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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on : 23rd May, 2011

Date of decision : 16th August, 2011

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W.P.(C) 3476/2011

STATE OF UTTARAKHAND THROUGH PRINCIPAL
SECRETARY AND ANR.

..... Petitioners

Through: Mr.Soli J.Sorabjee, Sr. Advocate with
Ms.Rachana Srivastava, Advocate

versus

AJAY KUMAR AND ORS.

..... Respondents

Through: Mr.A. Mata, Sr. Advocate with
Mr.Apoorva Tiwari, Advocate for R-1
Mr.A.S.Chandhiok, ASG with
Mr.Sanjeev Sachdeva, Advocate for
Union of India.

CORAM:

HON'BLE THE CHIEF JUSTICE

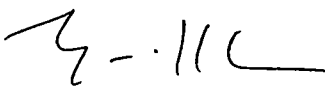
HON'BLE MR. JUSTICE SANJIV KHANNA

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

DIPAK MISRA, CJ

For orders, see WP (C) No. 3457/2011.


CHIEF JUSTICE


SANJIV KHANNA, J.

AUGUST 16, 2011

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+ W.P.(C) 3457/2011

AJAY KUMAR JOSHI Petitioner
Through: Mr.A. Mata, Sr. Advocate with
Mr.Apoorva Tiwari, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.A.S.Chandhiok, ASG with
Mr.Sanjeev Sachdeva, Advocate for
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Union of India.

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+ W.P.(C) 3477/2011

STATE OF UTTARAKHAND AND ANR. Petitioners

Through: Mr.Soli J.Sorabjee, Sr. Advocate with
Ms.Rachana Srivastava, Advocate

versus

AJAY KUMAR JOSHI AND ORS. Respondents

Through: Mr.A. Mata, Sr. Advocate with
Mr.Apoorva Tiwari, Advocate for R-1
Mr.A.S.Chandhiok, ASG with
Mr.Sanjeev Sachdeva, Advocate for
Union of India.

+ W.P.(C) 3485/2011

SUBHASH KUMAR Petitioner

Through: Mr.Dushyant Dave and Mr.Nidesh
Gupta, Sr. Advocates with
Mr.Sumit Bansal, Advocate

versus

AJAY KUMAR JOSHI AND ORS. Respondents

Through: Mr.A. Mata, Sr. Advocate with
Mr.Apoorva Tiwari, Advocate for R-1
Mr.A.S.Chandhiok, ASG with
Mr.Sanjeev Sachdeva, Advocate for
Union of India.

+ W.P.(C) 3486/2011

SUBHASH KUMAR Petitioner

Through: Mr.Dushyant Dave and Mr.Nidesh
Gupta, Sr. Advocates with
Mr.Sumit Bansal, Advocate

versus

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AJAY KUMAR JOSHI AND ORS.

..... Respondents

Through: Mr.A. Mata, Sr. Advocate with
Mr.Apoorva Tiwari, Advocate for R-1
Mr.A.S.Chandhiok, ASG with
Mr.Sanjeev Sachdeva, Advocate for
Union of India.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. Whether reporters of the local papers be allowed to see the judgment? | Yes |
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DIPAK MISRA, CJ

Regard being had to the commonality of controversy, this batch of writ petitions was heard together and is disposed of by a singular order. Ajay Kumar Joshi, the petitioner in W.P.(C) No.3457/2011, preferred two original applications before the Central Administrative Tribunal, Principal Bench, New Delhi (for short 'the tribunal') forming the subject matter of O.A. Nos.2357/2010 and 3604/2010 assailing the action of the State of Uttarakhand in extending the benefit of promotion to the respondent nos. 4 to 6 in the pay scale of the Chief Secretary and further challenging the selection of the respondent - Subhash Kumar for the post of Chief Secretary of the State on the foundation that there

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has been total violation of the provisions contained in the Rules, Regulations and instructions in the field. The tribunal accepted the contentions raised by the applicant before it and set aside the benefit of promotion extended to the respondent – Subhash Kumar and also quashed the order of promotion of the applicant and directed to make fresh selection after following the due procedure as postulated in law within two months with a further stipulation that the present arrangement would remain in vogue during the said period. Shri A.K. Joshi has preferred W.P.(C) No.3457/2011 for quashing the direction by which his promotion has been annulled and further to issue a command for restoration of his promotion. The State of Uttarakhand has preferred W.P.(C) No.3476/2011 and W.P.(C) No.3477/2011 challenging the order passed by the tribunal and Subhash Kumar has preferred W.P.(C) No.3485/2011 and W.P.(C) No.3486/2011. Be it noted, the stand and stance put forth by the State of Uttarakhand and Subhash Kumar are same and their prayer is for quashment of the order passed by the tribunal in entirety.

2. Presently to the factual matrix. The applicant before the tribunal in OA No.3604/2010 called in question the legal propriety of the concurrence given by the Secretary, Department of Personnel & Training (DOPT), in response to the letters dated 31.5.2010 and 8.10.2010 of the State of Uttarakhand as regards the

availability of one vacancy in the apex scale of Indian Administrative Service (IAS) in the Uttarakhand cadre as on 31.5.2010 in terms of the provisions of Rule 3(2)(ii) and (iii) of the IAS (Pay) Rules, 2007 (for short 'the 2007 Rules') in addition to two vacancies in the said grade for which concurrence has already been given by the respondent by communication dated 19.9.2008 and further challenged the orders dated 12.9.2010 and 13.9.2010 whereby the 4th respondent, Subhash Kumar, had been appointed as the Chief Secretary of the Government of Uttarakhand. In the said application, the relief sought was to set aside the aforementioned two orders dated 12.9.2010 and 13.10.2010 contained in Annexures P-1 to P-3 of the original application; to issue appropriate guidelines of general application for posting of officers on the post of Chief Secretary in the State cadres; and to declare that the post of Director General, Uttarakhand Administrative Academy, Nainital is not equal in status and responsibility to the post of Chief Secretary, Government of Uttarakhand.

3. OA No. 2537/2010 was preferred assailing the action of the Screening Committee which met on 19.2.2010 recommending four officers, namely, Ajay Kumar Joshi, Suneel Kumar Muttoo, Subhash Kumar and Keshavdesi N. Raju as fit for the apex scale of the Chief Secretary. The applicant was further aggrieved by the order dated 31.5.2010 whereby Suneel Kumar Muttoo and Subhash

Kumar had been promoted to the scale of Rs.80,000/- (fixed) of the IAS, and the creation of 18 posts by the State of Uttarakhand under the second proviso to Rule 4(2) of the IAS (Cadre) Rules, 1954 (for short 'the 1954 Rules'). The prayer in the petition was to set aside the recommendations of the Screening Committee held on 19.2.2010 as far as they relate to the respondent Nos. 4, 5 and 6 as the same has been made in the absence of prior concurrence of the Government of India and non-availability of valid posts and further to set aside the order of promotion dated 31.5.2010 passed in favour of respondent Nos.4 and 5 therein; and to invalidate the order dated 28.5.2010 whereby 18 posts have been created by the State of Uttarakhand and to command the State of Uttarakhand to fill up the post of Chief Secretary (a cadre post) only from those officers in the CS Grade who are deemed to have been appointed against cadre posts on the basis of their respective *inter se* seniority. Be it noted, a further relief was added for setting aside the order dated 19.9.2008 of the Government of India which related to concurrence accorded in respect of the availability of one ex-cadre vacancy in the Chief Secretary Grade of pay in the Uttarakhand cadre of the IAS.

4. The grievance of the applicant, in essence, was that on 19.9.2008, when the concurrence of the respondent-DOP&T was given for two available vacancies in the grade of Chief Secretary, only one vacancy was actually available on that date

and, therefore, two ex-cadre posts could not have been created under Rule 9(7) of the IAS (Pay) Rules as proposed by the Government of Uttarakhand in its letter dated 3.9.2008 because 17 persons were already working against State Deputation Reserve fixed at 13. It was the further stand that since the person above the petitioner in the gradation list was found 'unfit' by the Selection Committee, the petitioner alone could have been selected and the respondent nos.4 and 5 could not have been empanelled in the select list as the vacancies were not available.

5. As is discernible from the factual exposition, the cadre strength of IAS officers in Uttarakhand state was determined at 94 under the IAS (Fixation of Cadre Strength) Regulations, 1955 vide the Government of India notification dated 4th October, 2004. The post categorized under Senior Duty Posts (SDP) are commonly known as cadre posts and the posts under State Deputation Reserve (SDR) are called ex-cadre posts. There are four grades having different pay-scales in SDP. The Chief Secretary grade is also known as the apex grade in the cadre, the highest grade having pay-scale of Rs.80,000/- (fixed).

6. In 2008, the State Government under Rule 9(7) of the 2007 Rules created two ex-cadre posts under SDR in the Chief Secretary grade as against two cadre posts already existing under SDP. The said cadre posts that existed are the Chief

Secretary and Director General, Uttarakhand, Administrative Academy, Nainital. On 3rd September, 2008, the State Government sent a proposal for concurrence to the Government of India for filling up of two vacancies in the Chief Secretary grade as there were two officers, namely, Shri Indu Kumar Pandey and Shri N.S. Napalchyal, who were already working in the Chief Secretary grade and two vacancies were available. At that point of time, 17 officers were working under SDR against the prescribed limit of 13. The Central Government accorded its concurrence in respect of two vacancies in the Chief Secretary grade vide communication dated 19th September, 2008. Before the meeting of the Screening Committee, Shri Indu Kumar Pandey, the then Chief Secretary took voluntary retirement on 2nd December, 2009 and therefore, the number of vacancies increased from two to three in the Chief Secretary grade. The Screening Committee held its meeting on 19th February, 2010 and took into account that apart from these three vacancies, one more vacancy would take place on 30th April, 2010 due to retirement of Shri N.S. Napalchyal. Regard being had to the aforesaid circumstances, the Committee considered all the officers in the zone of consideration and gave its recommendations finding Ajay Kumar Joshi, Sunil Kumar Muttoo, Subhash Kumar and Keshav N. Desi Raju as 'fit' and one Vijendra Paul to be 'unfit'.

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7. On the basis of the recommendations of the Screening Committee, the State Government promoted the officers, namely, Ajay Kumar Joshi, Sunil Kumar Muttoo and Subhash Kumar in the Chief Secretary grade on 31st May, 2010. The fourth likely vacancy that was taken into consideration by the Screening Committee could not be filled up because the officer who was to retire on 30th April, 2010 was, in fact, given an extension of six months, that is, upto 31st October, 2010 by the Government of India. After making the promotions, the State of Uttarakhand apprised the Government of India in respect of filling up of the third vacancy also which had arisen due to voluntary retirement of an officer on 2nd December, 2009 after the concurrence dated 19th September, 2008 for two vacancies. A reminder was also sent to the Government of India on 8th October, 2010 in the said regard.

8. The Government of India, vide letter dated 13th October, 2010, granted concurrence for the third vacancy as on 31st May, 2010 under Rule 3(2)(ii)(iii) of the 2007 Rules in continuation of its earlier concurrence dated 19th September, 2008, which were for two vacancies. On 12th September, 2010, an officer working in the Chief Secretary grade, N.S. Napalchyal, the then Chief Secretary, took voluntary retirement and the State Government appointed Subhash Kumar as

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the new Chief Secretary on 12th September, 2010 after considering all officers including Ajay Kumar Joshi, who was working in the Chief Secretary grade.

9. The tribunal noted that by virtue of Section 72 of the Uttar Pradesh Reorganisation Act, 2000, a separate cadre of Indian Administrative Services for the newly created State was created. The applicant was allocated to the new cadre of Uttarakhand. After certain litigations, the applicant joined the State of Uttarakhand on 12.10.2009.

10. The Union Government, in consultation with the Government of Uttarakhand, framed the Indian Administrative Service (Fixation of Cadre Strength) Sixth Amendment Regulations, 2004 which came into force on 4.10.2004. The cadre strength to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 (for short 'the 1955 Regulations') provided 51 posts at item No.1 of the schedule, known as SDP under the Government of Uttarakhand, which included the posts of the Chief Secretary and the Director General of Uttarakhand Administrative Academy, Nainital, known as cadre Posts under Rule 2(b) of the 1954 Rules.

11. The tribunal took note of the fact that at item No.3 of the above schedule, there is a provision for SDR, which is 25% of the SDP and it was fixed at No.13 in

the order dated 04.10.2004. The Government of Uttarakhand sought the concurrence of the Union of India by letter dated 3.9.2008 in respect of the vacancies in the scale of the Chief Secretary. The Government of India concurred with the proposal about the availability of two vacancies in the scale of Rs.26,000 (fixed) [pre-revised]. On 2.12.2009, as set forth, the then Chief Secretary, Indu Kumar Pandey, took voluntary retirement from service and N.S. Napalchyal was appointed in his place. It was contended that the ex-cadre post which he was occupying came to an end and SDR came to 16 on that day. The applicant submitted a representation dated 9.12.2009 seeking an accurate determination of vacancies in the grade of Chief Secretary since the promotion to the post was vacancy based. He placed reliance on the guidelines for promotion framed on 28.3.2000. He stated in the representation that no ex-cadre post in any grade, including the grade of the Chief Secretary, could be created in view of the fact that the SDR, as fixed by the order dated 4.11.2004, exceeded 13. He submitted another representation on 8.2.2010 challenging the correctness of the letter dated 3.9.2008 of the State Government on the foundation that the letter had been sent in great haste as the matter had been put up and approved by the Chief Secretary on the same day, in which five levels of officers from Under Secretary onwards

were involved and such an action / proposal was in violation of Rule 8(2) of the 1954 Rules.

12. As noticed, the first representation dated 9.12.2009 was rejected by the State of Uttarakhand. A meeting of the Screening Committee held at New Delhi on 19.2.2010 considered four vacancies, two cadre posts and two ex-cadre posts, for promotion to the grade of Chief Secretary. The Committee made the recommendation in respect of four officers for promotion to the grade of Chief Secretary. A note was put up on 22.2.2010 by the Principal Secretary stating that two officers would be promoted initially because DOP&T had permitted two vacancies and the rest two would be promoted after obtaining the concurrence of the DOP&T. At this stage, the applicant sought intervention of the Central Government as regards his representation dated 8.2.2010 and the Government of India sought comments from the Government of Uttarakhand but no action was taken. In the meantime, Subhash Kumar, who was the Principal Secretary of the Department of Personnel of the State Government, wrote to the Secretary, DOP&T, on 29.3.2010 seeking extension for the incumbent Chief Secretary, N.S. Napalchyal, who was granted extension for a further period of six months with effect from 30.4.2010. At this stage, the Government of India wrote to the State of Uttarakhand on 7.5.2010 to examine few aspects and to submit a fresh proposal

for confirmation of vacancies in the grade of Chief Secretary for prior concurrence of DOP&T. The Government of Uttarakhand took no notice of this communication and approved the recommendation dated 19.2.2010 of the Screening Committee on 25.5.2010. Three persons, namely, A.K. Joshi, Sunil Kumar Mattoo and Subhash Kumar were promoted to the grade of Chief Secretary. At this stage, the State of Uttarakhand created 18 posts in the grade of Additional Chief Secretary under the second proviso to Rule 4(2) of the 1954 Rules and the posts were created for two years. Before the tribunal, certain correspondences between the State of Uttarakhand and the Government of India were referred to.

13. The applicant who was posted as Director General, Uttarakhand Administrative Academy, Nanital joined the said post under protest and submitted a representation to the competent authority. When no response was shown, he preferred the original application. During the pendency of the original application, N.S. Napalchyal, the incumbent Chief Secretary, applied for voluntary retirement from service on 12.9.2010 and his request was acceded to. The fourth respondent, Subhash Kumar, was appointed as the Chief Secretary on that day. By order dated 13.10.2010, the Government of India gave its concurrence to the availability of one vacancy in the apex scale in Uttarakhand

cadre as on 31.5.2010 in terms of Rule 3(2) (ii) & (iii) of the Indian Administrative Service (Pay) Rules, 2007, in addition to the two vacancies in the said grade to which concurrence had earlier been given by its letter dated 19.9.2008.

14. Preliminary objections were raised with regard to territorial jurisdiction and limitation but the tribunal, after referring to Sections 20 and 21 of the Administrative Tribunals Act, 1985, came to hold that the Principal Bench at Delhi has jurisdiction to entertain the original application and further the delay, if any, deserves to be condoned and, accordingly, so ordered. Thereafter, the tribunal proceeded to deal with the merits of the case.

15. The principal contention that was urged before the tribunal on behalf of the applicant was that the respondents in complete disregard of the statutory provisions engrafted under the All India Services Act, 1951, the Rules and Regulations framed thereunder erroneously determined the vacancies in SDR and on the said basis, two ex-cadre posts could not have been created and resultantly the Government of India could not have given its concurrence for two vacancies in the apex scale by acceding to the initial proposal of the State Government. It was also urged that while effecting promotion to the grade of Chief Secretary, the basic requirement stipulated under Rule 9(7) of the 2000

Rules which has to be read in conjunction with Rule 8(2) of the 1954 Rules was not kept in view.

16. Quite apart from the above, it was also contended that the Govt. of Uttarakhand in creating 18 posts in May, 2010 abused its power under the second proviso to Rule 4 (2) of the 1954 Rules. Placing reliance on *E.P. Royappa V. State of Tamilnadu & another*, (1974) 4 SCC 3, it was asserted that the creation of posts under the second proviso to Rule 4(2) would not add to the cadre posts, but were actually to be treated as ex-cadre posts. In this regard, it was submitted that the State Government does not have the unbridled power to create any number of posts under Rule 4(2) of the 1954 Rules, as conferment of power would make the concept of accurate determination of the vacancies under Rule 3(2)(ii) and (iii) totally redundant because the State Government could create any number of ex-cadre posts in any grade. It was also contended that it would be an absolutely anomalous proposition that the posts created under Rule 4(2) of the 1954 Rules would be counted against cadre posts.

17. It was also submitted that it was mandatory under the 2007 Rules to seek prior concurrence of the Central Government for available vacancies for promotion to selection grade and above. In this regard, reliance was placed on the communication dated 28.3.2007 of the Additional Secretary (DOP&T) to

explain the rationale behind the introduction of Rule 3(2)(ii) and (iii) which basically provide for better cadre management of the service. It was put forth that such a step was taken as the State Governments were making promotions in respect of the cadre beyond the number of available vacancies. It was highlighted that there is no provision for ex-post facto determination of vacancies in Rule 3(2) of the 2007 Rules or any other Rule. Further, the stand was taken that on 3.9.2008, as only one cadre post was vacant in Uttarakhand, the proposal of the State Government for creation of two ex-cadre posts under Rule 9(7) of the 2007 Rules could not have been accepted because on that date the SDR was already 17 against the prescribed number of 13.

18. It was the applicant's grievance that though he was more meritorious than Subhash Kumar and also senior to him in the gradation list of 1977, yet he was placed in a position subordinate to him as the Director General, Uttarakhand Academy, Nainital. It was argued that the Chief Secretary was the president of the Governing Body of the said Academy whereas the Director General was only the member secretary. It was urged that the post being inferior in status to the post of the Chief Secretary, the senior person should have been posted as the Chief Secretary and the junior should have been posted as the Director General.

19. On behalf of the second respondent, it was set forth that the applicant was unfit to be appointed to the post of the Chief Secretary. The applicant could not have any grievance as he had been appointed to the grade of Chief Secretary as the post of the Director General, Administrative Academy is equivalent to the post of Chief Secretary. It was put forth that the only eligibility criteria which existed for appointment to the post of Chief Secretary was 30 years of service in the preceding grade and, therefore, the inter-se seniority in the batch is totally inconsequential. The SDR was not relevant at the stage of sending the proposal to the Government of India for concurrence of vacancy as the SDR is dynamic in nature and keeps on fluctuating due to various reasons such as retirement, transfer, deputation, etc. At no time, the number of ex-cadre posts exceeded the combined strength of SDR and Central Deputation Reserve (CDR). That apart, on 3.9.2008, two officers were working in the grade of Chief Secretary and one cadre post of Director General, Uttarakhand Administrative Academy and one ex-cadre post were vacant. After concurrence was received for two vacancies on 19.9.2008 from the Government of India, Indu Kumar Pandey, who was appointed as Chief Secretary, sought voluntary retirement from IAS which was sanctioned on 2.12.2009. N.S. Napalchyal, who was previously posted on the ex-cadre post of Additional Chief Secretary, succeeded him as Chief Secretary

resulting in one more vacancy in the ex-cadre post and, therefore, there was nothing illegal in the action of the Screening Committee taking cognizance of the availability of three vacancies as the same is provided under the Promotion Guidelines, 2000.

20. With respect to creation of 18 additional posts for 2 years, pending cadre review due in 2009, exercising the powers under the second proviso to Rule 4(2) of the 1954 Rules, it was urged that the State Government was fully justified in creating these posts as the development activities of the State had multiplied considerably after the last cadre review in the year 2004 and there was pressing need for officers to execute these programmes. As per paragraph 5.2 of the clarification issued by the DOP&T by letter No. 11033/1/98-AIS(II) dated 23.4.1998, the posts which were created under the above-mentioned cadre rule were to be counted as temporary addition to the cadre posts and they could not be counted against SDR which, according to the respondent, was utilized only to the extent of 9 well within the prescribed limit of 13 on the date of promotion to the grade of Chief Secretary, i.e., on 31.5.2010. Therefore, the respondent-State of Uttarakhand was within its right to promote 3 persons from the panel prepared by the Screening Committee to the apex grade of Chief Secretary. As regards the third vacancy created due to retirement of N.S. Napalchyal, it was reiterated that

there was no need to write to the Government of India for concurrence as the later approval given by the Government of India, for all practical purposes, did tantamount to deemed approval under Rule 3(2)(ii) & (iii) of the IAS (Pay) Rules, 2007. It was contended that as the applicant had already been promoted to the grade of Chief Secretary, his contention that he would have better chances of promotion to the said post had there been only two contenders for that instead of four, is not tenable because chance of promotion is not a right. Reliance was placed on the decisions rendered in *The State of Mysore v. G.N. Purohit & Ors*, (1967) SLR 753; *Ramchandra Shankar Deodhar & Ors. v. State of Maharashtra & Ors*, (1974) 1 SCC 3; *Mohammad Shujat Ali & Ors, v. UOI & Ors.*, (1975) 3 SCC 76; and *Bakshish Singh v. UOI & Ors.*, 1985 (Supp.) SCC 116.

21. The fifth respondent - Subhash Kumar emphasizing the words "at that level of pay" used in the Rule 9(7) of the 2007 Rules contended that two ex-cadre posts could be created without the permission of the Central Government as two cadre posts existed at the time of creation.

22. The seventh respondent - N.S. Napalchayal, placing reliance on *K.A. Nagmani v. Indian Airlines & Ors.*, (2009) 5 SCC 515, contended that the applicant had no right to challenge the creation of two ex-cadre posts by order dated 19.9.2008 because he participated in the selection and chose not to

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challenge the procedure before the meeting of the Screening Committee. Even if selection was at all to be set aside, the selection of the applicant would also be set aside. With regard to the applicant's claim of violation of paragraph 24 of the Guidelines of 2000, it was argued that the guidelines were only directory in nature and did not create any legal right for their enforcement. That apart, SDR and CDR had to be jointly seen and the status of the SDR was, therefore, relevant at the time of promotion. Placing reliance upon **Citizens for Justice and Peace v. State of Gujarat & Ors., (2009) 11 SCC 213**, it was asserted that the appointment to the post of Chief Secretary being a sensitive post, it is the prerogative of the State Government to choose an eligible candidate and no one has a right to be posted in a particular post.

23. The fundamental issues that emerged for consideration before the tribunal in the backdrop of the 1954 Rules, IAS (Fixation of Cadre Strength) Regulations, 1955, clarificatory letter dated 13.06.2000 of the DOP&T, para 24 of the general guidelines for promotion issued by the Central Government on 28.3.2000, and the 2007 Rules were whether the State Government could create additional posts and further, whether the promotion to the apex grade of Chief Secretary had been done in a legally justified manner when there was no prior concurrence by the Central Government:

24. The tribunal opined that consideration for promotion is a legal right and the issue has not to be looked at from the viewpoint that whether the applicant once promoted to the apex grade could have any right to the post of Chief Secretary. The tribunal held that at the time of selection for the post of Chief Secretary, if the rules had been scrupulously observed, the applicant would have been the only person to be promoted as there was a singular vacancy in the grade of Chief Secretary on 30.9.2008. It has also been opined by the tribunal that the creation of two ex-cadre posts by the State Government was in violation of the rules and even if the consideration was for two vacancies, as approved by the Central Government, Subhash Kumar, who was appointed as the Chief Secretary, could not have been selected and only Sunil Kumar Muttou, the fourth respondent in OA No.2537/2010, could have made it to the apex grade and the scenario would have been quite different.

25. The tribunal repelled the stand that as the applicant has already been promoted to the grade of Chief Secretary, he could not have any grievance on the foundation that he has been deprived of the right to be appointed to the post of Chief Secretary on the ground that promotions made to the apex grade were in violation of the 2007 Rules. The tribunal opined that a plain reading of Rule 3(2)(ii) of the 2007 Rules would make it amply clear that the State Cadre has to

seek prior concurrence of the Central Government on the number of available vacancies in each grade and the said Rule is absolutely unambiguous. The tribunal further made observations as to the intent behind the Rule and said that the same is clear from the letter dated 28.03.2007 of the DOP&T. It stated that the letter provides in clear terms that it shall be mandatory upon the State Cadre to seek prior concurrence of the Central Government on the number of available vacancies in each grade. Thereafter, the tribunal proceeded to state as follows:

“This letter, in essence, captures the illegality committed by the Respondents in not seeking prior concurrence for the third vacancy, only on the ground that it was an obvious vacancy. There is no such exemption in the aforesaid rule that if in the opinion of the State Government a vacancy was obvious, there was no need to seek prior concurrence. The reading of the Rule would also show that there is no provision for *ex post facto* approval. There is no merit in the contention raised on behalf of the Respondents that by order dated 16.10.2010 the Central Government gave its deemed approval for creation of posts under Rule 3(2)(iii) of the IAS (Pay) Rules, 2007, because the deemed permission under the said rule is considered to be given if the proposal of the State Cadre is not concurred in by the Central Government within one month. It is not deemed permission, if granted *ex-post facto*. The Central Government has violated its own rules by giving *ex post facto* approval to the proposal of the State Government.

26. The tribunal further stated that since prior concurrence is necessary for available vacancies for promotion, it would stand to reason that consideration of SDR would be relevant only at the time when the approval for the available

vacancies is given. The tribunal opined that Rule 8(2) of the 1954 Rules and Rule 9(7) of the 2007 Rules have to be read harmoniously. The tribunal thereafter observed as follows:

"The interpretation that it would mean that the State Deputation Reserve has to be considered for each grade is misconceived. The Sub-clause "at that level of pay" is only to signify that it is referring to earlier sub-clause "other than cadre posts which carry pay of Rs.26,000...". Nothing more than this has to be read in this Rule. By no stretch of the imagination this rule can be interpreted to mean that the status of the State Deputation Reserve has to be seen for each grade. Indubitably, it has to be seen for all the cadre posts together. It is entirely the choice of the State Cadre to create ex-cadre posts in any of the grades. But put together these cannot exceed the State Deputation Reserve. If it were so, the State Deputation Reserve would have been worked out for each of the posts. The only qualification is that in the apex scale only that number of ex-cadre posts can be created, which exist in the Senior Duty Posts, that is, cadre posts. It would be wrong to interpret it to mean that regardless of the utilization of SDR, as many ex-cadre posts can be created in the apex grade as there are cadre posts (two posts in the instant case). When it was clearly mentioned in the letter dated 03.09.2008 of the State Government that the utilisation of SDR was 17, beyond the prescribed 13, the Central Government was in error in approving the available vacancies as two."

27. The tribunal accepted the stand of the applicant that on 03.09.2008, only one vacancy in the cadre post was available and that alone should have been considered for filling up. The tribunal stated that it would be erroneous to hold that there has been no infraction of any rule as all the rules and regulations and

the instructions issued under them have to be read together. A combined reading of the rules and instructions would make it abundantly clear that the SDR has to be considered at the time of giving approval for the available vacancies and not at the time of making promotions; and that prior concurrence of the Central Government would be necessary before the meeting of the Screening Committee. The argument that the SDR and the CDR have to be jointly considered was misconceived. The tribunal opined that a careful reading of the Office Memorandum dated 27.01.2005, cited by the respondents therein, does not support the contention that for creation of ex-cadre posts, SDR and CDR have to be jointly considered. The OM adverted to, only stipulates that the number of persons on ex-cadre posts and on central deputation shall not exceed SDR + CRD and, therefore, the number of persons on central deputation would not exceed the CDR.

28. After so stating, the tribunal referred to the second proviso of Rule 4(2) of the 1954 Rules which provides that the State Government concerned may add for a period not exceeding two years and with the approval of the Central Government for a further period not exceeding three years to a State or Joint Cadre, one or most posts carrying duties or responsibilities of a like nature to

cadre-post. The tribunal referred to paragraph 5.2 of the clarification issued by the DOP&T and thereafter proceeded to express thus:

"The posts created by the State Government are such posts, which already exist in the cadre like Principal Secretary or Additional Chief Secretary. These posts, as would be clear from the highlighted portion of the clarification of 23.04.1998 would be counted in State Deputation Reserve. If posts created had been of the nature carrying duties and responsibilities of a like nature to cadre posts, such as, for example, Officer on Special Duty, these would be counted as temporary addition to cadre posts. In fact the second proviso to Rule 4(2) *ibid* only sanctions creation of such posts, which are "of a like nature to cadre posts" and not the creation of posts already existing in the cadre. Therefore, temporary creation of the posts of Principal Secretary and Additional Secretary under second proviso to Rule 4(2) *ibid* would not count in the cadre posts. Moreover, this stand is in the teeth of the ratio laid down by the Honourable Supreme Court in *E Royappa*, wherein it has been held in paragraph 18 that the second proviso to the Rule 4 (2) of the IAS (Cadre) Rules, 1954 does not confer any power on the State Government to alter the strength and composition of the cadre. It has been clearly held that the posts which are added under the second proviso do not increase the strength of the Cadre. In paragraph 81 *ibid* it has been held that only the Central Government can alter the strength of the cadre in its cadre review. The State Government cannot make any permanent addition to the cadre strength. Moreover, we have already held that the status of State Deputation Reserve has to be considered at the time of granting of approval for available vacancies and not at the time of promotion. The argument advanced was that at the time of promotion the utilisation of State Deputation Reserve was 9 because of the creation of 17 additional posts. The argument is neither correct nor material for consideration in the circumstances of this case."

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29. After so holding, it has been further observed by the tribunal that in the obtaining factual matrix, it was possible on the part of the State Government to go back to the Central Government and seek fresh prior concurrence as the promotions were made only in May, 2010. It repelled the argument that in praesenti, it would be an exercise in futility to ask the State Government to reconsider the issue as all concerned have been extended the benefit of promotion because the said promotions had been made in total contravention of the prescribed rules and further had the promotion been made in accordance with the rules, the scenario for the selection to the post of Chief Secretary would have been different. Being of this view, it proceeded to direct as follows:

"38. On the basis of the above consideration, the impugned orders dated 19.9.2008 and 13.10.2010 and all the consequential promotions made by the State Government are quashed and set aside, including that of the Applicant. The State Government is directed to make fresh selections after following due procedure as per the law within two months from the receipt of a certified copy of this order as per the existing position of the existing posts and SDR *et cetera*. However, the present arrangement may continue in the interest of administration for two months till fresh selection is made."

30. For the sake of convenience, we think it apposite to enumerate the conclusions arrived at by the tribunal in seriatim:

- (a) The stand of the State of Uttarakhand that the vacancies in the SDR and the CDR are to be jointly computed and the status of the SDR is relevant only at the time of effecting promotion is unacceptable.
- (b) The SDR would be relevant only at the time when the approval for the available vacancies is given, and under Rule 8(2) of the 1954 Rules, a cadre officer is not entitled to hold an ex-cadre post in excess of the State Deputation Reserve.
- (c) The ex-cadre posts in the apex grade shall not exceed the number of cadre posts at that level.
- (d) As it was clearly mentioned in the letter dated 3.9.2008 of the State Government that the utilization of SDR was 17 beyond the prescribed number of 13, the Central Government had committed an error in approving the available vacancies as 2 whereas on 3.9.2008, only 1 vacancy in the cadre post was available.
- (e) The second proviso to Rule 4(2) of the 1954 Rules read with paragraph 5.2 of the clarification issued by the DOP&T categorically conveys that the State Government cannot create posts already existing in the cadre but can

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only create posts which are "of a like nature to cadre post" and such creation of posts would not count towards the posts in the cadre.

- (f) If Rule 4(2) of the 1954 Rules and Rule 3 and Rule 9 of the 2007 Rules are conjointly read, it would clearly convey that the State Government has no authority to alter the strength and composition of the cadre.
- (g) The concurrence given by the Central Government initially on 12.9.2008 was incorrect as concurrence could have been given only in respect of 1 post.
- (h) The post facto concurrence given on 13.10.2010 would not validate the promotions as obtaining of prior concurrence under the 2007 Rules is mandatory.
- (i) The stand of the State Government and other respondents that issue of a direction for fresh consideration would be an exercise in futility is unacceptable as the promotions have been given in contravention of the prescribed Rules and Regulations.

31. We have heard Mr.Soli J. Sorabjee, learned senior counsel along with Ms.Rachana Srivastava, learned counsel for the petitioner in WP(C) Nos,3476/2011 and 3477/2011, Mr.Dushyant Dave and Mr.Nidesh Gupta,

learned senior counsel along with Mr.Sumit Bansal, learned counsel for the petitioner in WP(C) Nos.3485/2011 and 3486/2011, Mr.Mata, learned senior counsel along with Mr.Apoorv Tiwari, learned counsel for the petitioner in WP(C) No.3457/2011 and for the respondent no.1 in WP(C) Nos.3476/2011, 3477/2011, 3485/2011 and 3486/2011 and Mr.A.S.Chandhiok, learned ASG along with Mr.Sanjeev Sachdeva, learned counsel for the respondent-Union of India in all the writ petitions. Be it noted, we have heard all the contesting parties.

32. Mr. Mata, learned senior counsel appearing for Mr. Ajay Kumar Joshi, criticizing the order of the tribunal, contended that the State Government could not have promoted the respondents when the posts were not sanctioned in terms of Rule 3(2)(ii) and (iii) of the 2007 Rules as the said Rule is mandatory in nature and the posts in the grade can only be sanctioned when there is prior concurrence by the Central Government. It is urged by him that there is a distinction between prior concurrence and post facto concurrence and the post facto concurrence would never cure the defect since as per the postulates enshrined in the Rule, prior concurrence is mandatory and to that extent, the conclusion arrived at by the tribunal is absolutely correct and justified and does not require interference by the Court. The learned counsel would further submit that the tribunal has failed to appreciate the case of the petitioner inasmuch as

the stand of the petitioner was that he was the only candidate who could have been considered regard being had to his seniority and also taking note of the fact that there was sanction for the post by the Central Government, but the tribunal has failed to appreciate the same in proper perspective and expressed the view that the total selection process is erroneous and thereby proceeded to quash the order of promotion passed in favour of the petitioner and issued a direction to proceed afresh. To buttress the said submission, the learned senior counsel has pressed into service the 2007 Rules and drawn inspiration from the decision in *Ashok Kumar Das & Ors v. University of Burdwan & Ors.*, (2010) 3 SCC 616.

33. It is contended by Mr. Soli J. Sorabjee, learned senior counsel for the State of Uttarakhand, that the issue of grant of approval is an issue which is between two governments, namely, the State Government and the Union of India and does not confer any cause of action on a member of the service. The learned senior counsel submitted that the fixation of cadre strength is within the exclusive domain of the Central Government and the State Government and when there is a post-facto approval, this should be regarded as a matter pertaining to the adjustment of the cadre strength and hence, the tribunal has totally erred in cancelling the same. His further submission is that the respondent No.1, Ajay Kumar Joshi, the applicant before the tribunal, was

promoted to the apex scale, the Chief Secretary grade and, therefore, he had no concern how the vacancies were determined and concurrence was given. The Screening Committee took cognizance of the vacancies on an additional post created temporarily under second proviso to Rule 4(2) of the 1954 Rules as a consequence of which the right of the said applicant was never infringed.

34. Mr. Chandhiok, learned Additional Solicitor General for Union of India, urged that the controversy, if any, was between the State Government and the Central Government and when the Central Government has granted post-facto approval, the controversy, if any, should have been allowed to put to rest. It is his further submission that in a matter of cadre adjustment, the incumbents cannot have any say and the tribunal has fallen into grave error by entertaining the same in exercise of the power of judicial review.

35. Mr. Dushyant Dave, learned senior counsel appearing for the petitioner in WP (C) Nos. 3485/2011 and 3486/2011, has submitted that it is the prerogative of the State Government to appoint the eligible person as Chief Secretary and no incumbent has a right to claim appointment or promotion to a particular post. The learned senior counsel would submit that the tribunal has fallen into grave error by laying unnecessary emphasis on the "chances of promotion" vis-à-vis the post in question. It is canvassed by him that the tribunal should have

accepted the stand of the respondent that once the applicant before the tribunal had been brought in the grade of Chief Secretary, the controversy is put to rest and it should not have adverted to the facet of claim of the applicant that his consideration for the post of Chief Secretary has been curtailed by creating further posts without prior concurrence of the Central Government.

36. To appreciate the controversy in proper perspective, it is necessary to refer to the various rules, regulations and guidelines and dwell upon the controversy.

37. Rule 4 of the 1954 Rules deals with strength of cadre. The said rule reads as follows: -

"4. Strength of Cadres -

- (1) The strength and composition of each of the cadres constituted under Rule 3 shall be as determined by regulations made by the Central Government in consultation with the State Governments in this behalf and until such regulations are made, shall be as in force immediately before the commencement of these rules.
- (2) The Central Government shall, ordinarily at the interval of every five years, re-examine the strength and composition of each such cadre in consultation with the State Government or the State Governments concerned and may make such alterations therein as it deems fit:

Provided that nothing in this sub-rule shall be deemed to affect the power of the Central Government to alter the strength and composition of any cadre at any other time:

Provided further that State Government concerned may add for a period not exceeding two years (and with the approval of the Central Government for a further period not exceeding three years) to a State or Joint Cadre one or more posts carrying duties or responsibilities of a like nature to cadre posts."

[Emphasis supplied]

38. Rule 7 deals with posting. It reads as follows: -

"7. **Posting** - All appointments to cadre posts shall be made-

- a. In the case of a State Cadre, by the State Government; and
- b. In the case of a Joint Cadre, by the State Government concerned."

39. Rule 8 provides for cadre and ex-cadre posts to be filled by cadre officers."

It is as follows: -

"8. **Cadre and ex-cadre posts to be filled by cadre officers-**

- (1) Save as otherwise provided in these rules, every cadre posts shall be filled by a cadre officer.
- (2) A cadre officer shall not hold an ex-cadre post in excess of the number specified for the concerned State under Item 5 (now item 3) of the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955.
- (3) The State Government may, with the prior approval of the Central Government, appointed a cadre officer to hold an ex-cadre post in excess of number specified for the concerned State in item 5 (now item 3) of the Schedule to the Indian

Administrative Service (Fixation of Cadre Strength) Regulations, 1955 and, for so long as the approval of the Central Government remains in force, the said ex-cadre post shall be deemed to be addition to the number specified in item 5 (now item 3) of the said Schedule."

[Emphasis supplied]

40. At this juncture, we may refer to sub-rule (2) of Rule 3 of the 2007 Rules. It is as follows:-

"3. Scale of pay and appointment in these grades.

(1) xxx xxx xxx

(2)(i) Appointment to the Selection Grade and to posts carrying pay above this grade in the Indian Administrative Service shall be made by selection on merit, as per criteria that may be prescribed by the Central Government with due regard to seniority.

Provided that a member of the Service shall be appointed to the Super Time Scale only after he has completed phase IV mandatory Mid Career Training as prescribed.

(ii) Appointment of a member of the Service in the scales of Selection Grade and above shall be subject to availability of vacancies in these grades and for this purpose, it shall be mandatory upon the State Cadres or the Joint Cadre Authorities, as the case may be, to seek prior concurrence of the Central Government on the number of available vacancies in each grade.

(iii) The Central Government shall accord such concurrence within a period of thirty days from the date of receipt of such references and if the Central Government does not accord concurrence within a period of said thirty days,

the concurrence on availability of vacancies shall be deemed to have been accorded. The position emanating as referred to this clause shall be placed before the Screening Committee at the time it meets to consider promotion in these grades.

- (iv) A member of the Service shall be entitled to draw pay in the scales of Selection Grade and above only on appointment to these grades."

[Underlining by us]

41. The relevant part of Rule 9, which deals with pay of members of the service appointed to posts not included in Schedule II, is enumerated herein below; -

"9. Pay of members of the Service appointed to posts and included in Schedule II.

- (1) No member of the Service shall be appointed to a post other than a post specified in Schedule II, unless the State Government concerned in respect of posts under its control, or the Central Government in respect of posts under its control, as the case may be, make a declaration that the said post is equivalent in status and responsibility to a post specified in the said Schedule.
- (2) xxx xxx xxx
- (3) xxx xxx xxx
- (4) Notwithstanding anything contained in this rule, the State Government concerned in respect of any posts under its control, or the Central Government in respect of any posts under its control, may, for sufficient reasons to be recorded in writing, where equation is not possible, appoint any member of the Service to any such post without making a declaration that the said post is

equivalent in status and responsibility of a post specified in Schedule II.

(5) & (6) xxx xxx xxx

(7) At no time the number of members of the Service appointed to hold posts, other than cadre posts referred to in sub-rule (1) and sub-rule (4), which carry pay of Rs.26,000/- per mensem and which are reckoned against the State Deputation Reserve, shall except with the prior approval of the Central Government, exceed the number of cadre posts at that level of pay in a State cadre or, as the case may be, in a Joint cadre."

[Emphasis supplied]

42. On a careful scrutiny of the factual scenario in question and the submissions urged, the core issues that emanate for consideration are:-

- (i) What is the exact role of the State Government and the Central Government in the fixation of cadre strength?
- (ii) Whether the post facto concurrence would cure the defect despite the language employed in Rule 3(2)(ii) and (iii) of the 2007 Rules?
- (iii) Whether the tribunal is justified in quashing the promotions of all the incumbents on the ground that there has been violation of the Rules and Regulations?

- (iv) Can an eligible person put forth a claim for being posted as Chief Secretary on the ground that when the post was going to be filled up, he was the only candidate eligible for consideration?

43. First, we shall advert to the issue with regard to the existence of cadre and ex-cadre posts in the State of Uttarakhand as determined by the tribunal. As is manifest, placing reliance on Rule 4(2) of the 1954 Rules read with Rule 8 of the said Rules, the tribunal has opined that the determination of the cadre post by the State is unacceptable and further the ex-cadre post had exceeded its limit. While dealing with the role of the Central Government in creation of post, their Lordships in *E.P. Royappa* (supra) have ruled thus:

"17. It was contended that neither the post of Deputy Chairman, Planning Commission nor the post of Officer on Special Duty was a Cadre post within the meaning of Rule 4 of the Indian Administrative Service (Cadre) Rules, 1954. The Additional Solicitor-General as well as the Advocate-General of the State did not contend that either of the posts was a Cadre post within the meaning of the Indian Administrative Service (Cadre) Rules. The strength and composition of the Cadre as contemplated by Rule 4 of the Indian Administrative Service (Cadre) Rules is to be determined by the Central Government in consultation with the State Government. The relevant provision is sub-rule (2) of Rule 4. It states that the Central Government shall at the interval of every three years re-examine the strength and composition of each such Cadre in consultation with the State Government or the State Governments concerned and may make such alternations as it deems fit. There are two provisos in the sub-rule. The first

proviso states that nothing shall be deemed to affect the power of the Central Government to alter the strength and composition of the Cadre at any other time. The second proviso states that the State Government may add for a period not exceeding one year and with the approval of Central Government for a further period not exceeding two years, to a State or joint Cadre one or more posts carrying duties and responsibilities of a like nature of Cadre posts. It, therefore, follows that the strength and composition of the Cadre shall be determined by regulations made by the Central Government in consultation with the State Government. The State Government alone cannot alter the strength and composition of the Cadre.

18. The aforementioned second proviso to Rule 4(2) of the Cadre Rules does not confer any power on the State Government to alter the strength and composition of the Cadre. If such power were conferred on the State examination of the strength and composition at the interval of every three years by the Central Government in consultation with the State Government would be nullified. The meaning of the second proviso to Rule 4(2) is that the State Government may add for a period mentioned there to the Cadre one or more posts carrying duties and responsibilities of the like nature of a Cadre post. The posts so added do not become Cadre posts. These temporary posts do not increase the strength of the Cadre. The addition of the post of Deputy Chairman, Planning Commission or Officer on Special Duty to the Indian Administrative Service Cadre of Tamil Nadu State is not permissible because that would result in altering the strength and composition of the Cadre. The State has no such power within the second proviso to Rule 4(2) of the Cadre Rules."

[Emphasis added]

44. In this context, we may refer with profit to the decision in *K. Prasad & Ors. v. Union of India & Ors.*, AIR 1988 SC 535 wherein, while dealing with the

strength and composition of the cadre under the IFS (Cadre) Rules, 1966, especially Rule 4 of the said Rules, their Lordships referred to the decision in *E.P. Royappa* (supra) and expressed the view as follows:

"22. ...The argument is that it is for the Central Government to fix the strength and composition of the cadres and that this power can be exercised by it at any time. The first proviso to rule 4(2) of the Cadre Rules, it is said, places this beyond all doubt. As against this, it is contended by the direct recruits that the proviso relied upon is only a proviso to rule 4(2) and does not extend to rule 4(1). It is urged that it has application only to the power of the Central Government to make alterations to the cadre strength in between the three-year review contemplated by rule 4(2). Shri Kakkar, in this context, referred us to the following observations in *Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348 at p.379 : (AIR 1974 SC 555 at p.578):

"We now turn to the first ground of challenge which alleges contravention of the second proviso to R.4(2) of the Indian Administrative Service (Cadre) Rules, 1954 and R.9, sub-r. (1) of the Indian Administrative Service (Pay) Rules, 1954. So far as the second proviso to R.4(2) of the Indian Administrative Service (Cadre) Rules, 1954 is concerned, we do not think it has any application. That proviso merely confers limited authority on the State Government to make temporary addition to the cadre for a period not exceeding the limit therein specified. The strength and composition of the cadre can be determined only by the Central Government under R.4(1) and the Central Government alone can review it triennially or at any other intermediate time under R.4(2)."

23. We do not think that such a narrow interpretation of the proviso is warranted. As we see it, the proviso only outlines

the general principle that, whoever has the power to do a particular thing has also the power to exercise it from time to time, if need be : (vide, S.14 of the General Clauses Act, 1897). It had to be specifically put in because of the language of the main part of sub-rule (2) providing for a triennial review lest it should be construed as a restriction on the general power otherwise available. We, therefore, agree with the contention of the initial recruits that the Central Government has the power to alter the strength and composition of the cadres at any time. We are, however, still of the view that the contention urged on behalf of the initial recruits cannot be accepted for a different reason. If the terms of the relevant rules are scrutinised, it will be seen that the strength and composition of the cadre has to be determined by regulations and that these regulations have to be made by the Central Government in consultation with the State Government. It is a well settled principle that, if a statutory power has to be exercised in a particular manner, any exercise of that power has to comply with that procedure. It follows, therefore, that if the initial composition can be only drawn up in consultation with the State Government and by regulations, it will not be permissible for the Central Government to modify or alter the same save in the same manner. In fact also, it has been brought to our notice, there have been subsequent increases in the authorised strength of almost all State cadres and this has been effected by an appropriate amendment to the Regulations. It is not the case of the Government that before the second and third selections were made, either the State Government was consulted or the regulations were amended for increasing the strength. Nor is it even their case that there was any specific order by the Central Government changing the strength and composition of any cadre. We are, therefore, of opinion that it is not possible to accept the contention of the initial recruits that the mere appointment of an excess number of officers should be treated as an automatic expansion of the cadre strength and composition in exercise of the power available under Rule 4(1)."

[Underlining is ours]

Be it noted, in the said case, a contention was raised that the Regulations and the Rules were not mandatory as they do not outline the consequences that will follow on violation of their requirements. Repelling the said submission, their Lordships proceeded to hold as follows:

"It is difficult to accept, in this context, the submission that the cadre strength could be varied without amending the Regulations and schedule or without consulting the State Government concerned. The former course would leave the strength of the cadre easily alterable, fluctuating and indeterminable and thus nullify the entire purpose of the Cadre Strength Regulation. So far as the latter is concerned, this Court held, in Kapur v. Union of India, (1975) 2 Serv LR 531 (Punj & Har) that it is open to a State Government to overutilise the deputation reserve in an All India Service without consulting the Central Government. Equally, we think, it is not open to the Central Government to alter the strength and composition of the Cadre without consulting the State Government concerned."

[Emphasis supplied]

45. We have referred to the aforesaid decision in extenso as we find that what has been laid down therein is that the procedure prescribed under the Rules are to be followed. It is not open to the State Government to overutilize the deputation reserve in All India Service without consulting the Central Government and similarly the Central Government is not empowered to alter the

strength and composition of the cadre without consulting the State Government concerned.

46. In this context, we may refer with profit to a passage from *Harjeet Singh v. Union of India & Ors.*, (1980) 3 SCC 205 wherein their Lordships, while interpreting Rule 9 of the IPS (Cadre) Rules, 1954 and IPS (Fixation of Cadre Strength) Regulations, 1955, have opined thus:

"On the other hand we think that the Fixation of Cadre Strength Regulations made Under Rule 4 of the Cadre Rules do not over-ride the Recruitment Rule, the remaining Cadre Rules and the Seniority Rules so as to render invalid any service rendered by a non-cadre officer in a cadre post on the mere ground of breach of the Fixation of Cadre Strength Regulations, when there has been strict compliance with Rule 9 of the Cadre Rules. We think that fixation of Cadre strength is the exclusive concern of the Central and the State Governments and the Regulations are made for their convenience and better relationship. Excessive utilisation of 'Deputation or Central Reserve' is a matter for adjustment and controversy between the Central and the State Governments and is of no concern to any member of the Service. For example no cadre officer who is asked to fill a deputation post can refuse to join the post on the ground that the 'Deputation Reserve' has already been exceeded. The Regulations are not intended to and do not confer any right on any member of the Service, unlike some other Rules which do confer or create rights in the members of the Services. Among other Rules, for instance, Rule 9(2) of the Recruitment Rules stipulates that the total number of persons recruited by promotion shall not at any time exceed 25% of the posts shown against item Nos. 1 and 2 of the cadre in the schedule to the Fixation of Cadre Strength Regulations. Now, if at a point of time this limit is

exceeded, direct recruits may have a just cause for complaint and it may perhaps be held that to the extent of the excess the appointments by promotion are invalid and confer no rights of seniority over direct recruits. But, as we said, the Fixation of Strength Regulation confer no rights on members of the Service and a mere breach of the Regulation furnishes no cause of action to any member of the service on the ground that, his seniority is affected in some round about way."

[Emphasis supplied]

47. At this stage, we may refer to the decision in *K. Rajendran & Ors. v. State of Tamil Nadu & Ors.*, AIR 1982 SC 1107. We are absolutely conscious that the said decision was rendered in a different context but their Lordships have delved into the concept of Governmental administration and the necessities of alterations in the staffing pattern and have opined that it is within the exclusive domain of the executive, of course subject to judicial review within permissible parameters.

48. The scope of judicial review as far as fixation of cadre strength is concerned rests on the principle whether there had been proper determination of cadre strength as per the rules. On an x-ray of the anatomy of the Rules, it is vivid that the determination of the strength of the cadre has to be done by both the Governments in consultation. The stand of the State is that the number of ex-cadre posts at no point of time exceeded the combined strength of the SDR and CDR posts. Pending cadre review in 2009 in exercise of Rule 4(2) of the 1954

Rules, 18 additional posts for two years were created. It was also the stand that two posts existed on 3.9.2008 as two officers were working, one as the Chief Secretary and the other as Director General, Uttarakhand Administrative Academy and both the posts were in the grade of Chief Secretary. One ex-cadre post was vacant and, hence, concurrence was sought for two vacancies and after concurrence, two posts resulted. The tribunal has opined that when the State Government had communicated that the utilization of SDR was 17 beyond the prescribed limit of 13, the Central Government was in error in approving the available vacancies as the vacancy position was one.

49. In this context, we may refer with profit to the communication of the competent authority of the Central Government on 19.9.2008. It reads as follows:

"I am directed to refer to your letter Nos.2255/Thirty/-I-2008-12(19)/2005 dated 3.9.2008 on the abovementioned subject and to convey the concurrence of this Department to the availability of 2 vacancies in ASTS-II. Rs.26,000/- of IAS in Uttarakhand as per the provisions of Rule 3(2)(ii)&(iii) of the IAS(Pay) Rules, 2007."

50. After the said concurrence was given, as the factual matrix reveals, the State Government, by order dated 31.5.2010, promoted three officers to the Chief Secretary grade against three vacancies. Because of the said position, the State

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Government, by letter dated 8.10.2010, wrote to the Central Government stating thus:

"2. Pursuant to concurrence given by the Government of India, a meeting of Screening Committee could be held on the 19th February, 2010. In the meeting due to retirement of the Chief Secretary Mr. Indu Kumar Pande on 2nd December, 2009, one more vacancy in Chief Secretary grade, had occurred. Therefore, the Screening Committee took the cognizance of three obvious vacancies in the Chief Secretary grade (one against cadre posts and two against ex-cadre posts) and furnished its recommendations accordingly. Taking into consider the recommendations made by the Screening Committee, the State Government vide order dated 31st May, 2010 promoted three officers to the Chief Secretary grade against three obvious vacancies available in this grade.

3. Since the meeting of Screening Committee was held in pursuance of the concurrence given by the Government of India's letter dated 19th September, 2008 and the State Government had issued promotion orders accordingly, therefore, the Government of India has also been apprised of the aforesaid facts vide State Governments letter No.807, dated 31st May, 2010, a copy of which is being enclosed herewith. By this letter, the Government of India's approval to the actions taken by the State Government in this matter was also sought (Enclosure-III). The statement showing grade-wise sanctioned strength of SDP and SDR and officers in position against the sanctioned strength as on 31st May, 2010 is also enclosed with this letter of 31st May, 2010.

4. Here, it is also worthwhile to mention that by making the said promotions on 31st May, 2010 all the four posts in the Chief Secretary grade were filled up. Thereafter, due to retirement of the then Chief Secretary Shri N.S. Napalchyal on 12th September, 2010, one vacancy in Chief Secretary grade has occurred and presently only three officers are working in

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this grade. For the promotion against one available vacancy, a proposal for the concurrence of the Government of India is being sent separately."

51. After the concurrence was sought, the DOP&T of the Central Government prepared the following note:

"2. The Chief Secretary has drawn reference to this Department's letter dated 19.9.2008 whereby concurrence to the availability of 2 vacancies in the Apex Scale was conveyed and stated that the meeting of the Screening Committee for filling up these two vacancies was held on 19th February, 2010 and in the same meeting, the Committee also made recommendations for filling up another vacancy i.e. 3rd vacancy on account of retirement of Shri Indu Kumar Pande on 12th December, 2009 for which concurrence of the Central Government was obtained. On the basis of the recommendations of the Screening Committee, the State Government has ordered the promotion of three IAS officers on 31.5.2010. At the same time the State Government had requested this Department to convey concurrence to the availability of 3rd vacancy. The incumbency position provided by the State Government vide letter dated 31.5.2010 is as follows:

Grade	No. of Cadre posts	Utilization of cadre posts	No. of Officers occupying Ex cadre posts under SDR	Officer on inter-cadre deputation	Available vacancies	Vacancies for which confirmation is sought
Chief Secretary	2	1	--	--	3	3
ASTS	13	13	--	--	--	--
STS	19	15	--	--	--	--
Selection Grade / Sr.	34	34	9	--	--	--

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Scale / JAG						
Total	68	63	9	--		3

3. Rule Position: As per rule 3(2)(ii) of IAS (Pay) Rules, 2007,

“Appointment of a member of the Service in the scales of Selection Grade and above shall be subject to availability of vacancies in these grades and for this purpose, it shall be mandatory upon the State Cadres or the Joint Cadre Authorities, as the case may be, to seek prior concurrence of the Central Government on the number of available vacancies in each grade”.

Further, under Rule 3(2)(iii) of IAS(Pay) Rules, “The Central Government shall accord such concurrence within a period of thirty days from the date of receipt of such references and if the Central Government does not accord concurrence within a period of said thirty days, the concurrence on availability of vacancies shall be deemed to have been accorded. The position emanating as referred to this clause shall be placed before the Screening Committee at the time it meets to consider promotion in these grades”.

4. It may be stated that the said letter of the State Government for concurrence of one vacancy in the Apex Scale as on 31.5.2010 doesn't appear to have been received in the Section. However, on the basis of incumbency position given by the State Government, it is observed that the 3 vacancies in the Apex Scale as on 31.5.2010 have actually been there. The no. of ex-cadre posts under SDR quota are also within permissible limit of 13 posts.

5. If approved, we convey the concurrence to the availability of 3rd vacancy in the Apex-Scale of IAS in Uttarakhand cadre.”

52. Thereafter, approval was granted and on 13.10.2010, a letter was communicated, which is as follows:

"I am directed to refer to the State Government's letter no.807/30-1-10-12(19)/2002-TC, dated 31st May, 2010 and d.o. no.1470/XXX-1/12(19)2005/TC-I, dated 08.10.2010 on the above mentioned subject and to convey the concurrence of this Department to the availability of one vacancy in Apex Scale of IAS in Uttarakhand cadre as on 31.5.2010 in terms of the provisions of Rule 3(2)(ii) & (iii) of the IAS(Pay) Rules, 2007, in addition to existing 2 vacancies in this grade already concurred to by this Department vide letter dated 19.9.2008."

53. On a perusal of these aspects, it is perceptible that whether there existed two vacancies on 3.9.2008 or not is not clear. True it is, it has been laid down in *Harjeet Singh* (supra) that the fixation of cadre strength is the exclusive concern of the Central and the State Governments and the Regulations are made for their convenience and better relationship and the excessive utilization of 'Deputation or Central Reserve' is a matter of adjustment and controversy between the Central and the State Governments. Thus, it is in the domain of the Central and the State Governments. Yet, there has to be application of mind to the stipulations prescribed under the Rules and Regulations and there cannot be an oversight of any fact. The tribunal has not really considered how it has precisely arrived at the conclusion that the ex-cadre posts were not limited to 13 and there

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was only a singular vacancy in the grade of Chief Secretary. Regard being had to the concept of cadre adjustment and the inter-play of Rule 4 of the 1954 Rules and Rule 9(7) of the 2007 Rules wherein the Central Government and the State Government have requisite roles, we are of the considered opinion that there should be a proper determination of the vacancies in the Chief Secretary grade that existed on 19.9.2008, the date on which the first concurrence was given by the Central Government. We are disposed to think that the tribunal has fallen into error by expressing the view that the singular vacancy existed. The proper course is to direct both the Governments to determine the vacancy keeping in view the 1954 Rules, the cadre fixation method and the Regulations.

54. The second and third issues can be dealt on a common base. The plea of the State Government was that the third vacancy ensued and when the vacancy existed, the grant of concurrence was a mere formality. The language employed in Rule 3(2) clearly lays down that the appointment of a member of the service in the scales of selection grade and above shall be subject to availability of vacancies in these grades and for this purpose, it shall be mandatory upon the State cadre or the joint cadre authorities, as the case may be, to seek prior concurrence of the Central Government on the number of vacancies in each grade. Thus, merely on the assumption of existence of vacancy, the State Government cannot fill up the

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post. Prior concurrence has its signification and legal sanctity. In this regard, we may refer with profit to the decision in *Union of India and Ors. v. Vinod Kumar and Ors.* (1996) 10 SCC 78 wherein it has been held thus:

"Section 5D(7)(a) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 specifies that the method of recruitment and other conditions of service of Addl. Central Provident Fund Commissioner and other officers and employees of the Central Board shall be such as may be specified by the Central Board in accordance with the rules and orders applicable to officers and employees of the Central Government drawing corresponding scales of pay. A proviso specifies that where the Central Board is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters specified in the main provision, it shall obtain the prior approval of the Central Government. Without obtaining such prior approval, employees were recruited, in deviation of the Rules. It was contended that *ex-post facto* approval was obtained. Rejecting the contention the Supreme Court held:

Under the proviso, where the Central Board is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters enumerated above it is mandatory that it should obtain prior approval of the Central Government. Admittedly, prior approval was not obtained. On the other hand, ex post facto approval was obtained but in the teeth of the language of the proviso ex post fact approval is not an approval in the eye of law. Under these circumstances, the Tribunal had rightly held that the approval was not valid in law and the matter was kept at large and directed the Appellant to issue notification afresh for recruitment in accordance with rules. We do not find any illegality in the order."

[Emphasis added]

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55. In *U.P. Avas Evam Vikas Parishad and another v. Friends Co-op. Housing Society Ltd. and another*, AIR 1996 SC 114, the Apex Court deliberated on the difference between approval and permission and proceeded to state as follows:

"5. This Court in *Life Insurance Corp. Of India v. Escorts Ltd.*, (1986) 1 SCC 264 : (AIR 1986 SC 1370), considered the distinction between "special permission" and "general permission", "previous approval" or "prior approval" in paragraph 63 held that "we are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into S.29(1) of the Act". Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous act. As to the word "approval" in S.33(2)(b) of the Industrial Disputes Act, it was stated in *Lord Krishna Textiles Mills Ltd. v. Workmen*, (1961) 1 Lab LJ 211 at 215-16 : (AIR 1961 SC 860 at p.863) that the management need not obtain the previous consent before taking any action. The requirement that the management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in S.33(1)."

56. In *High Court of Judicature for Rajasthan v. P.P. Singh and another*, AIR 2003 SC 1029, a three-Judge Bench of the Apex Court reiterated the principle in *U.P. Avas Evam Vikas Parishad* (supra). In the said case, their Lordships

observed that the decision of the High Court in its interpretation of Rule 15 of the Rules of the High Court of Judicature for Rajasthan, 1952 was erroneous as it did not use the words "prior approval". In that context, their Lordships stated thus:

"36. Furthermore, the terminology 'consultation' used in R.15 having regard to purport and object thereof must be given its ordinary meaning. In Words and Phrases (Permanent Edition, 1960, Volume 9, page 3) to 'consult' is defined as 'to discuss something together, to deliberate.' Corpus Juris Secundum (Volume 16A, Ed. 1956, page 1242) also says that the word 'consult' is frequently defined as meaning 'to discuss something together, or to deliberate.' By giving an opportunity to consultation or deliberation the purpose thereof is to enable the Judges to make their respective points of view known to the others and discuss and examine the relative merits of their view. It is neither in doubt nor in dispute that the Judges present in the meeting of the Full Court were supplied with all the requisite documents and had full opportunity to deliberate upon the Agenda in question.

37. There is another aspect of the matter which may require consideration. For all intent and purport the report of the two-Judges Committee has been approved by the Full Court. Once approved, it terminated into a decision of the Full Court itself. In the instant case even the Governor has acted upon the recommendations of the High Court. The writ petitioners-first respondents herein did not question the appointments of the appointees not the High Court. Thus, there cannot be any doubt whatsoever that for all intent and purport the opinion of the two-Judges Committee received approval at the hands of the Full Court.

38. The High Court, in our opinion, further committed a manifest error in arriving in its conclusion in so far as it failed to take into consideration that R.15 does not postulate the prior approval of the Full Court in relation to any action which may be initiated by the Chief Justice."

We have referred to the aforesaid decision solely for the purpose that the postulate for prior concurrence or prior approval or previous approval stands on a different footing from approval, "subject to approval" or "grant of permission".

57. In *Behari Kunj Sahkari Avas Samiti v. State of Uttar Pradesh and Ors.* (2008) 12 SCC 306, their Lordships have held thus:

"The question whether the transfer or sale of an evacuee property without prior or previous approval of the Custodian General is valid and whether post facto approval constitutes sufficient compliance with the provisions of The Administration of Evacuee Property Act, 1950. Section 10(1) enacts that the duty of the custodian is to preserve and maintain the property. Sub-section (2) enacts that only for the purposes enumerated in Sub-section (1) there could be transfer or sale of the property and no such action could be taken without the previous approval of the Custodian General. The Supreme Court held on a construction of the relevant provisions:

"The approval of the Custodian General is to be taken first. This is clear from the expression "previous approval", before the order is passed. Post-facto approval is not sufficient. This procedure was not followed. Tender process was not adopted which would have ensured that the best price was available. If the

order dated 30-1-1985 is a nullity, further action is of no consequence."

58. Recently, in *Ashok Kumar Das and others* (supra), a two-Judge Bench of the Apex Court, while adverting to the expressions 'approval of the State Government' and 'prior approval' has opined thus:

"15. The words used in Section 21(xiii) are not "with the permission of the State Government" nor "with the prior approval of the State Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff. Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise."

59. In *Hira Lal Sharma v. Municipal Corporation of Delhi*, 64 (1996) DLT 527, a Division Bench of this Court was considering the provision enshrined under Section 96 of the Delhi Municipal Corporation Act, 1957 which laid a postulate

that no appointment to any category A post within the meaning of clause (1) of sub-section (8) of Section 90 shall be made except after consultation with the Union Public Service Commission. In that context, the Bench opined as follows:

"When Section 96 is closely examined, the intention of the legislature becomes crystal clear. The legislators in their wisdom have incorporated the words "That no appointment in the category A post shall be made except after consultation with the Commission. There is a clear legislative mandate that no appointment shall be made in this category unless there is prior approval by the Commission. The relaxation has been made with regard to other categories. The category to which the post of respondent no.2 belongs is a category where the Legislature in clear, explicit and categorical terms directed that the appointment to the said post cannot be made without prior approval of the Commission."

60. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that prior concurrence is a categorical imperative. It is absolutely mandatory. In view of the language employed in the Rules, the post facto approval would not validate the promotions conferred. However, as we have opined, whether there existed one or two vacancies when first concurrence was given had not been ascertained by the Central Government in proper perspective. The tribunal, as stated hereinbefore, has not appositely analyzed the vacancy position and has also not taken into consideration the concept of cadre adjustment. Therefore, we are of the considered opinion that the Central Government and the State Government should work out the exact number of

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existing vacancies giving due regard to the concept of cadre adjustment. Be it noted, the tribunal has opined that there was only a singular post in the grade of Chief Secretary when the first concurrence was given by the Central Government and, hence, A.K. Joshi being the singular candidate could alone have been considered for the post of the Chief Secretary. We have already dislodged the finding with regard to the determination of the vacancy. Hence, we have directed both the Governments to carry out the exercise afresh. There has to be application of mind keeping in view the rule position while determining the said vacancy. The said exercise should be completed within a period of six weeks. At this juncture, we may note with profit the tribunal, while quashing the orders of concurrence, had directed the existing arrangement to continue. This Court had directed status quo to be maintained. In view of the said position, it is directed that after completing the exercise pertaining to determination of the existing vacancy a review DPC shall be held and the cases of all incumbents shall be considered after following the due procedure after obtaining of concurrence within a period of six weeks. Till the said exercise is carried out, the order of status quo shall remain in force.

61. The fourth issue pertains to the filling up of the post of Chief Secretary. At this juncture, it is profitable to refer to the Promotion Guidelines, 2000.

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Annexure I to the said Guidelines deals with the principles regarding the promotion of members of the IAS and composition of DPCs. Para 6 of the said Guidelines, which deals with the gradation of Chief Secretary, is as follows: -

"Para VI: Promotion in the Grade of Chief Secretary.

The zone of consideration for promotion in this grade would consist of all the members of the service who have completed 30 years of service. Appointment in this grade would be made from amongst the officers thus cleared, at any time during the relevant year and subject to the provisions of rule 9(7) of the IAS (Pay) Rules, 1954 (as amended in 2007). The Screening Committee for this purpose shall consist of the Chief Secretary concerned, one officer working in this grade in the cadre and another officer of the cadre serving in Government of India in the same grade."

62. Annexure II provides for general guidelines for promotion, etc. and functioning of screening committees. Para 3 deals with determination of vacancies and para 24 deals with availability of vacancies. Both the paragraphs, being relevant, are reproduced below: -

"Annexure II: General Guidelines for promotion etc. and functioning of Screening Committees.

3. Determination of vacancies:

It is essential that the number of vacancies in respect of which a panel is to be prepared should be estimated as accurately as possible. For this purpose, the vacancies to be taken into account should be the clear vacancies arising in a grade due to death, retirement, resignation, promotions and deputation..."

24. **Availability of vacancies:**

Whenever promotions are vacancy based, while computing the available vacancies for filling up the same by promoting officers placed in the panel, care should be taken to ensure that the total ex-cadre posts created in various grades for the purpose do not exceed in sum the permissible quota of State Deputation Reserves indicated in the respective Cadre Schedules. Provisions of rule 9(7) of the IAS (Pay) Rules, 1954 (as amended in 2007) would also require to be followed while making promotions in the highest grade of the Service."

63. In *Citizens for Justice and Peace v. State of Gujarat and others*, (2009) 11 SCC 213, it has been opined that an appointment of a government servant is the prerogative of the particular Government especially when it is a sensitive appointment of the Director General of Police. And under the doctrine of "judicial review", the court should not extend its hands to upset such an appointment, more particularly, in the factual panorama which is perceptible today. The said principle would apply to the post of Chief Secretary. One has a right to be considered for the Chief Secretary's grade but on being promoted to the said grade, he cannot put forth a claim that he being fit and senior should be appointed to the post of Chief Secretary. That, in our considered opinion, is the prerogative of the State Government.

64. In view of the aforesaid premised reasons, we proceed to record our conclusions and directions in seriatim:

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- (i) The conclusion of the tribunal that a singular post existed in the grade of Chief Secretary is not correct as the foundation or basis of the finding of the tribunal in this regard is not clear.
- (ii) The cadre adjustment is within the domain of the Central Government and the State Government but the same has to be done by following the Rules and Regulations in letter and spirit and such adjustment should show application of mind.
- (iii) The obtaining of prior concurrence from the Central Government in view of the language employed in Rule 3(2) of the 2007 Rules is mandatory and a post facto concurrence would not validate the promotion.
- (iv) As the incumbents are holding the post in the grade of Chief Secretary for almost two years, the status quo existing as on today shall be maintained for a period of three months.
- (v) The State Government and the Central Government shall carry out the exercise of the cadre strength as on today keeping in view the Rule position within a period of six weeks and thereafter, a fresh DPC be held for consideration of the candidates to the said grade. It should be borne in mind that the selection and concurrence are vacancy based and both the

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authorities should rationally determine the vacancy position while filling up the Chief Secretary's grade after adjusting the cadre.

65. Consequently, the order of the tribunal is modified and the writ petitions are disposed of with the above directions. The parties shall bear their respective costs.

Hitendra Mishra
CHIEF JUSTICE

Sanjiv Khanna
SANJIV KHANNA, J.

AUGUST 16, 2011
pk/dk