

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

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Judgment reserved on: 24.04.2012  
Judgment pronounced on: 09.05.2012

+ W.P.(C) 5216/2010

**Vinod Goel**

..... Petitioner

Versus

**High Court of Delhi through its  
Registrar General & Ors.**

..... Respondents

**Advocates who appeared in this case:**

For the Petitioner : Mr. G.D.Gupta, Sr. Advocate with Mr. Piyush Sharma  
For the Respondent : Mr. Chetan Lokur with Mr. Jayant Mehta for R- 9 to 10, 12 to 15 and 17

**CORAM:**

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR. JUSTICE V.K.JAIN**

**V.K. JAIN, J.**

1. By an advertisement dated 13.05.1996, Delhi High Court invited applications for direct appointments from the Bar to 09 vacant posts in the Delhi Higher Judicial Service (DHJS). 02 out of those 09 posts were reserved for Scheduled Caste (SC) candidates and one for Scheduled Tribes (ST) candidates, thereby leaving 06 posts to be filled up from amongst general category candidates. It was also stated in the advertisement that in case no suitable ST candidate was available, the post will be open to general category candidates. Accordingly, general category candidates were also eligible to apply against the posts reserved for ST candidates. The

Screening Committee, appointed by this Court, prepared a panel of 09 candidates, 07 out of whom were from general category and the remaining 02 from SC category. One Shri Kulbhushan Gupta was amongst the six candidates recommended to be appointed against general category posts and he was placed at Serial No. 5 in the order of merit. Since no candidate belonging to ST category was found suitable, the Committee recommended that the petitioner Shri Vinod Goel, who had been placed at Serial No. 7 in the order of merit be appointed against the vacancy reserved for ST candidate.

2. The Full Court, in its meeting held on 24.02.1997, recommended that six candidates, namely Neeraj Kumar Gupta, Ved Prakash Vaish, Satya Narain Gupta, Satish Chander Malik, Kul Bhushan Gupta and Anil Kumar Chawla, whose names figured at Serial Nos. 1 to 6 in the panel prepared by the Screening Committee be appointed against these unreserved vacancies and two candidates, namely, Shri Raj Paul Singh Teji (Respondent No. 2) and Shri Suresh Chand Rajan (Respondent No. 3) be appointed against two vacancies reserved for SC candidates. It was also resolved that the vacancy reserved for ST candidates, on de-reservation be filled by appointment of petitioner Shri Vinod Goel, who was the last selected candidate from the General category. Pursuant to the resolution passed by the Full Court on 24.02.1997, a letter was sent by the Registrar of this Court to the Government of NCT of Delhi, recommending that Neeraj Kumar Gupta, Ved Prakash Vaish, Satya

Narain Gupta, Satish Chander Malik, Kul Bhushan Gupta, Anil Kumar Chawla be appointed against 09 posts falling to the direct recruits at point Nos. 34, 35, 36, 38, 39 and 40 (all unreserved) on Cycle-I, point No. 29 (reserved for ST candidates) to be carried forward on its de-reservation to the subsequent recruitment year), point No. 37 (SC of Cycle-I) and point No. 1 (SC of Cycle-II) respectively of the 40 point roster. While recommending de-reservation of the vacancy meant for ST candidates, the Registry of this Court placed reliance upon the instructions contained in Government of India's OM No. 36012/6/88-Estt. (SCT) dated 24.05.1989. Vide notification dated 21.04.1997, Shri Neeraj Kumar Gupta, Shri Ved Prakash Vaish, Shri Satya Narain Gupta, Shri Satish Chander Malik, Shri Anil Kumar Chawla, Shri Rajpal Singh Teji (SC) and Shri Suresh Chand Rajan (SC) were appointed in Delhi Higher Judicial Service, as per the order of merit indicated in letter of this Court dated 11.03.1997.

3. By a notification dated 03.11.1997, 14 members of the Delhi Judicial Service were appointed in the Delhi Higher Judicial Service with effect from the date they assumed charge of office. These 14 persons are respondent Nos. 4 to 17 in this writ petition. These 14 promoted officers assumed charge on 20.11.1997.

4. Since a complaint had been received by this Court against Shri Kulbhushan Gupta who had been placed at serial No. 5 of the merit list, by the Screening Committee, the Full Court, in its meeting held on 22.11.1997, after considering

those complaints decided that the recommendation made by it for his appointment to Delhi Higher Judicial Service pursuant to Resolution dated 24.02.1997 be withdrawn. It was further resolved that the petitioner Shri Vinod Goel whose name had earlier been recommended for appointment against the vacancy reserved for ST candidates on its de-reservation be appointed against the unreserved vacancy, released consequent to withdrawal of the recommendation made in respect of Shri Kulbhushan Gupta. It was also decided that the reference made to the Government for de-reservation of the vacancy which had been reserved for ST candidate, be treated as withdrawn and that post be advertised along with other existing vacancies falling to the share of the direct recruits. Pursuant to the decision taken by the Full Court on 22.11.1997, a letter dated 03.12.1997 was sent by this Court to Government of NCT of Delhi, stating therein that the recommendations of this Court for appointment of Shri Kulbhushan Gupta to Delhi Higher Judicial Service may be treated as withdrawn and Mr Vinod Goel be appointed against the unreserved vacancy released consequent to withdrawal of recommendation in respect of Shri Kulbhushan Gupta. It was further requested that the proposal of this Court for de-reservation of the vacancy made for ST candidates be treated as withdrawn. Vide notification dated 31.12.1997, the petitioner was appointed in Delhi Higher Judicial Service.

5. A draft seniority list of the members of Delhi Higher Judicial Service was circulated on 12.8.2002 inviting objections within 15 days. In its meeting dated 25.05.2005, the Full Court finalized the seniority of the members of the Delhi Higher Judicial Service up to Shri K.C. Lohia who had joined the service on 04.06.1991. The Committee of 04 Hon'ble Judges, on considering the objections of other members of Delhi Higher Judicial Service in respect of the draft seniority list circulated on 12.08.2002, recommended, by majority, that the seniority of the officer be determined on the basis of Office Memorandum dated 03.07.1986, issued by DoP&T. One Hon'ble Judge of this Court, however, differed with the recommendation of the remaining three members of the Committee and opined that seniority should be determined on the principle of continuous length of service.

6. The seniority list approved by the Full Court on 18.05.2007 was challenged before Supreme Court in *WP(C) No. 477/2007 **B.S. Mathur & Anr. v. Union of India & Ors.*** and connected *WP(C) No. 502/2007: (2008) 10 SCC 271* filed by the petitioner, respondents 2 and 3 and their 5 batch mates. Vide its judgment dated 15.10.2008, Supreme Court directed this Court to determine seniority up to the year 2006 on the principle of continuous length of service. Pursuant to the decision of the Supreme Court in the case of **B.S. Mathur** (*supra*), a Committee of 03 Hon'ble Judges of this Court submitted a report dated 20.11.2008 recommending that the petitioner be placed below respondents No. 2 to 17 in the seniority. On 27.11.2008,

the Full Court included one more Hon'ble Judge in the Committee and remitted the matter to the Committee for re-consideration after inviting objections. A provisional seniority list dated 01.12.2008 was then issued by this Court inviting objections within two weeks. The petitioner objected to his being placed below respondent Nos. 2 to 17. The Committee submitted its reports on 22.09.2009. Three out of the four Hon'ble Members of the Committee recommended that the petitioner be placed below respondents 2 to 17, whereas, one Hon'ble Member of the Committee recommended that he be placed above them. The Full Court, in its meeting held on 18.11.2009, accepted the majority view. Accordingly a final seniority list was circulated on 23.12.2009. On 25.02.2010, the petitioner submitted a representation to this Court seeking review of his seniority position in Delhi Higher Judicial Service. Another representation was submitted by him on 13.05.2010. The Full Court, in its meeting, held on 06.07.2010 rejected the representations of the petitioner. Being aggrieved by the decision of the Full Court, the petitioner is before us by way of this writ petition.

7. Admittedly, the petitioner before this Court was also one of the petitioners in WP(C) 502/2007, which was one of the writ petitions decided by the Supreme Court vide common judgment dated 15.10.2008. A perusal of the writ petition would show that the petitioner had claimed seniority of direct recruits vis-à-vis

promotees, from the date the vacancy arose in the cadre. Ground (x) taken in the writ petition reads as under:

“Because in terms of Rule 8(2), the date of appointment or year of appointment is insignificant and is not at all relevant factor for determining or fixing the seniority of direct recruits vis-à-vis the promotees and the only criteria relevant is the date on which the vacancy arose and it specifically lays down that the first vacancy which arises shall go to the direct recruit.”

8. In **B.S.Mathur** (Supra), the Supreme Court was called upon to adjudicate upon the seniority list of the members of the Delhi Higher Judicial Service, approved by this Court on 22.5.2007, accepting the majority report determining the seniority in terms of OM No. 22011/7/86-Estt.(D) dated 3.7.1986 issued by the Government of India. The Court after considering its earlier decisions in **O.P.Singla v. Union of India:** (1984) 4 SCC 450, **Delhi Judicial Service Association v. Union of India** Writ Petition No. 1540 of 1986, **Rudra Kumar Sain and Ors v. Union of India and Ors** AIR 2000 SC 2808, **Suraj Prakash Gupta and Ors v. State of J&K** AIR 2000 SC 2386, **All India Judges' Association v. Union of India** AIR 2002 SC 1752 and **R.K.Sabharwal and Ors v. State of Punjab** AIR 1995 SC 1371, inter alia, observed and held as under:

“40. Perusal of the Seniority List drawn by application of principle of Rota Quota as laid down in Rule 8(2) read with Rule 7 of DHJS Rules shows that in case the principle of Rota Quota is followed, then it would cause a serious injustice to the promotee officers inasmuch as, the

direct recruits who have not yet entered the service would rank senior to the promotee officers promoted in their quota way back on 16.8.2000. If this is allowed to happen, this would not only be unreasonable but create a great heart-burning amongst the officers appointed from the two sources. Hence, in our view, the principle of Rota Quota contained in the statutory Rule 8 (2) read with Rule 7 of DHJS Rules, does not properly address the problem of resolving inter se seniority dispute between the direct recruits and the promotee officers.

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43. ...In the batch of 1992, only one direct recruit, Ms. Veena Birbal was appointed. She being at S. No. 1 her seniority is not at all affected by the application of any of the three rules i.e., the principle of Rota Quota as contained in the statutory Rule 8(2) read with Rule 7 of DHJS Rules, principle as contained in the O.M. referred above or the principle of continuous length of service. The seniority of the officers of other three batches of direct recruits appointed in 1995, 1997 and in the year 2000 is adversely affected to their detriment, if the seniority is decided on the basis of principle contained in the above referred O.M.

44. It may be seen from the seniority list which is based on the principle contained in the O.M. that the six direct recruits of 1995 batch, namely, Ms. I.K. Kochhar, Mr. A.K. Pathak, Mr. B.S.Mathur, Mr. P.S. Teji, Mr. I.S. Mehta and Mr. Lal Singh who all were appointed against the substantive vacancies in their quota on 7/9.3.1995 would become junior to the promotee officers, Mr. Ajit Bharihoke, Mr. D.K. Saini, Mr. R.S. Khanna, Mr. S.K. Tandon and Mr. Prem Kumar who were promoted from DJS to DHJS on 24.8.1995 against vacancies that became available to them after the appointment of the above named six direct recruits. In the same way, the seven direct recruits of 1997 batch, namely, Mr. V.P. Vaish, Mr. S.N. Gupta, Mr. S.C. Malik, Mr. A.K. Chawla, Mr. Vinod

Goel, Mr. R.P.S. Teji and Mr. S.C. Rajan appointed against substantive vacancies in the quota of direct recruits on 21.4.1997 would become junior to the promotee officers Mr. Mahavir Singhal, Mr. S.K. Sarvaria, Mr. P.C. Ranga, Mr. Babu Lal, Mr. D.C. Anand, Mr O.P. Gupta, Mr. C.K. Chaturvedi, Mr. A.S. Yadav, Mr. R.K. Gauba, Mr. H.S. Sharma, Mr. J.R. Aryan, Mr. K.S. Pal, Mr. M.K. Gupta and Ms. Sangita Dhingra Sehgal, who were promoted from DJS to DHJS after them on 20.11.1997. Similarly, the three direct recruits of 2000 batch, namely, Mr. Rajnish Bhatnagar, Mr. Rakesh Siddartha and Mr. Amar Nath appointed in the direct recruit quota against substantive vacancies on 26.5.2000 would become junior to the promotee officers, Mr. N.P. Kaushik, Ms. Asha Menon, Mr. Pradeep Chaddah and Mr. Narender Kr. Sharma promoted to DHJS on 16.8.2000. None of the abovenamed promotee officers was even promoted to the cadre of DHJS when the above named direct recruits over whom they are proposed to be made senior were appointed in the cadre of DHJS against substantive vacancies. Those promotee officers were working as Sub-Judges/Metropolitan Magistrates in the cadre of Delhi Judicial Service at the time the above named direct recruits were appointed as Additional District Judges in the cadre of DHJS. We are of the view that by no stretch of imagination or legal fiction, a promotee officer working in the lower cadre can be made senior to an officer working on a higher post as an Additional District Judge at that point of time. In case by application of principle as contained in the O.M., officers working in the lower cadre are made senior to the Additional District Judges of that time, then it would cause a great heart burning amongst those direct recruits who were appointed in their own quota against substantive vacancies before the promotion of the promotee officers in question.

48. Now let us have a glance at the seniority list prepared on the basis of the principle of "continuous length of service". Ever since the inception of the service till the

seniority up to Mr. K.C. Lohia was finally decided, the High Court has continuously followed the principle of "continuous length of service" as directed to be applied to the officers of DHJS by this Court in **O.P. Singla and Rudra Kumar Sain's** cases (supra). When **O.P. Singla and Rudra Kumar Sain's** cases were decided by this Court, this Court had noticed breakdown of Rota Quota in the service and it was for that reason, directions were given for determining the inter se seniority by applying the principle of continuous length of service.

(emphasis supplied)

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50. The High Court while fixing seniority of officers upto Shri K.C. Lohia including those who were appointed after amendment of the Rules and whose seniority was not determined in **Rudra Kumar Sain's case**, did not apply the O.M. dated 3.7.1986 or the principles contained therein. Their seniority was fixed essentially on the basis of "length of service". There was no good reason for the High Court to discard the principle of "continuous length of service", which it had followed for determining seniority of officers upto Shri K.C. Lohia and apply the O.M. dated 3.7.1986 for the purpose of fixing the seniority of officers appointed after the appointment of Shri K.C. Lohia. Rule 8(2) cannot be applied on account of gross inequity and injustice which its application is bound to produce and since this Court has already held in the case of **Suraj Prakash Gupta and Ors. v. State of J & K** AIR2000SC2386 that direct recruits cannot claim seniority from the date of occurrence of vacancy in the direct recruitment quota, the seniority should be determined on the basis of continuous length of service as was done by this Court in **O.P. Singla's** case and **Rudra Kumar Sain's case** and was also done by Delhi High Court in case of officers upto Shri K.C. Lohia. If the seniority is fixed in this manner, it will not cause any

injustice either to promotees or to direct recruits.

**(emphasis supplied)**

51. Further it has to be kept into consideration that seniority even by one day may materially affect the future prospects and career of an officer. The person appointed even on day earlier may reach a position which the person appointed one day later may not be able to reach due to reasons such as limited number of higher posts or his becoming age barred by the time next vacancy arises. The only advancement in the career of a member of Delhi Higher Judicial Service is elevation to the High Court. Therefore, it will not be fair and equitable to give march to a later appointee over a prior appointee of the same year, even if that march is for a few months or even for a few days. It, therefore, cannot be disputed that the application of O.M. dated 3.7.1986 which does not ipso facto apply to officers of Delhi Higher Judicial Service would produce inequity for officers from one or the other source and therefore, has to be avoided if a better principle, which is fair and reasonable to all can be applied.

52. As observed earlier, perusal of the seniority list prepared on the basis of the principle of "continuous length of service" clearly demonstrates that in case the seniority of the officers of DHJS is fixed by reference to their date of appointment, then nobody would suffer any injustice. Each and every officer would get due weightage of the service rendered by him or her in the cadre of DHJS. If inter se seniority is finally decided by applying the principle of "continuous length of service", it may bring an end to litigation between the officers of the two groups. Therefore, the principle of "continuous length of service" should be applied for determining the inter se seniority of the officers of Delhi Higher Judicial Service appointed up to the year 2006. In case of officers appointed on the same date, whether direct appointees or promotees, the seniority should be fixed on the principles as stated in O.M. dated 3.7.1986 since it cannot be

determined on the basis of length of service alone in case of appointment from two different sources on the same date.

9. It would thus be seen that the Supreme Court held in the case of **B.S.Mathur** (Supra) that the rule of rota-quota had broken down as the appointments of direct recruits and promotee officers had not taken place simultaneously and there had been no change in this position even after the earlier decisions of the Supreme Court in **O.P.Singla** (supra) and **Rudra Kumar Sain** (supra). The Supreme Court clearly held that the principle of “continuous length of service” needs to be applied to determine the inter se seniority of officers of Delhi Higher Judicial Service appointed/promoted upto the year 2006, irrespective of whether they were direct recruits or promotee officers. The Court was of the view that the principle of rota-quota, if followed, would cause serious injustice to the promotee officers since it would make those direct recruits, who were not even born in service, senior to the promotee officers who had entered the service before the entry of direct recruits and this would be unreasonable. In para 26 of the judgment, the Court expressed a view that a later appointee, even if he is appointed a few days later, should not be allowed to have march over an earlier appointee. The Court gave a clear mandate that it is the principle of “continuous length of service” which should be applied to determine inter se seniority of the officers, who had been appointed upto the year 2006.

10. In view of the decision of Supreme Court in **B.S.Mathur** (supra), the High Court was required to determine seniority strictly on the basis of “continuous length of service”. Any departure from this principle would be contrary to the dictum of the Supreme Court in the case of **B.S.Mathur** (supra).

11. It was contended by the learned Senior Counsel for the petitioner that in **B.S.Mathur** (supra), the Supreme Court had approved the seniority list upto Shri K.C.Lohia and since the High Court, while fixing seniority upto Shri K.C.Lohia had given seniority to Shri S.L.Bhayana, Smt. Reva Khetrapal, Shri S.N.Aggarwal Shri P.K.Bhasin and Shri M.C.Garg (as Their Lordships then were) over the promotee officers, who had joined Delhi Higher Judicial Service earlier in point of time, the petitioner is also entitled to the same treatment since in the merit list prepared by the Screening Committee, he was shown senior to respondent No.2 Shri R.P.S.Teji and respondent No.3 Shri S.C.Rajan. He submitted that Smt. Reva Khetrapal, Shri S.N.Aggarwal, Shri P.K.Bhasin and Shri M.C. Garg were given retrospective seniority despite the fact that they were appointed late and adjusted against future vacancies.

12. The facts leading to appointment of Smt. Reva Khetrapal, Shri S.N.Aggarwal and Shri P.K.Bhasin can be summarized as under:

In April, 1987, Delhi High Court had issued advertisement to fill up 10 vacancies in Delhi Higher Judicial Service in the quota of direct recruits. 02 out of these 10 posts were reserved for Scheduled Castes candidates and 02 for Scheduled

Tribes candidates. It was also notified in the advertisement that one of the 02 vacancies reserved for Scheduled Tribes was open to the general candidates, who would be considered in case no suitable Scheduled Tribes candidate was available. 05 candidates from general category were recommended for appointment and were appointed on 6.1.1988. One vacancy of general category, therefore, still remained unfilled. Hence, one more candidate of general category could have been appointed against that vacancy. However, since the High Court wanted that the post meant for Scheduled Tribes candidate should not lapse, it was recommended to the Government that one post meant for Scheduled Tribes candidates be de-reserved and the 6<sup>th</sup> candidate of general category viz. Shri S.L.Bhayana be appointed on de-reservation of the post. The proposal for de-reservation of the vacancy, however, was not accepted by the Government. Therefore, in August, 1989 Shri S.L.Bhayana was appointed against the vacancy of general category.

In December, 1987 Delhi High Court again invited applications to fill up 04 reserved vacancies, two meant for Scheduled Castes candidates and two for Scheduled Tribes candidates. It was notified in the advertisement that in the event of suitable candidates from reserved categories not being available, the vacancies shall be filled up from the general category candidates. Ms. Reva Khetrapal, Shri S.N.Aggarwal and Shri P.K.Bhasin had applied against the posts advertised in December, 1987. However, only one candidate from Scheduled Caste category viz.

Shri L.D.Mual was found suitable. Neither any other Scheduled Castes candidate nor any candidate from Scheduled Tribes category was found suitable. It was therefore, resolved by this Court to appoint 03 general category candidates after obtaining de-reservation of the remaining 03 reserved posts, in terms of the instructions contained in “Brochure of Reservation for Scheduled Castes or Scheduled Tribes Candidates in Service”. A proposal was accordingly sent to Delhi Government on 16.11.1988. However, the said proposal was not forwarded by the Delhi Government to Central Government. Vide Memorandum dated 25.4.1989 issued by DoP&T a general ban was imposed on de-reservation w.e.f. 1.4.1989. In view of the said memorandum, neither Delhi High Court nor Delhi Government pursued the proposal, which had been sent on 16.11.1988 for de-reservation of 03 reserved posts.

In September, 1989, yet another advertisement was issued to fill up 03 likely vacancies in Delhi High Judicial Service, two of which were reserved for Scheduled Tribe candidates and one for Scheduled Caste candidates. It was notified in the advertisement that one vacancy reserved for Scheduled Tribe candidates would be exchangeable with Scheduled Caste candidates if a suitable Scheduled Tribe candidate was not available. Two candidates belonging to Scheduled Caste categories viz. Shri Prithvi Raj and Shri G.S.Jugti were selected. No suitable candidate from Scheduled Tribe category was however available. Shri P.K.Bhasin

and Shri S.N.Aggarwal filed two separate writ petitions seeking appointment to Delhi Higher Judicial Service. They also sought a direction to de-reserve 03 reserved vacancies. Vide its judgment dated 19.4.1991, a Division Bench of this Court directed appointment of respondents No. 6 & 7 in the writ petitions, who had been selected for appointment against two reserved vacancies one meant for Scheduled Castes candidates and other in exchange for Scheduled Tribes candidates. One vacancy in the general category arose during the pendency of these writ petitions. The Court directed appointment of the senior-most general category candidate against that vacancy. It was further directed that the second general category candidate (Shri S.N.Aggarwal) in the order of merit, be adjusted against the Scheduled Caste vacancy, which was advertised in 1989 by making a proposal for de-reservation, in the manner contemplated in OM dated 25.4.1989. A direction was issued to DoP&T, to consider the proposal for de-reservation and allow the same within a month from the date of its receipt from the Delhi Government. Directions given by the Court were predicated on the premise that the candidates once selected and empanelled must be accommodated.

After the aforesaid decision of the Division Bench one vacancy arose on retirement of Shri G.S.Dakha, who belonged to the Scheduled Caste category. A Review Application in CW No. 2590/1990 was then filed by Shri S.N.Aggarwal contending that the vacancy created by retirement by Shri G.S.Dakha was in fact a

general category vacancy, though Shri Dakha belonged to the Scheduled Caste category. This factual position was conceded by the High Court. In view of the admission of the High Court it was directed that Smt. Reva Khetrapal and Shri S.N.Aggarwal be appointed against unreserved vacancies and Mr. P.K.Bhasin be appointed against the vacancy which in terms of the judgment dated 19.4.1991 was to be used to appoint Shri S.N.Aggarwal.

By a notification dated 5.9.1991 the strength of Delhi Higher Judicial Service was increased. As a result, two more general category vacancies became available. Shri P.K.Bhasin then filed CM No. 5569/1991 seeking appointment to the first of these general category vacancies. The High Court and Delhi Government stated that they had no objection to the appointment of Shri P.K.Bhasin against the general category vacancy. The Division Bench, vide order dated 26.11.1991, directed that Shri P.K.Bhasin be appointed against a general category vacancy. It was further directed that no steps need to be taken for de-reservation of any vacancy.

Pending implementation of the directions issued by a Division Bench of this Court on 19.4.1991, 07 promotee officers viz. Shri B.L.Garg, Ms. Aruna Suresh, Shri J.P.Sharma, Shri V.B.Gupta, Ms. Urmila Rani and Shri K.C.Lohia were appointed to Delhi Higher Judicial Service on ad-hoc (stopgap) arrangement, for a period of 06 months from the date they assumed charge. These promotee officers also furnished undertaking that the period of their ad-hoc appointment shall not be

counted while reckoning their seniority. Smt. Reva Khetrapal, Shri S.N.Aggarwal and Shri P.K.Bhasin pursuant to the directions issued by the Division Bench on 19.4.1991 and 26.11.1991, joined service on 30.11.1991.

13. Ms Maninder Kaur, Mr V.Shankara and Mr Mahinder Singh who were empanelled pursuant to the advertisement issued by this Court in April, 1987, filed writ petitions seeking directions that the panel of 1987 be exhausted first and they be appointed in Delhi Higher Judicial Service. They also sought quashing of the appointments of Smt. Reva Khetrapal, Shri S.N.Aggarwal and Shri P.K.Bhasin to Delhi Higher Judicial Service, besides seeking review of the orders passed by a Division Bench of this Court in their cases. Another writ petition was filed by Shri S.K. Kaul claiming parity with Smt. Reva Khetrapal, Shri S.N.Aggarwal, and Shri P.K.Bhasin contending that being on the panel of 1988, he deserved the same treatment which was given to these three persons. One Shri Malkhan Singh, who had applied for appointment to Delhi Higher Judicial Service pursuant to an advertisement issued in May, 1985, also filed a writ petition challenging the subsequent advertisement issued by this Court and seeking appointment to Delhi Higher Judicial Service. These writ petitions were decided by a Full Bench of this Court in **Ms Maninder Kaur versus Delhi High Court and Others**, ILR (1995) 1 Del. 695. The Full Bench was of the view that if the petitioners were aggrieved by the judgment and order of the Division Bench, they can either challenge it before

the superior Court by filing an appeal or by filing an application for impleadment and for review of the judgment and re-hearing of the matter. The Full Bench held that petitions seeking review/recalling of the decision of the Division Bench was not permissible.

As regards Shri Kaul, who was at serial No. 6 of the panel in which the names of Smt. Reva Khetrapal, Shri S.N.Aggarwal and Shri P.K.Bhasin were placed at serial No. 1 to 3, the Full Bench was of the view that he cannot claim any right to the appointment against a future vacancy. It was observed that in case the entire panel is to be exhausted irrespective of the number of vacancies notified for selection, it would lead to perpetuating the panel and that would be arbitrary and unconstitutional, depriving other eligible candidates for being considered for public employment. It was also observed that empanelment gives no right to appointment. The Full Bench was of the view that the ratio of Supreme Court decision in **Prem Prakash, etc. v. Union of India & Ors**, AIR 1984 SC 1831, had not been correctly applied by the Division Bench. The view taken by Full Bench in this regard reads as follow:-

“The decision of the Division Bench in Bhasin's case directing adjustment against future vacancies results in depriving other eligible candidates for being considered for the said vacancies. In our view the ratio of Prem Prakash's case was not correctly applied by the Division Bench. We may also notice that the Division Bench after rightly noticing in Para 89 of the aforesaid report that the principle laid down in Prem Prakash's case will not be

attracted seems to have erred in the later portion of the judgment (Para 106) in directing on strength of Prem Parkash's case that candidates once selector and empanelled must be accommodated in future vacancy which came into existence during the pendency of the writ petition. There are reasons for preparing larger panel than the number of vacancies. It is possible that a recommended candidate may not come forth to join the Service or even after selection and recommendation there may be hurdles in his appointment like medical clearance etc. In order to avoid delay in the recruitment, a larger panel is prepared so that person next on the panel can be recommended for appointment. This, however, would not mean that in case the number of selected and recommended candidates to the extent of the existing vacancies join, the other candidates on panel are required to be adjusted against future vacancies. As held hereinbefore, this would lead to continuing the panel in perpetuity which is neither permissible in law nor in the interest of the Service.

For the aforesaid reasons, in our view, Bhasin's case has not been correctly decided in so far as it implies right to appointment against future vacancies and enforcement of that right by issue of mandamus and, therefore, to that extent we overrule the said decision. We hold that the question of consideration of a candidate on select panel for being recommended would arise only when the candidate has been selected against the 'declared vacancy or in case of some extreme urgency and a candidate on the select list will have no right to be considered for recommendation for appointment as Adj against a future vacancy. We, Therefore, conclude that Mr. Sanjay Kaul, Mr. Malkhan Singh and none of other petitioners have any right to be considered for appointment as ADJ's against future vacancies and seek issue of mandamus."

14. A perusal of the seniority list up to Shri K.C. Lohia, which was approved by the Full Court in its meeting held on 25.05.2005 would show that Shri S.L. Bhayana

who joined service on 11.08.1989 was shown senior to the promotee officers, namely, Shri G.P. Thareja, Shri J.M. Malik, Shri Brijesh Kumar who had joined Delhi Higher Judicial Service much earlier on 27.02.1989. It further shows that Smt. Reva Khetrapal and Shri S.N. Aggarwal who joined service on 30.11.1991 were shown senior not only to Shri L.D. Maul, a direct appointee who joined service on 01.09.1989, but also to the promotees, namely, Shri H.P. Sharma, who joined service on 30.11.1990, Shri Kuldeep Singh who joined on 22.05.1991 and Shri B.L. Garg, Ms. Aruna Suresh, Shri J.P. Sharma, Shri V.B. Gupta, Ms. Urmila Rani, who had joined service on 30.05.1991. The petitioner before us is claiming parity with the case of Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N. Aggarwal and Shri P.K. Bhasin who were made senior to those promotees, who had joined Delhi Higher Judicial Service much before these persons joined the service on 30.11.1991. Smt. Reva Khetrapal, Shri S.N. Aggarwal and Shri P.K. Bhasin were also given seniority over a direct appointee Shri L.D. Maul, who had joined service, much earlier than them.

15. As far as Shri S.L. Bhayana is concerned, though his appointment was recommended against a vacancy reserved for ST candidates, on its de-reservation, admittedly one general vacancy was available at the time this Court recommended his appointment against the reserved post. Therefore, Shri S.L. Bhayana could well have been recommended and in fact ought to have been recommended against that

general vacancy, he being a general category candidate. However, in the case of the petitioner, since only six vacancies in general category were available on the date Full Court recommended his appointment against the vacancy reserved for ST candidates and six candidates, namely, Neeraj Kumar Gupta, Ved Prakash Vaish, Satya Narain Gupta, Satish Chander Malik, Kul Bhushan Gupta and Anil Kumar Chawla, all of whom admittedly were higher to the petitioner in the order of merit, had been recommended against those six vacancies, no vacancy in general category was available for appointment of the petitioner to Delhi Higher Judicial Service. But for the decision of this Court to recommend the name of the petitioner against a vacancy made for ST candidate, the name of the petitioner would not at all have been recommended on 24.02.1997, for appointment to Delhi Higher Judicial Service.

It was only on 22.11.1997 when the Full Court decided to withdraw the recommendations made by it for appointment of Shri Kulbhushan Gupta to Delhi Higher Judicial Service, that a general category vacancy became available for considering the appointment of the petitioner to Delhi Higher Judicial Service. Had seven instead of six general category vacancies been available on 24.02.1997 and despite that the High Court was to recommend appointment of the petitioner against the vacancy reserved for a ST candidate, as was done by it in the case of Shri S.L. Bhayana, only then the petitioner could have sought parity with Shri S.L. Bhayana.

16. It was contended by the learned senior counsel for the petitioner when this Court resolved on 22.11.1997 to withdraw its recommendation for appointment of Shri Kulbhushan Gupta, a general category vacancy became available retrospectively with effect from 24.02.1997 when the name of Shri Kulbhushan Gupta was recommended against that general category vacancy. We, however, find no merit in this contention. There is no rationale or logic behind giving retrospective effect to the release of the general category against which the name of Shri Kulbhushan Gupta was recommended. The petitioner had no right, even to be considered against a general vacancy, at any time prior to 22.11.1997. He did not have even a legitimate claim against the vacancy, which was not available prior to 22.11.1997 and which got released only on withdrawal of the recommendation in respect of Shri Kulbhushan Gupta. It could not have been in contemplation even of the petitioner at any time prior to 24.02.1997, that this Court would withdraw its recommendations for appointment of Shri Kulbhushan Gupta and consequently, the general category vacancy against which his name was recommended, would get released. No rule or principle of law for giving retrospective effect to release of a vacancy in such a case has been brought to our notice. We, therefore, cannot grant parity to the petitioner with Shri S.L. Bhayana. By a letter dated 11.03.1997, this Court had recommended appointment of the petitioner against a reserved vacancy subject to its de-reservation by the Government. The recommendation made by this

Court for de-reservation of a vacancy reserved for ST candidates was not binding upon the Government and in fact when this Court had recommended appointment of Shri S.L. Bhayana against a reserved vacancy, after its de-reservation, the Government had declined the recommendation made by this Court. Even if we proceed on the assumption that the recommendation of this Court for de-reservation of the ST vacancy was binding on the Government, that would make no difference, since before de-reservation of the post reserved for a ST candidate, the petitioner could not have been offered appointment against that post and since de-reservation of that post never materialized, it can hardly be disputed that no clear vacancy in Delhi Higher Judicial Service, against which the petitioner could be appointed, was available before this Court, on 22.11.1997, decided to withdraw its recommendation for appointment of Shri Kulbhushan Gupta against a general vacancy.

17. In its report dated 13.10.2004, a Committee of Judges, while considering the objections filed by Smt. Reva Khetrapal, Shri S.N. Aggarwal and Shri P.K. Bhasin to the tentative seniority list circulated on 12.08.2002, inter alia, observed as under:-

“Though Shri S.L. Bhayana was appointed in August, 1989, in law he ought to be deemed to have been appointed against sixth clear general category vacancy w.e.f. 6.11.1988 along with other five appointees, namely (1) Ms. Rekha Sharma (2) Sh. S.N. Dhingra (3) Sh. S.C. Mittal, (4) Sh. S.S. Bal and (5) Sh. R.K. Tiwari.

The same procedure has been followed by this Court in other appointment. Vinod Goel, a direct recruit, who has been shown at serial No.84 in the seniority list, was

selected along with Sh. Neeraj Kumar Gupta at serial No.79, Shri Ved Prakash Vaish at serial No.80, Shri Satya Narain Gupta at Serial No.81, Sh. Satish Chander Malik at Sr. No.82, Sh. Anil Kumar Chawla at Sr. No.83, Sh. Vinod Goel at serial No.84, Shri Raj Pal Singh Teji at Sr. No.85 and Sh. Suresh Chand Rajan at serial No.86, Shri Vinod Goel was selected against a Scheduled Tribe vacancy and his case was sent for de-reservation of the Scheduled Tribe vacancy to the Govt. of India and it was recommended in this case that he would appointed only in the event of de-reservation of the S.T vacancy by the Govt. of India. The other candidates who were selected along with him were appointed in the DHJS on 21.4.1997. Shri Vinod Goel was placed at Sr. No.6 in the select panel by the Hon'ble High Court. Thereafter, Sh. Vinod Goel was appointed against a general category vacancy on 31.12.1997 by the High Court while his colleagues who were in the select panel from serial No.1 to 5 and from serial No.7 to 8 had already joined on 21.4.1997, still he has been given seniority from 21.4.1997 and not from the date of joining i.e. on 31.12.1997 and he has been given seniority as per his placement in the select panel at serial no.6 he has been shown senior to Sh. Raj pal Singh Teji at serial No.85 and Sh. S.C.Rajan at serial No.86 who were appointed and had joined as Addl. Sessions Judge on 21.4.1997. Not only that, Mr. Vinod Goel has also been given seniority over the promote officers shown at serial No.87 to 100 in the seniority list. All these promote officers from serial no.87 to 100 had joined as Addl. District & Sessions Judge on 20.11.1997 i.e. much before Shri Vinod Goel in the seniority list and Sh. Vinod Goel has been given his seniority as per his placement at serial No.6 in the select panel.”

Relying upon above-referred observations of the Committee, the learned senior counsel contended that in view of the past practice of this Court which was followed in the cases of Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri

S.N.Aggarwal and Shri P.K.Bhasin and Shri M.C. Garg, the petitioner is also entitled to seniority above respondents 2 and 3, namely, Shri S.C. Rajan and Shri R.P.S. Teji, who ranked lower to him in the order of merit.

The last Committee of Judges in its report dated 22.09.2009, dealt with the plea of the petitioner in the following manner:-

“Shri Goel’s advertence to the previous committee’s observations (in the previous report adopted by the Full Court on 25.5.2005) about his position in the seniority list, was in the context of Shri Bhayana’s representation. The committee referred to the fact that later appointees could be given seniority over intervening promotee officers if they (direct recruit appointees) could not join, or had some impediment in appointment. The reference to Shri Goel’s case was not determinative, but only illustrative. The facts relating to Shri Goel, or the relative merits were not and could not be considered. In any event, as stated earlier, the facts of Shri Bhayana’s appointment-which was the context of the committee’s report, did not afford any parallel, with his case. It is also worthwhile noting that when the intervening promotees were appointed to DHJS, it was on adhoc basis for six months, with an undertaking that they could not claim seniority. However, no such condition appears in the case of the promotees appointed on 20.11.1997, appointed before Shri Goel’ indeed the previous part of the report dealing with Shri Singhal’s representation shows that sufficient vacancies existed for promotion.”

As far as the case of Smt. Reva Khetrapal, Shri S.N. Aggarwal and Shri P.K. Bhasin are concerned, it was noted by the Committee that seven promotee officers, namely, Mr. Babu Lal, Ms. Aruna Suresh, Shri J.P.Sharma, Shri V.B.Gupta,

Ms.Urmila Rani and Shri K.C. Lohia, who joined Delhi Higher Judicial Service, on 30.05.1991 were appointed purely on ad hoc basis for a period of six months on their submitting an undertaking that the period of their ad hoc appointment shall not be counted while reckoning their seniority. It was further noted by the Committee that no such condition was imposed at the time of appointment of the promotees, (respondents No. 4 to 17) on 20.11.1997.

18. The learned senior counsel for the petitioner submitted that in the event of no suitable person in the reserved category being selected, the general category candidates could be considered against those posts and to this extent, the case of the petitioner is not different from the case of these three persons. He also pointed out that the Committee was not correct in saying that unlike in the case of Smt Reva Khetrapal, the advertisement at the time of selection of the petitioner did not provide for consideration of general category candidates against reserved post, in the event of the suitable candidate from reserved category not being available.

A perusal of the report of the earlier Committee (dated 13.10.2004) would show that seniority of the petitioner in Delhi Higher Judicial Service was not the issue on which the Committee was called upon to give its report. Therefore, we agree that reference to the placement of the petitioner was only by way of illustration while considering the representation made by Shri S.L. Bhayana. The Committee while making the quoted observations did not take into consideration

the fact that at the time of making recommendation for appointment of Shri S.L. Bhayana against a reserved post, a clear general category vacancy was available and his name could have been recommended against that post, whereas, no such clear vacancy was available for the petitioner, at any point of time prior to 22.11.1997 when this Court decided to withdraw the recommendations for appointment of Shri Kulbhushan Gupta.

19. As regards the case of Shri M.C. Garg, the last Committee observed as under:

“As regards the third instance of “past practice” in the case of Shri M.C. Garg, he was concededly included in the selection list, and was in the merit position, immediately after Shri Gaur. The grant of seniority to him, on that basis, rather than fortuitous date of reporting for appointment, is in consonance with Chairman Puri Gramya Bank (supra); G. Deen Dayalan Ambedkar (Supra); Surender Narain Singh (supra) and Suresh Chandra Jha (supra). For these reasons, the “past practice” in the three instances cannot be precedents for consideration, as suggested by the officer.”

A perusal of the seniority list approved by this Court would show that the appointment of Shri M.C. Garg was notified 06<sup>th</sup> March, 1995, though he joined service on 08.05.1995. The case of the petitioner cannot be treated at par with the case of Shri M.C. Garg for the simple reason that even the recommendation for the appointment of the petitioner was made on 22.11.1997, whereas, the respondents 2 and 3, namely, Shri S.C. Rajan and Shri R.P.S. Teji were appointed on 21.04.1997 and they joined service on the same date. More importantly, no promotee officer

had joined Delhi Higher Judicial Service between 06.03.1995 when the appointment of Shri M.C. Garg was notified and 08.05.1995, when he joined the service. On the other hand, respondents 4 to 17 before this Court had joined Delhi Higher Judicial Service on 03.11.1997, much before the Full Court resolved to recommend the appointment of the petitioner.

20. Even if we proceed on the assumption that the case of the petitioner is identical to that of Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N. Aggarwal, Shri P.K. Bhasin and Shri M.C. Garg or only with the case of Smt. Reva Khetrapal, Shri S.N. Aggarwal and Shri P.K. Bhasin, considering the mandate of Supreme Court in **B.S. Mathur** (*supra*) holding that seniority of the members of the Delhi Judicial Service up to the year 2006 has to be determined on the basis of “continuous length of service”, the petitioner in the facts and circumstances of this case, cannot be granted seniority with effect from a date prior to 31.12.1997 when he joined the service. Neither the past practice nor any past administrative decision of this Court can come in the way of implementation of the decision of Supreme Court in the case of **B.S. Mathur** (*supra*). Therefore, irrespective of whether grant of retrospective seniority to Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N. Aggarwal, Shri P.K. Bhasi and Shri M.C. Garg was right or wrong, the seniority of the officers who joined Delhi Higher Judicial Service after Shri K.C. Lohia was required to be fixed and has rightly been fixed on the basis of “continuous length of

service”. Since the petitioner was party to the decision of Supreme Court in **B.S. Mathur** (supra), he is bound by the principle of “continuous length of service” laid down by the Supreme Court in that case. It is, therefore, not open to him to claim seniority from a date prior to his joining the service, since that would be contrary to the principle of “continuous length of service” which the Supreme Court had approved in the said case.

21. Had the name of the petitioner been recommended against a clear general category vacancy on 24.02.1997 and his joining had been delayed on account of reasons not attributable to him, there could have been merit in his contention to give him seniority from the date his juniors in the select list were given seniority in the service. But, the petitioner’s name against a general category vacancy came to be recommended only on 22.11.1997 and by that time not only respondents 2 and 3, but also respondent 4 to 17 had already joined Delhi Higher Judicial Service in their own right and against clear vacancies available for their appointment. The appointment of the private respondents was not an ad hoc or stopgap arrangement. Unlike in the case of Shri B.L.Garg, Ms. Aruna Suresh, Shri J.P.Sharma, Shri V.B.Gupta, Ms. Urmila Rani and Shri K.C.Lohia, none of them gave an undertaking not to claim seniority from the date of their appointment. Therefore, the mandate of Supreme Court in the case of **B.S. Mathur** (supra) was required to be applied with full vigour and in its true spirit while determining the seniority of the

petitioner and the High Court having fixed his seniority strictly in terms of the said judgment, no fault can be found with its decision.

22. Relying upon certain observations of the Supreme Court in para 23 and 25 of the judgment in **B.S. Mathur** (emphasized by us), the learned senior counsel for the petitioner contended that the seniority list up to Shri K.C. Lohia was approved by Supreme Court and consequently, the decision of this Court to grant retrospective seniority to Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N. Aggarwal and Shri P.K. Bhasi also had the approval of the Supreme Court. We, however, find no merit in this contention. In the case of **B.S. Mathur** (*supra*), Supreme Court had no occasion to consider the validity or otherwise of the retrospective seniority granted to Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N. Aggarwal, Shri P.K. Bhasin and Shri M.C. Garg. In fact, a perusal of paras 23 and 25 of the judgment clearly indicates that Supreme Court proceeded on the assumption that it was the principle of continuous length of service which had been applied by the High Court till the seniority up to Shri K.C. Lohia was finally decided by it. There is no indication in the judgment that issue of retrospective seniority granted to these five persons was raised by any of the parties to the writ petitions filed in Supreme Court. In fact, the last sentence in para 39 of the judgment would show that seniority list up to Shri K.C. Lohia was not disputed either by direct recruits or by promotees. Therefore, the Court had no occasion to go into the correctness or

otherwise of the retrospective seniority granted to Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N. Aggarwal, Shri P.K. Bhasin and Shri M.C. Garg. The Court, in paras 23 and 25 of the judgment, observed that it was the principle of “continuous length of service” which the High Court had adopted since inception of service and there was no good reason for the High Court to discard that principle of fixing seniority after Shri K.C. Lohia, on the basis of the OM dated 03.07.1986 issued by DOP&T. The observation “In the same way, the seven direct recruits of 1997 batch, namely, Mr. V.P. Vaish, Mr. S.N. Gupta, Mr. S.C. Malik, Mr. A.K. Chawla, Mr. Vinod Goel, Mr. R.P.S. Teji and Mr. S.C. Rajan appointed against substantive vacancies in the quota of direct recruits on 21.4.1997 would become junior to the promotee officers Mr. Mahavir Singhal, Mr. S.K. Sarvaria, Mr. P.C. Ranga, Mr. Babu Lal, Mr. D.C. Anand, Mr O.P. Gupta, Mr. C.K. Chaturvedi, Mr. A.S. Yadav, Mr. R.K. Gauba, Mr. H.S. Sharma, Mr. J.R. Aryan, Mr. K.S. Pal, Mr. M.K. Gupta and Ms. Sangita Dhingra Sehgal, who were promoted from DJS to DHJS after them on 20.11.1997”, was made in the context of implications of applying the OM dated 03.07.1986, for determining seniority of direct recruits vis-à-vis promotees and cannot be construed to mean that the Supreme Court wanted the petitioner to be senior to respondents 3 to 18 in this petition. In fact even the date of appointment of the petitioner has been stated as 21.04.1997 which admittedly is not the case. This clearly shows that Supreme Court did not at all go in the issue of seniority of

the petitioner vis-à-vis respondents 2 & 3 and 4 to 17. Therefore, we cannot accept the contention that retrospective seniority granted to Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N.Aggarwal, Shri P.K.Bhasin and Shri M.C. Garg was approved by Supreme Court in the case of **B.S. Mathur** (*supra*). In any case, for the reasons stated hereinabove, we are of the view that the case of the petitioner cannot be treated at par with the case of Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N.Aggarwal and Shri P.K.Bhasin. As far as Shri M.C. Garg is concerned, no promotee officer joined Delhi Higher Judicial Service between date of his appointment and the date of his joining service.

23. It was contended by the learned senior counsel for the petitioner that a seniority list which was got prepared by the Hon'ble Judge who gave the dissenting report dated 22.02.2007 and in which the petitioner was shown senior to respondents 2, 3 and 4 to 17 was approved by Supreme Court in the case of **B.S. Mathur** (*supra*). We cannot agree. In the said case, Supreme Court had approved the principle of "continuous length of service" for determining seniority in Delhi Higher Judicial Service and it is not correct to say that the Court had approved the seniority list which was annexed to the minority report dated 22.02.2007 and was got prepared by the Hon'ble Judge who gave the dissenting opinion, which was not accepted by the Full Court in its meeting held on 18.05.2007.

24. It was submitted by the learned senior counsel that it was clearly stated in the notification dated 21.04.1997, whereby seven persons, including respondents 2 and 3 were appointed to Delhi Higher Judicial Service, that their seniority in Delhi Higher Judicial Service shall be as per the order of merit indicated in the letter dated 11.03.1997 from Registrar of this Court to the Lieutenant Governor of Delhi and in the letter dated 11.03.1997, the petitioner was shown at serial No. 7, whereas respondents 2 and 3 were appointed at Serial No. 8 and 9 respectively. The notification dated 21.04.1997 refers to inter se seniority of seven persons who were appointed vide that notification and does not refer to seniority of Shri R.P.S. Teji and Shri S.C. Rajan vis-à-vis with petitioner Shri Vinod Kumar Goel. Moreover, we cannot ignore the fact that if the petitioner is placed above respondents 2 and 3, it will result in his becoming senior also to respondents 4 to 17 who were promoted to Delhi Higher Judicial Service in their own right against clear vacancies available in their quota and who had joined service even prior to this Court resolving to offer appointment to the petitioner.

25. It was pointed out by the learned senior counsel for the petitioner that in the seniority list issued on 14.10.1999 as well as in the tentative seniority list issued on 12.08.2002, the petitioner was placed above respondents 2 to 17, which shows that the High Court had always considered him senior to private respondents. A perusal of the letter dated 14.10.1999, whereby the first list was circulated would show that

it was only a draft seniority list since the officers were required to send their objections, if any, to the said list on or before 30.10.1999. This draft seniority list was withdrawn by the High Court vide letter dated 06.09.2000. The forwarding letter dated 12.08.2002 would show that the second list was also a draft list and the officers were asked to send their objections, if any, within 15 days of the receipt of the letter. No legal right accrued to the petitioner on the basis of these draft seniority lists, since the objections received by the High Court against these lists were required to be considered and disposed of before issuing the final seniority list. In any case, considering the mandate of Supreme Court in the case of **B.S. Mathur** (*supra*), the past practice of this Court became irrelevant since the seniority of officers appointed after Shri K.C. Lohia had to be fixed strictly on the basis of “continuous length of service”.

26. In **Hemani Malhotra v. High Court of Delhi** (2008) 7 SCC 11, this Court had issued an advertisement inviting applications for making appointment of 16 vacant posts in Delhi Higher Judicial Service. It was stated in the advertisement that the examination was to be a two stage selection process comprising a written examination of 250 marks and interview/viva voce. Minimum qualifying marks in the written examination were to be 55% for General Candidates and 50% for Scheduled Castes and Scheduled Tribes candidates. The result of the written examination was not declared by this Court and, therefore no merit list of the

candidates who passed the written test was notified. Interview letters were issued by this Court to the petitioners in the writ petition. Before they could be interviewed, the Full Court decided to fix minimum qualifying marks of 55% for General category and 50% for Scheduled Castes and Scheduled Tribes candidates in the viva voce. After viva voce test, the petitioners were not selected. No final merit list on the basis of combined result of written examination and interview was declared by this Court. The case of the petitioners before Supreme Court was that they had been excluded from consideration for appointment solely on the basis of cut off marks prescribed at the stage of viva voce test, which was illegal. It was held by Supreme Court that since minimum marks for viva voce were not prescribed before commencement of selection process, prescription of such minimum marks at viva voce test was illegal. Supreme Court noted that had the marks obtained by the petitioner at viva voce been added to marks obtained by them in written test, their names would have been placed in the merit list. Supreme Court, therefore, directed this Court to add the marks obtained by the petitioner in the written examination to the marks obtained by them in viva voce test and to prepare a combined merit list along with the other selected candidates. This Court was also directed to declare the petitioner as selected for being recommended for appointment to Delhi Higher Judicial Service. It was, however, directed by Supreme Court that the petitioners would neither be entitled to seniority nor salary

with retrospective effect. Their seniority was directed to be reckoned from the date of their appointment and they were to be paid salary only from that date. It would thus be seen that despite Supreme Court despite finding that the petitioners were entitled to be appointed in Delhi Higher Judicial Service, and had wrongly been denied such appointment, did not grant them seniority with reference to their position in the merit list. Seniority to them was granted only from the date of their appointment. The recommendation for appointment of the petitioner before this Court was made on 22.11.1997 and he came to be appointed only on 31.12.1997. He was not even born in the service when respondents 2 and 3 and, more importantly, respondents 4 to 17 joined the service. If he is granted seniority above the private respondents, that would be in utter violation of the principle of “continuous length of service” approved by Supreme Court in the case of **B.S. Mathur** (*supra*) to which he was a party.

In the case of **Hemani Malhotra** (*supra*), an injustice had been done to the petitioners by not recommending their appointment, despite they being otherwise entitled to that. On the other hand, no injustice has been done to the petitioner since no vacancy for a general category candidate was available at any time before 22.11.1997 when a general category vacancy got released on account of a decision of this Court to withdraw the recommendations for appointment of Shri Kulbhushan Gupta against that post. Therefore, the case of the petitioner in **Hemani Malhotra**

(supra) stood on a much stronger footing than the case of the petitioner in the present case and despite that they were given seniority only from the date of their joining the service. The petitioner certainly is not entitled to a more favourable treatment in the matter of fixation of his seniority, particularly vis-à-vis the promotees who had joined the service in their own right, even before this Court decided to recommend the appointment of the petitioner against a general category vacancy.

27. The learned senior counsel for the petitioner had relied upon N. Suresh Nathan v. Union of India AIR 1992 SC 564, Shankarsan Dash v. Union of India (1991) 3 SCC 47, Balwant Singh Narwal v. State of Haryana (2008) 7 SCC 728, Surendra Narain Singh v. State of Bihar (1998) 5 SCC 246, Pilla Sitaram Patrudi v. Union of India (1996) 8 SCC 637, Suresh Chandra Jha v. State of Bihar (2007) 1 SCC 405 and K.P. Dubey v. Union of India in W.P. No. 3818/1998.

In **N. Suresh Nathan** (supra), Supreme Court noted that the practice followed in the department for a long time was that in the case Diploma-holder Junior Engineers who obtained the Degree during service, the period of three years' service in the grade for eligibility for promotion as Degree-holders commenced from the date of obtaining the Degree and the earlier period of service as Diploma-holders was not counted for this purpose. The Court was of the view that if past

practice is based on one of the possible constructions which can be made of the rules, then upsetting the same, would not be appropriate. However, in the case before this Court, the facts in the case of the petitioner are not identical to the case of Shri S.L. Bhayana, Smt. Reva Khetrapal, Shri S.N. Aggarwal, Shri P.K. Bhasin and as far as the case of Shri M.C. Garg is concerned, no promotee officer had joined the service between the date of notification of his appointment and the date of his joining the service. In any case, in view of the clear mandate of Supreme Court in **B.S. Mathur** (*supra*), it is not open to this Court to follow a past practice while fixing seniority of officers who joined service after Shri K.C. Lohia, if such a practice is contrary to the principle of continuous length of service approved by the Supreme Court in that case.

In **Shankarsan Dash** (*supra*), Supreme Court observed that though the State is under no legal duty to fill all or any of the vacancies, the decision not to fill up the vacancy has to be taken bona fide for appropriate reasons and if vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates as reflected in the recruitment test, and no discrimination can be permitted. There is no quarrel with the proposition of law laid down in this case. But, there is no comparative merit of the petitioner, vis-à-vis respondents 4 to 17 who have entered the service from a different source.

In **Balwant Singh Narwal** (*supra*), Supreme Court, while accepting the general principle that the selection made by U.P.S.C being merely recommendatory does not imply automatic appointment and that the appointing authority should not give notional seniority without valid reason from a retrospective date which would affect the seniority of those who already entered service, relying upon its earlier decision in **Surender Narayan v. State of Bihar** (1998) 2 SCR 1165, held that the candidates who were selected against earlier vacancies, but could not be appointed along with others of the same batch due to technical difficulties (litigation in that case), when appointed subsequently, will have to be placed above those who were appointed against subsequent vacancies. However, in the case before us, the appointment of the petitioner against a general category vacancy was made only on 22.11.1997, the recommendation dated 11.03.1997 being for his appointment against a reserved category, contingent upon its de-reservation, no legal right accrued to the petitioner for grant of retrospective seniority, particularly vis-à-vis the promotees who had already joined service in their own right, before the appointment of the petitioner against a general category vacancy was recommended. This judgment, therefore, does not help the petitioner.

In **Surender Narayan** (*supra*), the dispute was with respect to inter se seniority of Munsifs appointed on the basis of examination held by Public Service Commission under the Bihar Judicial Service (Recruitment) Rules in 1955 and the

Munsifs appointed under Bihar Civil Service (Judicial Branch) Ad hoc Recruitment Rules 1975. One of the questions for consideration before Supreme Court in that case was whether the persons appointed under 1955 Rules or the persons appointed under 1974 Rules should rank senior. The recruitment process under 1955 Rules was initiated on 03.04.1976, by advertising 200 posts out of which 48 were reserved posts. Only 15 candidates qualified against the 48 reserved vacancies. 143 General candidates and 15 reserved candidates were appointed during March, 1975 to 22<sup>nd</sup> May, 1975. Later on, names of 33 General category candidates were recommended for appointment against the vacancies which were reserved for SC and ST candidates, but were converted to general vacancies because of non-availability of reserved category candidates. These persons (respondents 3 to 34 before Supreme Court) were appointed between 17.06.1976 to 01.09.1976. The appointments under the 1974 Rules were made between 23.05.1975 to 17.11.1976. The Munsifs who were appointed under 1974 Rules contended that they should rank senior to respondents 3 to 34 since they were appointed earlier in point of time. Two other appellants, who belonged to the reserved category and were appointed between March, 1975 to 22<sup>nd</sup> May, 1975 and whose position in the merit list was lower than that of respondents 3 to 34, contended that they should be treated as senior to the respondents 3 to 34 because they were appointed earlier than those respondents. Supreme Court held that respondents 3 to 34 should rank senior. Interpreting the

expression “such candidate” in Rule 20 of 1955 Rules, Supreme Court held that the expression cannot be given a restricted meaning to ignore only SC/ST candidates in the supplementary list and in the facts and circumstances of the case this expression shall be referable to the candidates who figure in the merit list prepared by the Commission and out of this merit list, a supplementary list of candidates under Order 20 was required to be prepared, who, in the opinion of the Commission, had attained the required standard of qualifications and were suitable for the appointment. It was further held that once the merit list is prepared, the same cannot be modified and it has to remain in force until the supplementary list is prepared to fill in the advertised post, but without any compromise as regard to the merit. The Court was of the view that since there was no provision in the 1955 Rules to carry forward the vacancies/posts reserved for SC/ST candidates and the appointment of respondents 3 to 34 was delayed till 1976 on account of exchange of correspondence between the State Government and the Commission, respondent 3 to 34 cannot be blamed for this misconception of law and they had to be assigned seniority according to their position in the merit list. The Court was of the view that the respondents 3 to 34 could not be made to suffer for no fault on their part when they were appointed against advertised vacancies. This judgment has absolutely no applicability to the facts of the case before us since recommendation for appointment of the petitioner against a general category vacancy was made only on

22.11.1997 and recommendation for his appointment against a reserved category was contingent upon de-reservation of the vacancy reserved for ST candidates and that de-reservation never materialized.

In **Pilla Sitaram Patrudi** (*supra*), Supreme Court found that the appointment of the appellant was delayed for no fault on the part of the appointee. It was, therefore, held that he was entitled to the ranking given in the select list. Since the petitioner before this Court was not selected for appointment against a general category vacancy and such vacancy became available only on 22.11.2007, this judgment does not help him in any manner.

In **Suresh Chandra Jha** (*supra*), Supreme Court held that in the absence of any rule, the seniority has to be determined according to merit list and not according to the date of joining. Even this judgment would be of no help to the petitioner since he was not selected for appointment against a general category vacancy and in any case respondents 4 to 17 had joined the service in their own right before his name was recommended for appointment against a general category vacancy. There was no common merit list of candidates to be appointed from two different sources, one being direct recruitment and the other being promotion from Delhi Judicial Service.

In **K.P. Dubey** (*supra*), the petitioner was selected to the post of Section Officer in CPWD and was asked to report for duty. Since the communication

asking him to report did not reach him, he sought extension of time which was allowed to him and he joined duty within such extended time. Since the respondents sought to fix his seniority from the date of confirmation and not in the order of merit, an OA was filed by the petitioner before the Central Administrative Tribunal. The Tribunal, noticing that the seniority list had been prepared on the basis of length of service, dismissed the OA. The petitioner, thereupon, invoked the jurisdiction of this Court, by way of a writ petition. The order of the Tribunal was set aside by this Court, noticing the undisputed position that the seniority was to be determined in accordance with the merit and opining that where seniority is governed by statutory rules, the doctrine of continuous officiation would not apply. The order passed by this Court was set aside by Supreme Court on the ground that the persons who were affected had not been impleaded. The matter was remitted to this Court for deciding afresh after giving a hearing to those affected persons. It was held by this Court that it is merit which would govern the determination of seniority. Again, this judgment has no applicability to the case before us as the petitioner was not offered appointment at any time before respondents 4 to 17 joined the service in their own right and there was no common merit list of the candidates appointed from two different sources.

28. For the reasons stated hereinabove, we are of the view that the seniority of the petitioner having been fixed strictly in accordance with the principle of

“continuous length of service” approved by Supreme Court in the case of **B.S. Mathur** (supra), no interference in the matter is called for by us. The writ petition is devoid of any merit and is hereby dismissed. There shall be no order as to costs.

**V.K.JAIN, J**

**BADAR DURREZ AHMED, J**

**MAY 09, 2012**  
**bg/sn/vn**