits. The Tribunal also noted that Executive Engineers were given such benefit.

20. As noted hereinabove, other persons filed Original Applications which were also allowed and in respect whereof 4 other captioned writ petitions have been filed in the year 2010 questioning the subsequent orders passed by the Tribunal, which we note are simply following the order dated 13.5.2004 allowing OA No.2710/2003 by Vijender Singh and others.

21. Pertaining to the parity drawn by the Tribunal with respect to similar benefit granted to the Executive Engineers, we note that the department was compelled to grant benefit to the Executive Engineers expressly stating in the order that

the benefit granted was subject to a writ petition which the department was proposing to file questioning the decision by the Tribunal in favour of the Executive Engineers and admittedly a writ petition has been filed in this Court being W.P.(C) No.7346/2007. Thus said act of the department could not be treated as a precedent to create a right and to this extent we disagree with this line of reasoning.

22. We need to pen a word for the benefit of the department CPWD as also all other government departments. We are finding a belated challenge to directions issued by the Tribunal and as a result when contempt petitions are filed before the Tribunal requiring compliance with the directions issued by the Tribunal, the departments are compelled to implement the decisions of the Tribunal but making the same expressly subject to any orders which may be passed in writ petitions. Indeed, we find same thing happening in the instant writ petitions and as a result what has happened is that subject to orders which may be passed in the writ petitions, the respondents have been paid wages by treating them in the scale of Assistant Engineer from the retrospective date when vacancy accrued and not from the date of actual promotion. We hope that the government departments would act fast and quick realizing that in an electronic age things move with the speed of light and not with the speed at which a bullock cart moves.

23. Reverting back to the issue at hand, suffice would it be to state that the only issue which we need to decide is whether the claimants before the Tribunal were entitled to be placed in the pay scale of an Assistant Engineer and earned benefit with retrospective date, being when the vacancy accrued, or from the date of actual promotion and further whether for purposes of qualifying service required as an

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eligibility service for further promotion said benefit of having served as an Assistant Engineer with effect from a retrospective date has to be granted.

24. Pertaining to the issue of qualifying service we find no pleadings as to how do the departmental rules define qualifying or regular service and thus we feel that in the absence of properly constituted pleadings it would be impermissible for us to adjudicate upon the issue, and like wise on account of lack of pleadings even the Tribunal should have refrained from adjudicating on the issue. We may highlight one thing here and which we have been lamenting repeatedly; not clearly written decisions being penned by the Tribunal and in particular by a particular Bench, a Member whereof is the author of the impugned decision dated 13.5.2004. It has been observed in para 11 that the promotion is to be deemed on notional basis from the date they (the claimants before the Tribunal) have been found eligible on acquirement of eligibility and passing of the LDCE. It is through the use of this expression that the Tribunal has granted relief. We do not find any discussion by the Tribunal with reference to the case law on the subject. Ignoring that for purposes of seniority benefit of posts falling in the respective quota have been rotated 1:1 has been granted and thus seniority was not a matter in issue and what was in issue was back wages and acquiring eligibility for further promotion, without highlighting said aspect, the Tribunal has penned the decision.

25. As noted by us hereinabove in para 16 above, learned counsel for the parties conceded that the issue was of the claimants before the Tribunal being placed in the pay scale of an Assistant Engineer from the date when the vacancy arose and to be paid wages accordingly and not from the date

of actual promotion and further acquisition of service in the grade for purposes of further promotion.

26. Since learned counsel, as usual, had used the fire power of precedents we reflect upon the decisions cited to determine whether we can find a rule of Law which helps us in adjudicating the issue we are deciding.

27. We deal firstly with the decisions relied up by Sh.Amarjit Singh Chandhiok, learned Additional Solicitor General who argued the writ petitions on behalf of the petitioners.

28. The first decision cited is reported as *Union of India & Ors. vs. K.K.Vadera & Ors.* 1989 Supp (2) SCC 625. The protagonists were the respondents who were holding the post of Junior Scientific Officers (Group 'B' posts) in the Defence Research & Development Service. They had earned promotion to the said post as and when one fell vacant. The promotion order stipulated that they would be promoted to the posts of Scientists 'B' with effect from October 16, 1985 or from the date they would actually assume charge of the post to which they were promoted. The respondents filed an application before the Central Administrative Tribunal, Allahabad, claiming that they should have been promoted to the post of Scientists 'B' with effect from July 1, 1984. The Tribunal rejected the prayer of the respondents that their promotions should have been made with effect from July 1, 1984 but directed that their promotions should be with effect from the date on which the promotional posts were created. The Supreme Court was deciding the Appeal against the view taken by the Tribunal. Allowing the Appeal the Supreme Court observed in para 5 as under:-

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> "5. .....We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post fall vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted."

29. Relevant would it be to note that as per the decision there was no rule which was cited before the Court as per which promotion to the post had to be with retrospective effect i.e. from the date the post fell vacant. The observations of the Supreme Court that *'We do not know of any law'* would mean that service jurisprudence does not jurisprudentially recognize retrospective promotions. The decision would therefore mean that unless a specific rule exists evidencing to the contrary, promotions take effect from the date the person is actually promoted and not retrospectively.

30. The second decision relied upon is reported as *Baij Nath Sharma vs. Hon'ble Rajasthan High Court At Jodhpur & Anr.* (1998) 7 SCC 44. The appellant, who was a member of the Rajasthan Judicial Service (for short 'RJS'), was aggrieved by the judgment dated 17.09.1997 of the Division Bench of the Rajasthan High Court dismissing writ petition (CWP No. 3455/97), wherein he had prayed that his case for promotion to the Rajasthan Higher Judicial Service (for short 'RHJS') be considered from the date when the posts in the RHJS fell vacant. No statutory rule was shown which could have helped the appellant. No officer in RJS was promoted who was junior to the appellant prior to the date when appellant was promoted. The appeal was dismissed relying on the ratio of law in *K.K Vadera's* case (supra).

31. The third decision relied upon is the decision reported as *State of Uttaranchal & Anr. vs. Dinesh kumar Sharma* (2007) 1 SCC 683 in which it was observed:-

> "Respondent was working as a Subordinate Agriculture Services Group-I. Subsequently, he became eligible for promotion. A promotional post became vacant and thereafter, substantive appointment of Respondent to said post was made. Respondent claimed seniority and consequential benefit from date when promotional post became vacant. State Government rejected claim made by Respondent. On writ, Division Bench of High Court directed state to reconsider case of Respondent. Hence the appeal was filed which was allowed and it was held that under Rule 8 of Uttar Pradesh Government Servants Seniority Rules, 1991 a person appointed on promotion shall not get seniority of any earlier year but shall get seniority of year in which his/her appointment is made. Hence respondent was not entitled to seniority from date when promotional post became vacant as no retrospective effect could be given to order of appointment order under the Rules."

32. The third decision also holds that unless a rule to the contrary exists, promotion has to be given effect from the date it is made and not from the date when a post falls vacant.

33. Let us now deal with the decisions cited by learned counsel for the respondents.

34. The first is an unreported decision of the Supreme Court in Civil Appeal No.1655/1997 titled *"Union of India & Anr. vs. Santhanakrishnan & Ors."*. The facts were that there was delay in holding the examination to fill up posts which had fallen vacant in the 33.33% quota known as Limited Departmental Competitive Examination under Rule 2(iii) of the Relevant Rules. Whereas vacancies in the remaining 66.66% quota were being filled up in the year said vacancies arose, this was not done with respect to posts falling vacant in the 33.33% quota. The question involved was the computation of

required minimum period of service among the class of promotees whose results were published in May 1985 whereas the actual promotions were effected in June 1985, for further promotion as Senior Assistant Engineer. The Tribunal gave due leavage for completing the process of examination and fixed the notional date of promotion as 12.9.1982. Supreme Court observed that view taken by the Tribunal was right keeping in view that by virtue of such notional date of promotion, the department was not put to any monetary loss and the promotees concerned were not entitled to any arrears of salary from that date, though for other purposes, including seniority it was ordered to be counted.

35. The decision is purely on facts and from the observations: *'After hearing the learned counsel appearing on either side, we are of the view that de-hors the niceties of the legal issues involved as also the interpretation of the relevant rules, substantial justice seems to have been rendered by attempting to resolve an unprecedented and one time problem which seems to have cropped up'* it is but apparent that the Supreme Court had in mind 'substantive justice' and thus the decision can be traced to the power of the Supreme Court under Article 142 of the Constitution of India.

36. The second decision cited was *Union of India & Ors. vs. K.B Rajoria* (2000) 3 SCC 562 wherein appellant No.4 was notionally promoted to the post of Additional Director General, (Works) of PWD w.e.f. 20.2.1995. The Recruitment Rules prescribed "Two years regular service for becoming eligible for promotion" to the next post of Director General. The respondent K.B.Rajoria approached the Tribunal and relevant would it be to note that he did not question the retrospective notional promotion given to appellant No.4 but claim similar benefit for himself on the plea that he was similarly situated.

Ignoring that K.B.Rajoria was not questioning the eligibility of appellant No.4 to be promoted as Director General, the Tribunal dismissed the application filed by K.B.Rajoria who petitioned the High Court and ignoring that K.B.Rajoria was not questioning the entitlement of appellant No.4 to be promoted as Director General and was claiming entitlement for himself as well, the High Court held none eligible and as a consequence appellant No.4's promotion was threatened. The Supreme Court overruled the verdict of the High Court by interpreting 'Regular Service' as defined in the Rules. Relevant would it be to note that the Supreme Court did not decide the issue raised by K.B.Rajoria that he was entitled to retrospective promotion. Thus, said decision is hardly a precedent to decide the issue with which we are confronted.

37. The third decision cited is reported as *P.N Premachandran v. The State of Kerala & Ors.* AIR 2004 SC 255. The private respondents before the Supreme Court could not be promoted on Regular Basis as Assistant Directors in time on account of administrative lapses; however they were granted temporary promotions; DPC were not convened from the year 1964 to 1990 and hence the State of Kerala took a conscious decision that those who had been acting in a higher post for a long time, although on a temporary basis, but were qualified at the time when they were so promoted and were subsequently found to be eligible by the Departmental Promotion Committee to be promoted at a later date, should be granted benefit of promotion with retrospective effect. In these circumstances noting a residual provision conferring power upon the State Government being Rule 39 of Kerala State & Subordinate Services Rules 1958, the Supreme Court upheld the grant of promotion to the private respondents with effect from a retrospective date.

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38. The decision is in conformity with the consistent view taken by the Supreme Court that where an ad-hoc, temporary or stop-gap promotion which is not fortuitous is followed by regular promotion and on the date of ad-hoc, temporary or stop-gap promotion the person was eligible for regular promotion and there existed a vacancy in the quota applicable and it was followed by a regular promotion, for purposes of service benefits past service had to be reckoned as a regular service. The decision has no applicability as far as the instant case is concerned.

39. The next decision cited is reported as *Pilla Sitaram Patrudu & Ors. vs. Union of India & Ors.* 1996 8 SCC 637. The decision pertained to fixation of seniority and the Supreme Court was not called upon to decide the question we have been called upon to decide and thus the decision is of no relevance.

40. The decision reported as *Suraj Prakash Gupta & Ors. vs. State of J&K & Ors.* 2000 (7) SCC 561 concerns with the issue whether promotees can be treated as regularized with retrospective effect within their quota and can such benefit be given to direct recruits. It was held that under certain circumstances, promotees can be regularized with retrospective effect but not direct recruits for the reason no person can be given benefit in a cadre from a date prior to which he was born in service.

41. Similarly, the two other decisions relied upon by the respondents being *Sanjay Dhar Vs. J&K Public Service Commn. & Anr.* 2000 (8) SCC 182 and *The Direct Recruit Class-II Engineering Officers' Association & Ors. vs. State of Maharashtra & Ors.* (1990)2SCC 715 are of no help as they dealt with the issue of inter-se seniority between direct recruits and promotees, the usual debate on applying the rota

rule to the quota and the same being abjured when there is a total breakdown of the rule or where there is a residual power vested in the appropriate authority and power is exercised under the residual power to undo a wrong.

42. It is pertinent to note that in a recent judgment reported as *Nirmal Chandra Sinha Vs.Union of India (UOI) & Ors.* 2008 (14) SCC 29, with reference to the decision in *K.K.Vadera's* case (supra) the Supreme Court re-emphasized that in the absence of a rule permitting to the contrary, no person can claim promotion or appointment from the date when vacancy arose. It was held that benefits of promotion/appointment are the ones which flow after the person is born on the cadre. We may note that certain observations of the Supreme Court in the decision reported as *UOI vs. B.S.Aggarwal* 1997 (8) SCC 89 which tend to show to the contrary were explained, in para 9 of the decision in *Nirmal Chandra Sinha's* case (supra) as being given on the special circumstances of that case and on humanitarian considerations. The Supreme Court categorically held that the said decision cannot be said to be a precedent laying down any special law.

43. It is thus apparent that service jurisprudence does not recognize the jurisprudential concept of deemed retrospective promotion and unless there exists a rule or there exists a residual power and in exercise of the implementation of the rule or in exercise of power conferred by the residual rule a decision is taken or can be taken to grant retrospective promotion, no person can claim a right to be promoted from the date when the vacancy accrued and he must take the promotion with its benefits from the date of actual promotion.

44. Thus, the writ petitions are allowed. Impugned orders dated 13.5.2004, 16.7.2009, 14.7.2009 and 25.12.2009

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are quashed. OA Nos.2710/2003, 2542/2008, 220/2009, 1847/2008 and 1749/2008 are dismissed.

45. Since the respondents have taken benefit under the impugned decision of extra wages paid to them, we permit the petitioner to effect recoveries but in phases; the amount recovered would be by deducting from the monthly salary henceforth payable but not exceeding per month 20% of the basic salary till the amount is recovered. No interest would be recovered by the petitioner.

46. We may lodge a caveat. In the absence of any pleadings, the issue pertaining to qualifying service for purposes of further promotion to the post of Executive Engineer has not been decided by us and thus the said issue would be left open. Further, what would be the effect of the applicability of the next below rule i.e. when a person junior in the seniority list becomes eligible for promotion, whether the person above, who has not rendered the qualifying service would or would not be entitled to be considered for promotion is also an issue which is left open. Needless to state the respondents would be permitted to predicate a claim qua eligibility on the said issues. We may note that to a pointed question: Whether any promotions have been effected to the post of Executive Engineer and in the process the respondents have been left out vis-à-vis those who are shown junior to them in the seniority list and who became Assistant Engineers in the quota of 'seniority subject to fitness' category, the answer was a categorical 'No'. Thus, as of today, for purposes of further promotion all the effected parties have acquired the relevant eligibility which were informed is 8 years' regular service in the grade of Assistant Engineer and thus on said account the issue pertaining to qualifying service for further promotion has been rendered meaningless. The only issue

which would be surviving would be back wages and the same stands decided against the respondents.

47. Since the issue was debatable we refrain from imposing costs.

PRADEEP NANDRAJOG, J.

SIDDHARTH MRIDUL, J.

November 29, 2010
mm / dk