

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

% Date of Decision: 18.04.2012

+ **W.P.(C) No.8401/2010**

Union of India & Ors. ... Petitioners

Versus

Vinod Kumar Jain & Anr. ... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. A.S.Chandihoke, Additional Solicitor General of India with Mr. Sachin Dutta, Ms.Gyatri, & Mr. Manikya Khanna Advocates for Petitioners

For Respondent No.1 : Mr. Arun Bhardwaj, Advocate for respondent No.1;
Mr.Tanveer A.Mir Advocate for respondent No.2

AND

+ **W.P.(C) No.8503/2010**

Union of India & Ors. ... Petitioners

Versus

Smt. Prachi Nigam & Ors. ... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. A.S.Chandihoke Additional Solicitor General of India with Mr. Sachin Dutta and Ms.Gyatri, Advocates for Petitioners

For Respondent No.1 : Mr.Tanveer A.Mir Advocate for respondent Nos.1 to 5; Mr. Pushkar Sood Advocate for Respondent Nos. 6 to 16.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

ANIL KUMAR, J.

1. The petitioners, Union of India, through the Secretary, Department of Personnel & Training & Ors., have challenged the order dated 7th July, 2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No.3663/2009, titled as 'Smt. Prachi Nigam & Ors. v. Union of India & Ors.' with OA No.3097/2009, titled as 'Vinod Kumar Jain v. Union of India & Ors'. The Tribunal by the impugned order has quashed the order dated 2nd September, 2008 passed pursuant to order dated 26th May, 2008 in OA No.1317/2005, titled as 'Vinod Kumar Jain v. Union of India & Ors'. By the impugned order dated 7th July, 2010, the Tribunal, while quashing the order dated 2nd September, 2008 passed by the petitioners, has remanded the matter back to the petitioners with the directions to consider the aspect of the merger of AFLEs & DFLEs and grant of seniority on merger of both the categories of AFLEs & DFLEs in accordance with the observations made by the Tribunal in its order dated 26th May, 2008 passed in OA No.1317/2005. While passing the impugned order, the Tribunal also held that till a fresh order is passed by the petitioners, promotion to the post of Deputy Secretary shall remain on hold.

2. The brief facts to comprehend the controversy between the parties are that Sh. Vinod Kumar Jain, respondent No.1 in WP(C) 8401/2010, had joined the Language Cadre of the Research & Analysis Wing, Cabinet Secretariat, as LDC (Group 'C' post) with effect from 13th June, 1969. Later on, he was appointed as Assistant (Group 'B' non-gazetted post), and subsequently, he joined the Language Cadre as Interpreter (Group 'B' non-gazetted post) with effect from 26th August, 1985 in the pay scale of Rs.550-900/-, which was later on revised to Rs.2000-3200/-.

3. The said respondent no.1, Vinod Kumar Jain, was thereafter, promoted as Assistant Foreign Language Examiner in the pay scale of Rs.2000-3500/-(Group 'B' Gazetted post) with effect from 18th July, 1991.

4. The respondent No.1 to 5 of W.P.(C) No.8503/2010 also became Assistant Foreign Language Examiners (hereinafter referred to as 'the AFLE') Group 'B' (gazetted post) in the pay scale of Rs.2000-3500/-.

5. The same department also has the posts of Deputy Foreign Language Examiner (hereinafter referred to as 'the DFLE') which was a Group 'A' post with the pay scale of Rs.2200-4000/-. The recruitment to the various posts in the Language Cadre is governed by the Research

and Analysis Wing (Recruitment Cadre & Service) Rules, 1975 as amended from time to time.

6. The next promotion for AFLEs and DFLEs was to the post of Under Secretary (Language) in the scale of Rs. 3000-4500/-. The quota for promotion was 50% of AFLEs and 50% for DFLEs, however, the AFLEs required a residency period of 8 years service before becoming eligible for promotion to the post of Under Secretary (Language) whereas the DFLEs required 5 years service.

7. Subsequently, pursuant to the recommendations of the 5th Central Pay Commission the AFLE which was a Group 'B' (gazetted post) in the pay scale of Rs. 2200-4000, was revised in the pay scale of Rs. 8000-13500, with effect from 1st January, 1996 by the petitioners by OM dated 6th January 1999 and the arrears since 1st January, 1996 too were given to the employees who were on the post of AFLE.

8. Prior to the recommendations of the 5th Central Pay Commission, the classification and pay scale of the various posts up to the rank of the Under Secretary in the Language Cadre were as under:-

Sl. No.	Post	Pay Scale	Classification
1.	Interpreter	2000-3200	Gr. B Non Gazetted
2.	AFLE	2000-3500	Gr. B Gazetted
3.	DFLE	2200-4000	Gr. A Gazetted
4.	Under Secretary	3000-4500	Gr. A Gazetted

9. The posts of Interpreters and DFLEs were filled up 100% by direct recruitment. The posts of AFLEs were filled up 100% by promotion from the feeder grade of Interpreters. The qualification prescribed for direct recruitment to the post of Interpreter, which was a feeder grade for promotion to AFLEs, and that of DFLEs were as under:-

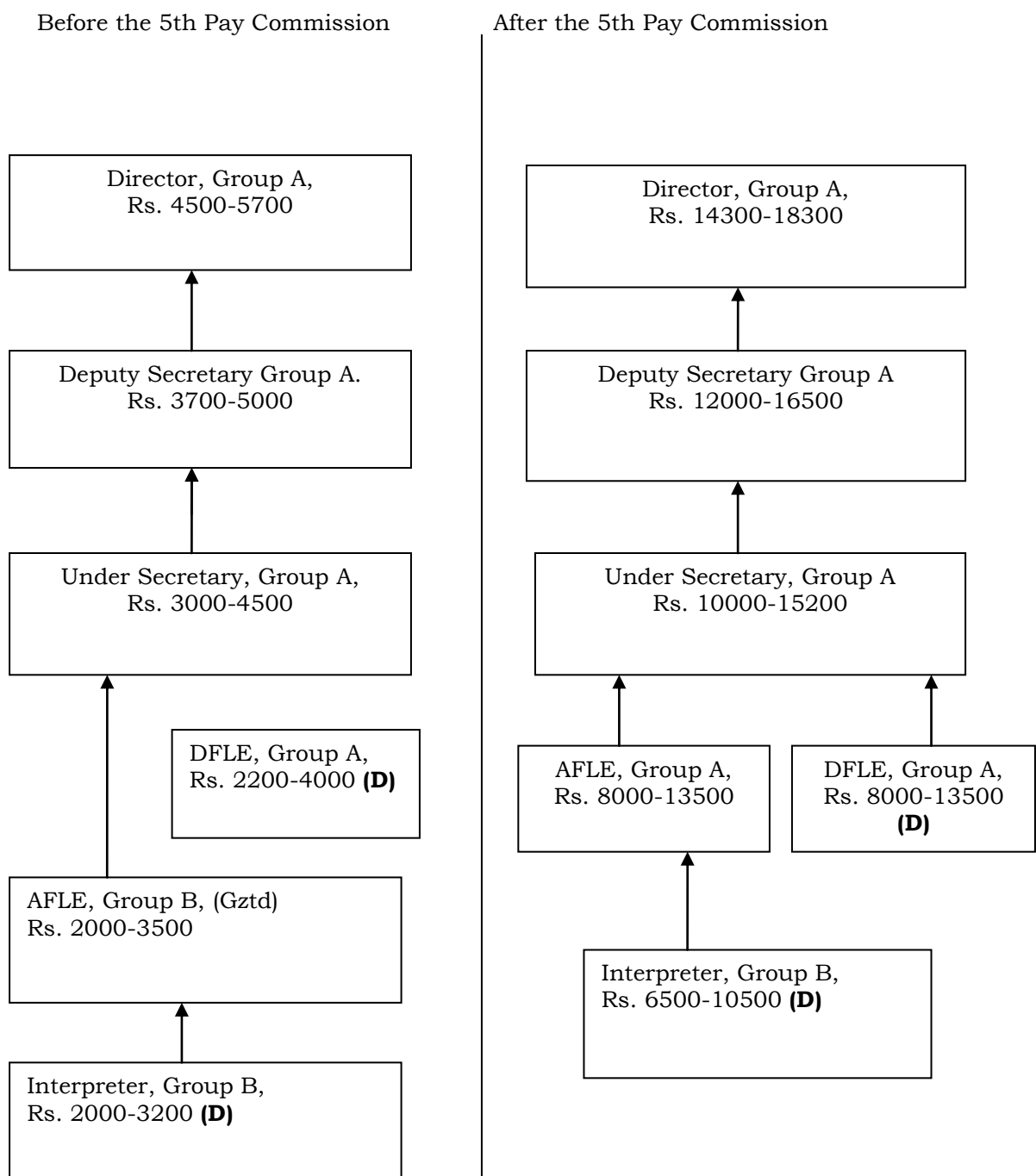
“i) **Interpreter**—Bachelor’s degree in a Foreign Language from a recognized university or institute or a degree with diploma in Foreign Language from a recognized university or institution.

ii) **DFLE**—Master’s Degree (2nd class) in a Foreign Language from a recognized university or institution or Master’s Degree (2nd class) in any subject with honours degree (2nd class) in a foreign language from a recognized university or institution.”

10. There was no parity between the DFLEs and AFLEs as the educational qualifications and the mode of recruitment prescribed in the Recruitment Rules were different.

11. Pursuant to the recommendations of the 5th Central Pay Commission, the pay scale of Rs.2000-3500/- of AFLEs was revised to Rs.8000-13500/- retrospectively from 1st January, 1996. Since the pay scale of AFLEs was revised from Rs.2000-3500/- to Rs.8000-13500/-, in terms of notification dated 20th April, 1998 of the Ministry of Personnel, Public Grievance & Pensions, the Group of the post of AFLEs was revised from Group ‘B’ to Group ‘A’. Therefore, the post of AFLEs in the Language Cadre in the pay scale of Rs.8000-13500/- was re-

classified as Group 'A' post and the Cabinet Secretariat's Order No.11011/4/99-DO-I dated 13th September, 1999 was passed to the same effect. The hierarchy of the Language Cadre for R&AW, Cabinet Secretariat, before the 5th Central Pay Commission and after the 5th Central Pay Commission is tabulated as under:-



12. Later on, the Recruitment Rules in the Language Cadre were amended by notification dated 25th May, 2001 and consequent thereto the post of Under Secretary (Language) was to be filled up (i) 40% by promotion of DFLEs (direct recruits) and (ii) 60% by promotion of AFLEs (promotees) with a residency period of 5 years in both the posts.

13. Before the amendment of the Recruitment Rules of Research and Analysis Wing, the post of Under Secretary (Language) was filled up 50% by promotion from DFLEs and 50% by promotion of AFLEs. The minimum length of service prescribed for eligibility was 5 years in case of DFLEs and 8 years in case of AFLEs. The basis of promotion in the case of AFLEs was seniority-cum-fitness, whereas, in the case of DFLEs it was selection. The rules had also provided that if the post in the quota of one stream remained unfilled due to the non-availability of eligible candidates, the promotion would be affected from other streams. After the re-classification of the post of DFLEs and AFLEs as Group A posts and the amendment of recruitment rules regarding promotion to the next higher post of Under Secretary (Language), the amendment of the rules providing filling up of the post of Under Secretary (Language) in the ratio of 60:40 was challenged in OA No.2452/2004 and OA No.2415/2004, titled as 'O.K.Sharma v. Union of India and Ors.'. The applicants in the said OA had sought quashing of ratio of 60:40 between the AFLEs and DFLEs for promotion to the post of Under

Secretary, on the ground that it was discriminatory and arbitrary. It was also contended that unequal ratio for promotion would affect the chances of the promotion of AFLEs. The Tribunal had repelled the challenge to the ratio of AFLEs to DFLEs of 60:40 by order dated 19.4.2005, holding that the chances of promotion are not conditions of service and therefore it would not be a right and also that no employee has a right to promotion, but instead he has only a right to be considered in accordance with the rules. Relying on 'Dwarka Prasad and Ors. v. Union of India and Ors.' (2003) 6 SCC 535, it was held that the amendment to the rules making ratio for promotion from 50-50 to 60-40 between DFLEs and AFLEs could not be disallowed. The Tribunal had held that merely because both the posts are in the same scale, it does not imply that they must get the same or higher percentage of promotional avenues and that the number of feeder cadre posts can only be one of the factors, but not the tilting factors. The Tribunal in the said OA in para 15 had held as under:-

“15. Identical is the position herein. We find nothing arbitrary or discriminatory tainted with malice that the said amendment should be disallowed. Merely because if both are in the same scale, does not imply that they must get same or higher percentage of promotional avenues. The number of feeder cadre posts can only be one of the factors but not a tilting factor. The respondents can take a decision keeping in view their experience of the nature of working of the persons and thereafter fill up the promotional posts. It is, therefore, basically the administrative department, which decides the said controversy. We find, therefore, that element of bias is totally absent. In fact, the posts of DFLEs are filled up by direct recruitment and the posts of AFLEs are filled up by

promotion. Therefore, at this stage, there is no equality amongst them. If the Department feels that they get higher number of posts keeping in view the lower number in the feeder cadre per se will not become discriminatory. The said contention must be rejected.”

14. The matter of appointment to the upgraded post was considered by the Department of Personnel and Training in its Office Memorandum dated 4th February, 1992. The said OM considered 4 situations regarding appointments to upgraded post including where upgradation of post involved only a higher replacement scale without any larger responsibility/higher qualification or higher eligibility service. In respect of these situations, the said OM stated that for such upgradation involving only higher replacement without any additional responsibility/higher qualification/ higher eligibility service, the suitability of the incumbent is not to be reassessed and such incumbent may be appointed to the post with the higher replacement scale w.e.f. from date of notification by the Government giving effect to the recommendation of similar body.

15. One of the AFLEs, Sh.Vinod Kumar Jain, filed an original application bearing OA No. 1317/2005 before the Tribunal and claimed that since the post had been upgraded from 1.1.1996, therefore, he has a preferential right as per Recruitment Rules for promotion to the post

of Under Secretary (Language) as both the posts of AFLEs and DFLEs are Group 'A' post, having the same pay scale of Rs.8000-13500/-.

16. In the meantime, with the initiation of the Cadre Review exercise in 2004-06, the Cadre Review Committee headed by the Cabinet Secretary considered, among many other things, the issue of merger of both the AFLEs and DFLEs, placed in the same pay scale of Rs. 8000-13,500/- from a functional and organizational point of view and it was decided that in the Language Cadre, only one entry grade of Interpreter through direct recruitment was required to be kept and consequently it was decided to dispense with direct recruitment in DFLE at Junior Time Scale level. Moreover, both the posts of AFLE and DFLE were merged together and re-designated as Senior Interpreter in the pay scale of Rs. 8000-13500/- by notification dated 13th March, 2008, with a provision to fill up newly designated post of Senior Interpreter by 100% promotion from the feeder grade of Interpreter (Group 'B' non gazette post). However, the said notification also provided that the reclassification of the merged posts of AFLEs and DFLEs as Senior Interpreters would be effected in such a manner that it does not have any adverse impact on the career prospects of the existing direct recruits joining the grade of DFLE's on or before the date of the notification, i.e. 13th march, 2008, and that they would continue to maintain their distinct identity till their promotion to the next higher grade of Under Secretary against their

quota. However, no changes were made to the Recruitment Rules for filling up the post of Under Secretary (Language).

17. The original application being OA No.1317/2005, titled as 'Vinod Kumar Jain v. Union of India' was decided by order dated 26th May, 2008 directing the petitioners to reconsider the aspect of merger of AFLEs and DFLEs and to pass an order accordingly. The Tribunal had also taken into consideration the amendment to the rules made on 13th March, 2008 by which the posts of AFLEs and DFLEs were reclassified as Senior Interpreter. The Tribunal had opined that by protecting the interest of the direct recruits in the post of DFLE, the petitioner had discriminated against the AFLEs since even though the grade and pay scale of AFLEs and DFLEs had become same, however, inspite of this their distinct identity was maintained, which prejudiced the employees in the post of AFLE.

18. The Tribunal was of the view that since the higher replacement scale had been accorded to the AFLEs with effect from 1st January, 1996, the distinction between the AFLE and DFLE had been done away with from the said date. The Tribunal further took note of the Presidential order which classified posts in the pay scale of Rs. 8000-13500/- to be Group 'A' posts with effect from 20th April, 1998 which was also given effect to by the DOP&T OM dated 12th June, 1998.

Therefore, according to the Tribunal, the order dated 13th September, 1999 reclassifying the post of AFLE as Group 'A' from 13th September 1999 was contrary to the Presidential order as it should have been with effect from 20th April, 1998.

19. The Tribunal further observed that a cadre having two different posts with an identical pay scale could not be discriminated against by treating them differently. The Tribunal also placed reliance on the decision of a co-ordinate bench dated 19th April, 2007 in OA. No. 1923/2006 titled as 'M. Srinivas Kumar & Anr. vs. Union of India & Ors' holding that the instant matter dealt with a similar controversy in the Cabinet Secretariat for the posts of ARO and RO and therefore it would apply mutatis mutandis to the facts and circumstances of the present case. The Tribunal also observed that undisputedly the respondents had been appointed before the DFLE's to the service, therefore, treating DFLEs as senior and maintaining a separate quota especially in light of the amended rules on 13th March, 2008 and the amalgamation of the two posts of DFLEs and AFLEs on reclassification as Senior Interpreters, would occasion the treatment of equals as unequals and that such differential treatment is without basis as they are holding identical posts. The relevant portion of the Tribunal's reasoning is reproduced as under:

“29. It is trite that when cadre consists of two different posts with having an identical pay scale, it would be

invidious discrimination to treat differently. For that purpose in the exigency of service and keeping in view appointment of both the cadres from the date of their substantially holding the posts and scale, the seniority has to be worked out.

30. Accordingly, a similar controversy when raised in M.Srinivas Kumars case (supra) the decision to finalize the merger and methodology to treat the combined seniority for further consideration for promotion in all four covers the present issue where the principle applied is *mutatis mutandis* applicable to the facts and circumstances of the present case.

31. From the perusal of the record, we have shocked to see that despite a strong view taken by the DOP&T to merge both the cadres and thereafter to lay down a combined seniority for further progression, the aforesaid has not been adhered to without any justification and reason.

32. Applicant undoubtedly was appointed before DFLEs to the service. Accordingly, treating DFLE senior and maintaining a separate quota cannot be sustained in law.

33. The merger now taken place with promulgation of the amended rules on 13.3.2008 though the re-designated posts of AFLE and DFLE on reclassification as Senior Interpreter but an invidious discrimination has been made by protecting the interest of the direct recruits DFLEs, which shall maintain their distinct identity till their promotion to the next grade of Under Secretary. It is trite that when two cadres are amalgamated, there cannot be a distinction in any of the parameters which would amount to treating equals unequally. It appears that the direct recruits have been favoured with without any basis, which has ultimately prejudiced the right of DFLEs for further career progression when they were in all functional requirements are holding the identical post.”

20. Pursuant to the directions of the Tribunal by order dated 26th May, 2008, the petitioners reconsidered the aspect of merger of the two posts in accordance with the rules/ instructions and recruitment rules

on the subject and passed a speaking order dated 2nd September, 2008 in light of the recruitment rules prevalent at the time of filing the OA in the year 2005 and also in view of the fact that the merger of the two posts being affected by notification dated 13th March, 2008 was to apply prospectively and not retrospectively. However, dissatisfied by the order dated 2nd September, 2008, the respondents filed a Contempt Petition No. 357/2008 before the Tribunal. The Tribunal by order dated 19th November 2008 issued the following directions:

“5. It is pertinent to note that the aforesaid decision has not been the subject matter of review before this Tribunal and also no writ petition has been filed against the decision. This implies that the direction issued by the Tribunal attained finality.

6. Consideration in legal parlance is to take positively in consonance with the direction and application of all the relevant factors involved in the issue. Once the court has directed a particular methodology to apply, no other methodology could be used. Any observation which runs counter to the Tribunal's order is not acceptable as while doing so they act as an appellate authority over the findings of the Tribunal. When there is a clear channel provided to the Respondents for appealing against the Tribunal's order before the Hon'ble High Court of Delhi, they cannot now approbate and reprobate simultaneously by not preferring any appeal except by implementing the directions of the Tribunal in its true letter and spirit. No doubt, on reconsideration a different view may be taken by the respondents, but a view, which has already been taken by the Tribunal cannot be disagreed in any manner while complying with the order. We could have asked for the presence of the concerned authority, who passed the order, who did not bestow any respect towards the judiciary, as in the order passed by them. In the interest of justice as the contempt cannot be used to settle the scores or to take any counter action, but to uphold the majesty of law, we afford the Respondents another opportunity to pass a fresh order

keeping in view the observation made by us in the body of the order passed in OA within four weeks from the date of receipt of a copy of this order failing which serious view of the matter shall be taken. For the present we dispose of the CP and discharge notices issued to the Respondents with liberty to the applicant to revive CP at appropriate time, if so advised.”

21. This order of the Tribunal dated 19th November, 2008 was challenged by petitioners in WP(C) No. 7680/2009. This writ petition was disposed of by order dated 21st July, 2009. Respondent no. 1 did not press the contempt petition before the Tribunal, however liberty was given to the respondent to challenge the order dated 2nd September, 2008. Thus, respondent no.1 filed O.A. No 3097/2009 before the Tribunal seeking the quashing of order dated 2nd September, 2008 as well as the footnote of the Notification dated 13th March, 2008, on the ground that it is in complete violation of the directions of the order dated 26th May, 2008 passed by the Tribunal in O.A. No. 1317/2005. Respondent no. 1 also sought that the merger of AFLE and DFLE be given effect to from 1st January, 1996 and consequently to prepare the combined seniority list in lieu of the merger and to further quash the Recruitment Rules amended in 2001 establishing the ratio of 60:40 for promotion to the post of Under Secretary. Respondent no.1 challenged the order dated 2nd September, 2008 on the grounds that he had joined the post of AFLE in the year 1991, 8 years prior to the recruitment of the DFLEs; that the AFLEs should be given the seniority with effect

from 1st January, 1996, the date upgraded pay scale was effected in terms of the judgment of the Supreme Court in the matter of S.K. Kaul and Ors. v. UOI, AIR 1989 SC 1688; that the order dated 13th March, 2008 is not actually a merger of AFLE and DFLE but is instead an illegal protection granted to the DFLE by arbitrarily maintaining the quota of 60:40 ratio and is a ploy to promote DFLEs as against the AFLEs for the post of Under Secretary; that the AFLEs and DFLEs only differ on account of qualifications, while the nature of work, duties and responsibilities, the pay scale as well as the residency period are the same and they also both have been given the Group A status; that DOP&T circular dated 4th February, 1992 which advises merger in case of upgraded scales also supports the claim of respondent no.1 and that the concept of promoting junior DFLEs as against their seniors in AFLE is illegal.

22. The petitioners contested the claims of respondent no.1 contending, inter alia, that the posts of AFLE and DFLE are two different, distinct and independent posts governed by separate recruitment rules. While DFLE post is a direct recruitment post, the AFLE post is a promotional post. Merely because both posts are the feeder posts for the promotional post of Under Secretary does not mean that the respondents can seek parity between the two posts. The method of recruitment and educational qualifications for both the posts

is entirely different. While for recruitment to the post of DFLE, the requisite qualification is post graduate, on the other hand for promotion to the post of AFLE there was no such prescribed minimum educational qualification. Thus, it was contended that the respondents cannot seek merger of two independent posts with retrospective effect. The petitioners also contended that it is a settled position in law that a policy decision taken by the Government cannot be made effective from a retrospective date. It was also urged that the posts of DFLE and AFLE are distinct therefore, the up-gradation of pay scale which was granted to the AFLEs with effect from 1st January, 1996 does not entitle them to the same rank as that of DFLEs. It was also pointed out that the order dated 13th September, 1999 reclassifying the post of AFLEs as a Group 'A' post was a natural corollary to the upgradation of their pay scale, however, it does not mean that AFLEs thereafter, became identical to DFLEs. The petitioners also contended that the reliance placed on the OM dated 4th February, 1992 is misplaced since the present matter does not involve the question of upgradation of posts but instead it is regarding the revision of the pay scale of an existing post and therefore the interpretation given to the said OM is factually incorrect. According to the petitioners, Serial no.1 in the circular of the DOP&T dated 4th February, 1992 is applicable in the present facts and circumstances. It was also submitted that the decision to maintain the distinction of the two posts was primarily to meet the functional

requirements of the Organization and also to ensure that the service conditions of the DFLEs be not made disadvantageous to them and further to retain better talent at the cutting edge level of JTS. However, in lieu of the Cadre Review of the Organization in the period of 2004-2007, the posts of DFLEs were done away and a single promotional post of Senior Interpreter was created. Consequently, it was made a 100% promotional post from the rank of Interpreter with prospective effect.

23. The Tribunal while taking into consideration the pleas and contentions of both the parties restricted itself to the issue of the order dated 26th May, 2008 passed by the Tribunal and the order dated 2nd September, 2008 passed by the petitioners and its validity thereof. By placing reliance on the judgment of Bhikhu Bhai Vithlavhai Patal & Ors. v. State of Gujarat & Anr. 2008(4) SCALE 278, the Tribunal observed that a valid consideration in law pursuant to the directions given by the Tribunal is to think over and facilitate an active application of mind on all the relevant aspects of the matter. On perusing the record, the Tribunal held that despite a strong view taken by the DOP& T to merge the posts of AFLE and DFLE and to thereafter lay down a combined seniority list for further progression, the same was not adhered to without any justification or reason. The Tribunal, after taking note of the order dated 2nd September, 2008, held that while reconsidering the aspect of merger of AFLEs and DFLEs none of the

observations and conclusions arrived at by the Tribunal had been considered in its right legal perspective by the petitioners. Thus the order suffers from serious legal infirmity since in the opinion of the Tribunal, the Joint Secretary, instead of reconsidering the matter, rather assumed the role of the appellate authority over the Tribunal and passed the order in total disregard of its order, without dealing with the issues raised and adjudicated. Therefore, it was held to be not a valid consideration in the eyes of law and consequently the Tribunal directed that the matter be again remanded back to the petitioners with a specific direction to reconsider the aspect of merger of the AFLEs and DFLEs and grant seniority on the merger of both the categories strictly in accordance with the observations of the Tribunal made in OA No. 1317/2005 and pass a speaking order. The relevant portion of the Tribunal's reasoning is as follows:

“9. We are of the considered view that while reconsidering the aspect of merger of AFLES and DFLEs, none of the observations and conclusions arrived at by the Tribunal have been considered in its right legal perspective by the respondents. When reconsideration is done on whims and fancies not adhering to the dicta of the Tribunal, the order suffers from a serious legal infirmity. It appears that the Joint Secretary (Pers.) instead of reconsidering the matter as apt in law rather assumed the role of the appellate authority over the Tribunal and passed the order in total disregard of the Tribunal's order, without dealing with the issues raised and adjudicated, which is no valid consideration in the eyes of law. No doubt, the contempt was withdrawn by the applicants but the contentions taken therein have been ordered by the High Court of Delhi to be raised in the petition and as the legality of the order dated 02.09.2008 has been challenged before us, only on this

issue we have no hesitation to hold that the order cannot be sustained in law.

10. Resultantly, leaving open the merit of the case, we partly allow these O.As quashing the impugned order dated 02.09.2008. We remand the case back to the respondents with a specific direction to meticulously reconsider the aspect of the merger of AFLEs and DFLEs and grant of seniority on merger of both the categories of DFLs and AFLEs, strictly in accordance with the observations made by the Tribunal in O.A 1317/2005 and pass a speaking order within two months from the date of receipt of a copy of the order. We also make it clear that till a fresh order is passed, promotion to the post of Deputy Secretary shall remain on hold. No costs.”

24. It is against this order of the Tribunal that the petitioners have preferred to approach this Court and has invoked its writ jurisdiction. The petitioners have contended, inter alia, that the amended Recruitment Rules of 2001 had not put the respondents/AFLEs in a disadvantageous position. Prior to 2001, the quota for AFLE in the matter of promotion was only 50% which in terms of the amended rules was increased to 60%. It was also contended that the posts of DFLE and AFLE could not be treated at par for various reasons. The post of DFLE was filled up by 100% direct recruitment while the post of AFLE was filled up by 100% promotion. The educational qualification for both the posts were different. Mere change in the classification of the post of AFLE as a Group ‘A’ post and revision of pay scale could not be a ground to treat both of them at par. It is also contended that the Tribunal erred in concluding that a merger of the two posts had been

effected, while in fact a new post of Senior Interpreter has been created and the rights of DFLEs already appointed have been safeguarded. As per the learned counsel for the petitioners, there has been no amalgamation of the posts as observed by the Tribunal. The learned counsel for petitioners further challenged the impugned order on the grounds of delay by contending that while the Recruitment Rules had been amended in the year 2001, it was interfered with by the Tribunal only after the OAs were filed by the respondents in the year 2005.

25. Learned Additional Solicitor General, Mr. A. S. Chandioke, also contended that the respondents had filed a contempt petition against the order dated 2nd September, 2008 passed by the petitioners, being numbered as 357/2008 before the Central Administrative Tribunal, claiming that the order was not in accordance with the order of the Tribunal dated 26th May, 2008, which was disposed of by order dated 19th November, 2008, the relevant portion of which has been reproduced hereinabove. This order dated 19th November, 2008 was thereafter challenged by the petitioners in W.P.(C) No. 7680/2009. Since the respondents had withdrawn the contempt petition, the said writ petition was disposed of by stating that the order passed by the petitioners dated 2nd September, 2008 was in compliance of the directions of the Tribunal in order dated 26th May, 2008. Thus the challenge to the contempt petition was rendered infructuous.

Thereafter, a second O.A. was filed against the order dated 2nd September, 2008 which was disposed of by the impugned order dated 7th July, 2010 by which the Tribunal partly allowed the O.As. and directed the petitioners to reconsider the aspect of merger within two months. The learned counsel contended that once the issue had been dealt with in the first round and it had also been held by the High Court that the petitioners had complied with the order dated 26th May, 2008, then the Tribunal could not sit over the High Court judgment. He also submitted that since the respondents had already withdrawn the contempt petition filed by them and it had also been held by this Court that the order of the Tribunal dated 26th May, 2008 had been complied with by the petitioners then their order dated 2.9.2008 could not be challenged again. Therefore, according to the learned counsel for the petitioners the impugned order of the Tribunal cannot be sustained even on this ground.

26. The respondents have reiterated their stand taken before the Tribunal and contended that the differential treatment of the AFLEs and the DFLEs is without any rationale and is in clear violation of the fundamental rights enshrined in the Indian Constitution and that the Tribunal has rightly directed the petitioners to reconsider the aspect of merger of the AFLEs and the DFLEs in accordance with law. Therefore, according to the respondents, the impugned order does not suffer from

any illegality, infirmity or any such perversity. The respondents have also heavily relied upon the order dated 13th September 1999 as well DOP&T OM dated 4th February, 1992 in order to contend that the AFLE and the DFLE posts were merged and that consequently a common seniority list ought to have been prepared by the petitioners.

27. This Court has heard the learned counsel for the parties in detail and has perused the entire record placed before the Tribunal. It is not disputed that the two posts that were the feeder grades for the promotional post of Under Secretary prior to the Amendment of the Recruitment Rules in the year 2008 dated 13th March, 2008 were the posts of Assistant Foreign Language Examiner (AFLE) and Deputy Foreign Language Examiner (DFLE).

28. To become an AFLE, one had to be promoted from the post of Interpreter while the DFLEs were recruited directly. Initially, the ratio between both the posts, for the purpose of promotion to the post of Under Secretary, was 1:1, i.e. 50% were promoted from the AFLEs and 50% were promoted from the DFLEs. In 2001, the rules had been amended and the said ratio was changed to 3:2, i.e. 60% were to be promoted from the AFLEs and 40% were to be promoted from the DFLEs.

29. The controversy in the present matter arose when the posts of AFLEs and DFLEs were reclassified as Senior Interpreters pursuant to the amendment of the recruitment rules in the year 2008, by which the petitioners ensured that the re-designation of the AFLE and DFLE posts would apply prospectively and ensured that it would not have any adverse effect on the career prospects of the direct recruits, i.e. the DFLEs, and incorporated in the order of amendment dated 13.3.2008 that the merger in the grades of Assistant Foreign Language Examiner and Deputy Foreign Language Examiner and their re-designation as Senior Interpreter will be effected in such a manner that it does not have any adverse impact on career prospects of the existing direct recruits in the grade i.e DFLEs who will continue to maintain their distinct identity till their promotion to the next higher grade of Under Secretary against their quota.

30. The Senior Interpreters are to be appointed by 100% promotion from the feeder grade of Interpreters. However, the respondents challenged the said distinction between the AFLEs and DFLEs on the ground that the said distinction had been done away with in the year 1999 itself pursuant to order dated 13th September 1999 by which the AFLEs were re-classified as Group 'A' being same as the DFLEs, which in turn was passed in view of the order dated 25th January, 1999 by which the higher pay scales of Rs. 8000-275-13500/- was given to the

AFLEs with effect from 1st January 1996 pursuant to the recommendations of the 5th Central Pay Commission. Thus, according to the respondents, since both the posts of AFLE and DFLE are group 'A' posts, having the same pay scale and the same duties and responsibilities, they are identical in nature and the distinction between the two maintained by the petitioners by their order dated 2nd September, 2008 is not only in complete violation of the observations of the Tribunal made in the order dated 26th May, 2008 but is also in violations of the fundamental rights enshrined in the Indian Constitution.

31. The petitioners, however, have contended that the AFLE and DFLE posts were certainly not identical since while the former was a promotional post, the latter was by direct recruitment. The educational qualifications for the post of DFLE are higher than the educational qualifications for the post of AFLE.

32. At this stage, it is appropriate to consider whether, the two posts of AFLE and DFLE were identical or not, so as to ascertain whether the distinction maintained between the two will be permissible as saved in the amended recruitment rules of 2008 and pursuant thereto the order passed by the petitioners dated 2nd September, 2008. Prior to the

recommendations of the 5th Central Pay Commission the difference in the posts of DFLE and AFLE was evident in terms of the mode of recruitment, the pay scales, the requirements for promotion to the next higher posts of Under Secretary as well as the educational qualifications required for the two posts. Pursuant to the recommendations of the 5th Central Pay Commission, the pay scale for the post of AFLE was brought at par with the post of DFLE. The higher pay scale of Rs 8000-13500 was granted to the AFLEs by the OM dated 25th January, 1999 with effect from 1st January, 1996 and the arrears due to them were also given. Thus, the pay scales of AFLE and DFLE became same.

33. By DOP&T order dated 20th April, 1998 it was directed that all the posts should be classified strictly in accordance with the norms prescribed under the notification from the date of the notification. The said notification prescribed that a central civil post carrying a pay or a scale of pay with a maximum of not less than Rs. 13,500 would be classified as Group 'A'. Consequently, the posts of AFLE having the higher pay scale of Rs 8000-13500 was re-classified as a group 'A' post. This was effected by the order dated 13th September 1999. Thus AFLE was re-classified as a Group 'A' post, however, for promotion to the post of Under Secretary, their separate identities were retained and there was any change in their educational qualification for appointment and mode of appointment.

34. The DOP&T order dated 20th April, 1998 and the order dated 13th September 1999, both did not prescribe and contemplate any merger nor did they stipulate any change in the qualifications or conditions of service with regard to duties and responsibilities attached to each of the posts and the mode of entry. It was merely a re-classification on account of the higher pay scales given to AFLE pursuant to the 5th Central Pay Commission and re-grouping pursuant to DOP&T order dated 20.4.1998.

35. Even the amendment made to the recruitment rules in the year 2001 maintained the distinction between DFLE and AFLE as the quota for promotion was changed to 40:60 from 50:50. The said amendment did not contemplate merger of two posts of DFLE and AFLE. However, the residency period of both the posts was made 5 years for promotion to the next post, as prior to 2001 the residency period for AFLEs was 8 years while the residency period for DFLEs was 5 years.

36. Another distinction which was retained in the two posts was about the educational qualifications. Yet another relevant aspect is that despite same pay scale and grouping of posts, no changes were evidently made out in terms of the nature of the responsibilities and

duties of the said posts and they remained as they were earlier, when AFLE was a Group 'B' post.

37. The respondents in the two writ petitions and in their Original Applications before the Tribunal had sought quashing of order dated 2.9.2008 passed by the petitioners pursuant to the order dated 26.5.2008 passed by the Tribunal in O.A No. 1317 of 2005 which was filed by Sh. Vinod Kumar Jain. The respondents had also sought quashing of footnote in the notification dated 13.3.2008 amending the rules which also safeguarded the rights of DFLEs and for quashing the ratio of AFLE & DFLE of 60:40 for promotion to the post of Under Secretary. They had also sought that the merger be held to be from 1.1.1996 when the pay scale equivalent to the pay scale of DFLE was granted to the AFLEs. The respondents also sought preparation of a combined seniority list of AFLEs and DFLEs on the basis of their date of appointment/promotion and to promote the respondents to the posts of Under Secretary and Deputy Secretary on the basis of combined seniority list and not to fill up the vacancies till the combined seniority list is prepared.

38. This is not disputed and cannot be disputed that one of the AFLE, Shri O.K.Sharma, had filed two Original application seeking the relief that the ratio of promotion between AFLE and DFLE should have been

74: 26 and not 60:40 as per the amended rule dated 25.2.2001 and that since he was working as AFLE since 1991, he had become eligible for promotion to the next post of Under Secretary after completion of 8 years of service and five vacancies which had occurred prior to the amendment of rules on 25.2.2001 should be filled according to rules prevalent before that date. The said Original Applications were decided by another Bench of the Tribunal by order dated 19th April, 2005 holding that the amendment fixing the ratio of promotion between AFLEs and DFLEs as 60:40 is valid. In para 15 of the said order the Tribunal had held as under:-

“15. Identical is the position herein. We find nothing arbitrary or discriminatory tainted with malice that the said amendment should be disallowed. Merely because if both are in the same scale, does not imply that they must get same or a higher percentage of promotional avenues. The number of feeder cadre posts can only be one of the factors but not a tilting factor. The respondents can take a decision keeping in view the experience of the nature of working of the persons and thereafter fill up the promotional posts. It is, therefore, basically the administrative department, which decides the said controversy. We find, therefore, that element of bias is totally absent. In fact, the posts of DFLEs are filled up by direct recruitment and the posts of AFLEs are filled up by promotion. Therefore, at this stage, there is no equity amongst them. If the department feels that they get higher number of posts keeping in view the lower number in the feeder cadre per se will not become discriminatory. The said contentions must be rejected.”

39. The Tribunal had thus repelled the contention that the ratio of promotion for AFLEs should have been higher and consequently, implicitly had also rejected the plea that the AFLEs and DFLEs were similar and that there could not be different ratio for promotion to the next post. Upholding the different ratio for promotion was indicative of the fact that the two posts were different and the AFLEs could not be compared with DFLEs for the purpose of promotion.

40. In O.A 1317 of 2005 decided by the Tribunal by order dated 26.5.2008, the respondent no.1 had prayed as under:

“it is therefore, respectfully prayed that the amended Recruitment Rules for the post of Under Secretary in the language cadre may be declared quashed as illegal.

The respondents may be directed to not fill up the vacant post of under Secretary in the language Cadre as per the existing RRS especially when the year wise vacancies have not been identified separately and

Respondents may be directed to merge the posts of DFLE and AFLE, they may further be directed to hasten the process of merger.

Having decided to merge the AFLE and DFLE, the respondent Department may further be directed to prepare a combined seniority list of AFLE and DFLE on the basis of their date of promotion/appointment and to make promotion in accordance with this combined seniority list.

Any other relief which this Hon'ble Court deems fit and proper may also be granted to the applicant.”

41. The application of the respondent no.1 was decided by order dated 26.5.2008 with directions to petitioners to reconsider the aspect of merger of AFLE and DFLE strictly in accordance with law and the petitioners were directed to hold the promotion to the post of Under Secretary. The Tribunal surprisingly did not consider the decision of coordinate bench in the case of O.K.Sharma (supra) appropriately holding that the amendment fixing the ratio of promotion between AFLEs and DFLEs as 60:40 to be valid. In O.K.Sharma (supra) the distinction between AFLE and DFLE had been upheld but in Vinod Kumar (supra) by order dated 26.5.2008 it was held that the distinction between the AFLE and DFLE has been done away with. If the Bench which passed the order dated 26.5.2008 had to differ with the order passed by another co-ordinate Bench dated 19.4.2005, the bench should have referred the matter to a larger bench. In any case, if the said bench had given a firm and binding finding regarding merger of the two posts since 1.1.1996, then the matter should not have been remanded to the petitioners to reconsider the aspect of merger of AFLE and DFLE strictly in accordance with law. If the Tribunal had reached the conclusions that the two posts stood merged for whatsoever reasons, in that case, the Tribunal should have given directions to the petitioners to carry out the consequential effects of alleged merger. The Tribunal could not have passed an order directing the petitioners to pass an order in accordance with law about the merger of posts of DFLE

and AFLE from a particular date as it was for the Tribunal to pass an unambiguous order.

42. The petitioners, therefore, reconsidered the matter about the merger of AFLE and DFLE in accordance with law, as was directed by the Tribunal and passed the order dated 2nd September, 2008. The petitioners had held as under:-

“13. As already discussed in foregoing paragraphs, the mere fact of granting a higher pay scale or a mere fact of being granted a higher classified status i.e Group A, in this case, would not, ipso facto, have the effect of amending the statutory recruitment rules. The statutory recruitment rules, in 2005, clearly distinguished between these two separate streams of AFLFEs and DFLEs, having different qualification and having different modes of entry. Though, due to operationalisation of the recommendation of the fifth pay commission, both AFLEs and DFLEs happened to be placed in the same scale of Rs. 8000-13500 as well as they happen to be placed in the same Group 'A'. However, the statutory recruitment rules, do not, at all mentioned either the pay scale or Group 'A' status of feeder streams of the post of US (Language). This point becomes all the more clear, when we find that even when these recruitment rules were amended in 2001, the distinctiveness of these two streams were kept intact. It cannot be a case that just because a notification has been issued granting a higher pay scale to promotee stream AFLEs, the distinctiveness of these two separate feeder streams should get obliterated, so as to treat all AFLEs as DFLEs.

14. The CAT has desired that we should reconsider the aspect of merger of AFLEs and DFLEs and its consequences. It is clear that as per the law, in vogue, in 2005, there was no merger of AFLE and DFLE, except the

fact that these two streams happen to be granted the same classified status and same pay scales. Hence, in the year 2005, no merger has taken place.

In fact, the merger has only taken place w.e.f 13.3.2008 with the introduction of the posts of Senior Interpreter in the pay scale of Rs.8000-13500. Due safeguards, while effecting merger, have been kept to protect the promotional prospects of both the streams, as per their promotional entitlements, as available to them in pre-13.3.2008 Statutory Rules.

15. The CAT has made a observation 'It is trite that when two cadres are amalgamated there cannot be a distinction in any of the parameters which would amount to treating equals unequally. It appears that the direct recruits have been favoured with without any basis, which has ultimately prejudiced the right of DFLE (sic) for further career progression when they were in all functional requirements are holding the identical post.'

In this connection it is observed that the post of AFLEs and DFLEs are not completely identical posts. As already discussed in the foregoing paragraphs, the post of AFLEs are filled up by the promotee officers with no minimum qualification laid down whereas the post of DFLEs have a minimum qualification of post-graduation. Though, due to operationalisation of fifth pay commission on the condition, they happen to be placed in the same scale and were given same classified status of Group 'A'. The CAT has taken a view that both these carders have been amalgamated. In our view, no amalgamation has taken place. The revised recruitment rules keep their distinct identity for their upward promotion. In any case, this issue was not before the CAT for adjudication in the OA, because the revised statutory recruitment rules (2008) could have not been challenged in the OA (filed in 2005)

As far as the question of treating equals unequally is concerned, it is submitted that in the eyes of law both are not equal in all respects, as already pointed out in the aforesaid paras. The rights of directly recruited DFLEs have been correctly protected in the order dated 13.3.2008

because it is settled law that conditions of service of a particular set of employees cannot be changed to their detriment, without any basis and without affording them opportunity. These DFLEs, at the time of recruitment were having a distinct quota of 50% (reduced to 40% later on) for their promotion to the higher post of US (Language). The classification between directly recruited DFLEs and the promotee AFLEs on a reasonable basis with clear objective. The objective is to ensure that employees with higher qualification, and who have been inducted into Government service after stringent selection, get better promotional prospects."

43. Against the said order of the petitioners dated 2.9.2008, a contempt petition was filed which was, however, dismissed by the Tribunal by order dated 19.11.2008 directing the petitioners to pass another fresh order. This order of the Tribunal was challenged by the petitioners in W.P (C) 7680 of 2009 titled as Union of India & ors. Vs Vinod Kumar Jain which writ petition was decided by order dated 21.7.2009. While passing the said order this Court had held that while passing the order dated 2.8.2008, the petitioners had complied with the order dated 26.5.2008 of the Tribunal. Consequently, it was held that the challenge to the order dated 2.9.2008 has been rendered infructuous. However, the liberty was granted to the respondents to challenge the said order before the Tribunal. This order was not challenged by the respondents.

44. The Tribunal decided the petitions by order dated 7th July, 2010. While dealing with the petitions filed pursuant to the liberty granted by the High Court, the Tribunal has held in para 8 of the order dated 7th July, 2010 that when the judicial fora directs consideration, more particularly making observations in the backdrop, these considerations, observations and conclusions arrived at are not to be treated otiose or non-existent. According to the Tribunal, it had ruled and observed in the order dated 26 May, 2008 that there has been a merger of both categories of AFLEs and DFLEs. Reliance has also been placed on the view taken by the DOP&T to merge both the cadres. According to the Tribunal, when cadre consists of two different posts having an identical pay scale, to treat them differently is violative of Article 14 of the Constitution of India. The Tribunal has further held that after a categorical finding as to amalgamation of cadre by the amended rules of 2008, distinguishing between the direct recruits (DFLE) and promotes (AFLE) amounted to treating equals unequally. In paras 9 and 10 of the impugned order which are reproduced hereinabove, though the Tribunal has held that the order of the petitioners suffers from a serious legal infirmity, yet has not elaborated or spelled the legal infirmity cogently.

45. Apparently the Tribunal has misapplied the settled law by the Courts in respect of merger. The learned counsel for the respondents

have not been able to explain satisfactorily as to how the cadres will be merged on the ground that the two posts have similar pay scales. In AIR 1963 SC 913, *The State of Punjab Vs Joginder Singh* relied on by the petitioners, the District Board and Municipal Board teachers were taken over by the Punjab Government and were given scales of pay as were applicable to teachers in Government employment. However, service rules differentiated them in the matter of promotion. The Supreme Court had held that the State can constitute two services consisting of employees doing the same work but with different scales of pay or subject to different conditions of service and constitution of such service is not violative of Article 14 of the Constitution of India. The plea that Article 14 of the Constitution of India requires that equal work must receive equal pay or that if there is equality in pay and work, there have to be equal conditions of service, was held to be untenable.

46. The plea of merger has been dealt with by the Courts in numerous judgments, some of which are as under. In *State of Maharashtra and Anr. v. Chandrakant Anant Kulkarni & Ors.* MANU/SC/0446/1981 while considering the question of integration of government servants allotted to the services of the new States when the different States of India were re-organised, the Supreme Court cited with approval the principles which had been formulated for effecting integration of services of different States. These principles

are: In the matter of equation of posts, (1) where there were regularly constituted similar cadres in the different integrating units, the cadres will ordinarily be integrated on that basis but (2) where there were no such similar cadres, the following factors were taken into consideration in determining the equation of posts:-

- (a) Nature and duties of a post;
- (b) Powers exercised by the officers holding a post the extent of territorial or other charge held or responsibilities discharged;
- (c) The minimum qualifications, if any, prescribed for recruitment to the post and;
- (d) The salary of the post.

The Apex Court further observed that it is not open to the Court to consider whether the equation of posts made by the Central Government is right or wrong. This was a matter exclusively within the province of the Central Government. Perhaps the only question the Court can enquire into is whether the four principles cited above had been properly taken into account. This is the narrow and limited field within which the supervisory jurisdiction of the Court can operate. The Apex Court subsequently relied on this ratio in its subsequent judgment in the case of Union of India & ors. Vs. S.L.Dutta & anr. MANU/SC/0087/1991 also.

47. Since the AFLE and DFLE posts in the present matter are clearly not equatable posts except in salary and the Group, till by amendment in 2008 another equivalent posts of Senior Interpreter was created prospectively and the rights of DFLEs had been protected, therefore, their merger could not have been effected retrospectively merely on the basis of opinion expressed by the Tribunal without cogent reasons consonant with acceptable legal grounds. Instead the contention of the petitioners does seem rational that they had done away with the DFLE post itself and re-designated the posts of AFLE as Senior Interpreter, which is why the interests of already existing DFLEs were protected and the amendment of 2008 was made applicable prospectively. The petitioners have acted in a bonafide manner. The Tribunal also failed to appreciate that the Courts do not have the power to direct a merger. In *Assn. for the Officers of the W.B. Audit and Accounts Service v. W.B. Audit and Accounts Service Assn.*, 1995 Supp (4) SCC 44, at page 46 the Supreme Court had held as under :

1. The Audit and Accounts Department of the State of West Bengal consists of three services, namely, the West Bengal Higher Audit and Accounts Service (Higher Service), the West Bengal Audit and Accounts Service (State Service) and the West Bengal Junior Audit and Accounts Service (Junior Service). The members of the Junior Service sought a mandamus from the Calcutta High Court to the effect that the Junior Service and the State Service be merged and reconstituted as single service. A learned Single Judge of the High Court allowed the writ petition and directed the merger of the two services with effect from 27-3-1971. The learned Judge further directed that after the unification of the two services, the seniority of the unified cadre be fixed with effect from 27-3-1971. Two appeals, one by the State

of West Bengal and the other by the Association of the officers were filed against the judgment of the learned Single Judge. A Division Bench of the High Court dismissed both the appeals and upheld the judgment of the learned Single Judge. These appeals by way of special leave are against the judgments of the High Court.

3. During the pendency of the appeal the Division Bench directed the State of West Bengal to file an affidavit clarifying its position. Secretary to Government, Finance Department, filed an affidavit dated 7-11-1990 wherein he stated that the State Government had fully examined the question of merger of the two services and had taken a conscious decision to the effect that such merger was not in the interest of the administration. We have been taken through the affidavit wherein elaborate reasons have been given for rejecting the demand for merger of the two services. It is not open to the High Court to go into the merits of the reasoning of the State Government. After going through the reasons given in the affidavit we are of the view that each one of the reasons given therein is cogent and the High Court was wholly unjustified in not taking the same into consideration. The Division Bench became wholly oblivious of the affidavit filed by the Finance Secretary and did not even notice the same in its judgment.

5. This Court has repeatedly held **that merger of more than one cadre or division of one cadre into two or more cadres is an executive act and is entirely within the administrative sphere of the State Government.** This Court in *Reserve Bank of India v. N.C. Paliwal* held as under: (SCR Headnote p. 379)

“The integration of different cadres into one cadre cannot be said to involve any violation of the equality clause. It is entirely a matter for the State to decide whether to have several different cadres or one integrated cadre in its services. **That is a matter of policy which does not attract the applicability of the equality clause.** The integration of non-clerical with clerical service sought to be effectuated by the Combined Seniority Scheme cannot, in the circumstances, be assailed as violative of the principle of quality.”

In *Inder Singh v. Vyas Muni Mishra*, the Supreme Court Court had again observed as under: (SCR Headnote p. 973)

“The High Court exceeded its jurisdiction in directing the merger of the posts of Ganna Gram Sewaks and Cane Supervisors.

The merger or bifurcation of a cadre is an executive act. It is for the State to consider whether two groups of persons working under two distinct posts perform the same kind of duties or not, and whether in implementing the Directive Principles, as contained in Article 39(d) of the Constitution, it is necessary to merge the two posts into one cadre post.”

48. In *Union of India v. Arun Jyoti Kundu*, (2007) 7 SCC 472, at page 481 the Supreme Court had again held that Central Administrative Tribunal or the High Court could not direct the merger of any cadre as it is a policy decision for the Government to take. So long as it is not done, it is not open to the Tribunal or the Court to issue directions in this regard. In the instant case, the Typists working in the Railways claimed merger of their cadre with the cadre of clerks consequent to grant of higher pay scale, which was denied by the Apex Court. The Supreme Court had held as under:

“20. When a concession was being extended as distinct from implementing a specific recommendation of the Pay Commission with reference to a particular point of time, it is open to the Government to provide that the benefit it proposes to give, would be available only from a notified date. As this Court has observed, neither the Central Administrative Tribunal nor the High Court, can direct the merger of any cadre. That is a policy decision for the

Government to take. So long as it is not done, it is not open to the Tribunal or the Court to issue directions in that regard and to follow it up with what are thought to be consequential directions.

21. We may in this context notice that the Central Administrative Tribunal, Principal Bench, Delhi dealing with a similar claim took up the position on the basis of decisions of this Court, that the Tribunal would have no jurisdiction to issue the directions sought for by the employees. It is submitted that the correctness of the said decision has been questioned in the High Court at Delhi. Therefore, it is not necessary for us to make any observation regarding that decision. But we note that, that Tribunal declined jurisdiction in similar circumstances.”

49. The petitioners had maintained the distinction between AFLEs and DFLEs till 2008 when the said posts were re-designated as senior interpreters prospectively. While doing so, the petitioners ensured that it would not have any adverse effect on the career prospects of the direct recruits, i.e the DFLEs. It was categorically incorporated in the order of amendment dated 13th March, 2008 that the merger in the grades of Assistant Foreign Language Examiner and Deputy Foreign Language Examiner and their re-designation as Senior Interpreter will be effected in such a manner that it does not have any adverse impact on career prospects of the existing direct recruits in the grade i.e DFLEs who will continue to maintain their distinct identity till their promotion to the next higher grade of Under Secretary against their quota. The learned counsel for the respondents have not been able to satisfy this court to strike down the footnote of the said amendment safeguarding

the career prospects of DFLEs. The amendment in the rules in 2008 which was prospective in nature cannot be made retrospective effective from 1st January, 1996 when the similar pay was recommended by the fifth pay commission and later on when the post was also re-designated as Group 'A' posts. It will be pertinent to notice that the other differences in the educational qualification, without having larger responsibilities and different ratio for promotion had persisted till the amendment was made in 2008. Retrospectivity is an exception and the rules framed operate prospectively. Even where the rules are framed and applied retrospectively, it cannot discriminate or violate the vested rights of the persons. With this objective the footnote was incorporated in the amendment dated 13th March, 2008 so as to safeguard the vested rights of DFLEs. The observation of the tribunal that safeguarding the vested rights of DFLEs had resulted in discrimination is factually not sustainable nor it is legally sustainable nor the learned counsel for the respondents have been able to make out any legally acceptable ground to strike down the said footnote. In *K. Narayanan v. State of Karnataka, 1994 Supp (1) SCC 44*, at page 55 the Supreme Court had considered the retrospectivity as an exception in the following manner :_

7. Rules operate prospectively. Retrospectivity is an exception. Even where the statute permits framing of rule with retrospective effect the exercise of power must not operate discriminately or in violation of any constitutional right so as to affect vested right. The rule-making authority should not be permitted normally to act in the past. The impugned rule made in 1985 permitting appointment by transfer and making it operative from 1976 subject to

availability of vacancy in effect results in appointing a Junior Engineer in 1986 with effect from 1976. Retrospectivity of the rules is a camouflage for appointment of Junior Engineers from a back date. In our opinion the rule operates viciously against all those Assistant Engineers who were appointed between 1976 to 1985. In *Ex-Capt. K.C. Arora v. State of Haryana*¹⁰ and *P.D. Aggarwal v. State of U.P.*¹¹ it was held by this Court that the President or Governor cannot make such retrospective rules under Article 309 of the Constitution as contravene Articles 14, 16 or 311 and affect vested right of an employee. Even in *B.S. Yadav v. State of Haryana* where the power to frame rules retrospectively was upheld it was observed: (SCC p. 557, para 76)

“Since the Governor exercises a legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case.”

As seen earlier there is no nexus between framing a rule permitting appointment by transfer and making it retrospective with effect from 1976. Appointing a person to a higher post in a different cadre in which he has never worked is violative of constitutional guarantee of those who are working in the cadre. It is against basic principle of recruitment to any service. Even in *Mohammad Shujat Ali*¹ where the Constitution Bench while reiterating that distinction in qualification was valid criterion for determining eligibility for promotion except where both held the same post and perform same duty did not strike down the rules as the differentiation in same class of persons was not brought about for the first time but existed from before and the two were treated as distinct and separate class. The retrospective operation of the impugned rule attempts to disturb a system which has been existing for more than twenty years. And that too without any rationale. Absence of nexus apart no rule can be made retrospectively to operate unjustly and unfairly against other (*sic*). In our

opinion the retrospective operation of the rule with effect from January 1, 1976 is discriminatory and violative of Articles 14 and 16.

50. In (1996) 7 SCC 191, State of West Bengal Vs Subal Chandra Das & ors, relied on by the respondents, post of Moharrir, constituting feeder post for promotion to the post of LDC, was re-designated as LDC and was granted the same pay scale as admissible to LDCs. In such circumstances it was held that there emerged only one cadre and therefore, the claim of directly recruited LDCs for a pay scale higher than that of LDCs who were promoted, who were earlier holding a lower-cost of Moharrir was held to be unjustified. The case relied on by the respondents is apparently distinguishable. The pay scale of AFLE and DFLE after the recommendation of fifth pay commission is the same. The ratio of the said case in the facts and circumstances does not advance and support the plea of the respondents.

51. It is no more res integra that the ratio of any decision must be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It must be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of

a decision. The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances in two cases. The Supreme Court in Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr. (AIR 2004 SC 778) had held that a decision cannot be relied on without considering the factual situation. In the judgment the Supreme Court had observed:-

“Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.”

52. The other precedent relied on by the respondents, AIR 1984 SC 1595, Sh. O.P.Singla & Anr. Vs Sh. Sadhu Ram & Ors. also does not support the pleas and contentions of the respondents. It was held in this case that whenever the rules provide for recruitment to a service from different sources, there is no inherent infirmity in prescribing a quota for appointment of persons from those sources and in working out the rule of quota by rotating the vacancies as between them in a stated proportion. It was further held that Rule (8) 2 of Delhi Higher

Judicial Service Rules, 1970 could not be held to be unconstitutional merely because, it reserved one third of the vacancies in the service for direct recruits and provided that the first available vacancy in the service will be filled in by a direct recruit, the next two by promotes and so on.

53. The learned counsel for the respondents also relied on the decision of the Supreme Court in *S.L. Kaul & Ors. v. Secretary to the Govt. of India, Ministry of Information and Broadcasting, New Delhi and Ors.*, AIR 1989 SC 1688. The precedent relied on by the respondents is apparently distinguishable since it dealt with fixing inter se seniority on merger. However, in case of AFLEs and DFLEs there had not been any merger in 1.1.1996 or thereafter when the AFLEs were placed in Group 'A' post. The respondents cannot rely on the ratio of the said case to contend that there would be merger if the pay scale and group of the posts is the same though the education qualification for recruitment have remained different and quota for further promotion persisted and had even been upheld by the Tribunal in another case filed by one of the AFLE.

54. The learned counsel for the respondents have also placed reliance on Office Memorandum dated 4th February, 1992 to contend that the posts of AFLEs merged with DFLEs when the post of AFLE was grouped

as Group 'A' post on account of increase of their pay scale equivalent to the pay scale of DFLE, though the other distinction between the two had persisted till amendment on 13.3.2008. The office Memorandum dated 4.2.1992 is as under:

“ NO. 22011/10/84-Estt,(D)

Government of India
Ministry of Personnel, PG and Pensions
(Department of Personnel & Training)
New Delhi, the 4th February, 1992

OFFICE MEMORANDUM

Subject: Revision of pay scale/upgradation of the post – date of regular appointment of the incumbents to the upgraded post.

The undersigned is directed to say that in the event of revision of pay scales or upgradation of posts, the question as to what criteria should be adopted in assessing the suitability of the incumbents of the post as well as the date of appointment to the upgraded posts has been under consideration in this department. In the matter of appointments to the upgraded posts, the following for situations can be expected: –

- i. Upgradation of posts involve only a higher replacement scale without any larger responsibilities/higher qualification or a higher eligibility service;
- ii. Upgradation involves only higher replacement scale without any higher responsibility but the officers concerned have to fulfill the higher eligibility service;
- iii. The upgradation of the posts involve higher responsibility or higher qualifications or higher eligibility service; and

iv. Upgradation involves change in group but without higher responsibility or higher qualification (or higher eligibility service).

2. The following criteria may be adopted in assessing the suitability of the incumbents of the post/deciding the date of appointment to upgraded posts.

1. Where the upgradation involves only a higher replacement scale without any additional responsibility/higher qualification/higher eligibility service, the suitability of the incumbents need not be assessed and they may be appointed to the post with the higher replacement scale with effect from the date notified by the Government, giving effect to the recommendations of the pay commission or similar bodies etc.

2. Where the upgradation involves a higher responsibilities or higher qualifications but with a higher eligibility service, the incumbents assessed for their suitability but it should be ensured that they have completed the requisite qualifying service for appointments to the upgraded post. In case they had completed the qualifying service on or before the date notified by the government, they may be appointed to the upgraded post from that date. In the case of others who fulfil the qualifying service on a later date, they should be appointed to the upgraded post from the date on which they complete the qualifying service. This would be subject to the condition that irrespective of the date of appointment, the original seniority of the incumbent in the grade prior to upgradation will be maintained for appointment to the upgraded post.

3. If the upgradation involves higher responsibility or higher qualification and higher eligibility service, the suitability of the incumbents has to be assessed and if found suitable, they will be appointed to the upgraded post prospectively i.e not earlier than the

date of UPSC's advice letter for if the assessment is made by the departments themselves, the date of assessment.

4. If the upgradation involves change in the group, but there is no higher responsibility or a higher qualification or (higher eligibility service) the suitability of the incumbents has to be assessed and if found suitable, they will be appointed to the upgraded post notified by the Government.

3. These instructions may please be brought to the notice of all concerned for guidance and compliance.

(Y.G.Parande)
Director”

55. There is no cogent reason to hold on the basis of the said Office Memorandum that the posts of AFLE merged with DFLE when the AFLEs were placed in `Group `A` on account of increase of their pay scale though they were not given larger responsibilities or eligibility service or higher qualification prescribed for them remain different from DFLE. The said Office Memorandum only contemplates that the suitability of such incumbents need not be assessed and they can be appointed to the post with higher replacement scale with effect from the date notified by the Government, giving effect to the recommendations of the pay commission or similar bodies etc. On the basis of the said office memorandum, therefore, it cannot be held that the post of AFLE got merged with DFLE with effect from 1.1.1996 nor can the respondents claim that there should be a combined seniority list on the

basis of respondents' appointment/promotion in the facts and circumstances.

56. The respondents have also prayed for directions to the petitioners for placing on record all original DOPT notes and recommendation including notes dated 1.10.2002; 9.4.2002, 11.4.2002, 10.10.2002 and 1.7.2003 by an interim application on the ground that DOPT had given directions to merge both the posts. This is not disputed that by the amendment dated 13.3.2008 post of senior interpreter has been created and merger of AFLE and DFLE was effected. Even if notes of DOPT or any other material will show that the steps were initiated for merger from earlier dates, the amendment cannot be held to be retrospective from such dates on which recommendation for merger were made by DOPT or the Department of the petitioners. There is no rule and regulation that the amendment to rules would relate back to the date when the proposal of amendment is initiated or recommended. The plea of the respondents is not sustainable in the facts and circumstances and in law and consequently the petitioners are not liable for directions to produce the DOPT notes as has been demanded by the respondents in CM No. 273/2011 in W.P (C) No. 8503/2011 and the said application is liable to be dismissed.

57. This Court does not find any serious legal infirmity in the order dated 2nd September, 2008 passed by the petitioners nor there is any legally sustainable ground to quash the said order. Therefore, in the facts and circumstances and for the foregoing reasons, the impugned order dated 7th July, 2010 passed by the Central Administrative Tribunal in O.A no. 3663 of 2009 titled as Prachi Nigam & Ors Vs Union of India & Ors and in O.A No. 3907 of 2009 titled as Vinod Kumar Jain Vs Union of India & Ors. is set aside and the original applications of the respondents are dismissed and the above noted writ petitions are allowed. The observation of the Tribunal that the two posts of AFLE and DFLE were merged w.e.f 1.1.1996 is quashed and the direction of the Tribunal to the petitioners to reconsider and decide about the merger of posts of AFLEs and DFLEs and grant of seniority on merger to both categories of DFLEs and AFLEs is consequently set aside. Since these posts could not be merged retrospectively, in the present facts and circumstances and for the foregoing reasons, there cannot be a common seniority list of AFLEs and DFLEs nor the respondents, AFLEs, are entitled for promotion to higher posts on the basis of alleged combined seniority list of AFLEs and DFLEs. The direction of the Tribunal to hold on the promotion to the higher posts till reconsideration of merger of posts in view of observation made by the Tribunal in the impugned orders is also set aside and the petitioners shall be entitled to promote the concerned employees

according to rules. Status Quo order dated 21.12.2010 passed in CM No. 21770 of 2010 is vacated and the application is dismissed. The application of the respondents, being CM 273 OF 2011 in WP(C) 8503 of 2010, is also dismissed. With these directions the writ petitions are allowed, however, parties are left to bear their own costs.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

April 18, 2012

‘vk’