

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

Judgment Reserved on: August 07, 2013

% *Judgment Delivered on: August 27, 2013*

+ **W.P.(C) 4394/2008**

SUDHIR KUMAR ATREY Petitioner
Represented by: Mr.M.K.Bhardwaj, Advocate

versus

UOI & ORS. Respondents
Represented by: Mr.Vinay Kr.Garg, Advocate with
Ms.Namrta Singh, Mr.Amit
Srivastava, Advocates for R-3 & 4

W.P.(C) 5915/2008

SURESH KUMAR YADAV Petitioner
Represented by: Mr.Amarjeet Singh, Advocate

versus

U.O.I & ORS Respondents
Represented by: Mr.Vinay Kr.Garg, Advocate with
Ms.Namrta Singh, Mr.Amit
Srivastava, Advocates for R-3 & 4

W.P.(C) 6237/2012

SURESH CHAND SHARMA AND ORS Petitioners
Represented by: Mr.A.K.Behera, Advocate.

versus

UNION OF INDIA AND ORS Respondents
Represented by: Mr.Ravinder Agarwal, Advocate for
R-1 to 4

WP(C) 894/2013

GOVIND GOPAL & ANR. Petitioners
Represented by: Mr.Vinay Kr.Garg, Advocate with
Ms.Namrta Singh, Mr.Amit
Srivastava, Advocates

versus

U.O.I & ORS Respondents
Represented by: Mr.Amrit Pal Singh, Advocate with
Mr.M.P.Singh, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V. KAMESWAR RAO

PRADEEP NANDRAJOG, J.

1. Headed by the Engineer-in-Chief, since its inception, the Military Engineering Service, for administrative purposes was bifurcated into five commands being, the Eastern, Western, Northern, Southern and the Central command with an officer of the rank of Chief Engineer being the administrative head and thus the controller of each command. There existed a separate cadre of Superintendents for buildings and roads and a separate cadre for electrical and mechanical equipments having the posts Superintendent (B/R) Grade II and Grade I as also Superintendent (E/M) Grade II and Grade I. These posts were governed by the Military Engineering Service (Non-Industrial Class III & IV posts) Rules, 1971.
2. For reasons unknown, in the year 1983, a separate cadre of Surveyor Assistants in Grade II and Grade I was created to make appointments of

persons with engineering background pertaining to the works of buildings and roads and thus with effect from the year 1983 their came into existence a separate cadre of Surveyors Assistant Grade II and Grade I; the cadre of Superintendent (B/R) Grade II and Grade I being retained. The entry was at Grade II level and the essential educational qualification for both cadres was a degree in Civil Engineering. Likewise there existed a separate cadre of Superintendent (E/M) Grade II and Grade I.

3. The posts of Surveyor Assistant Grade II were later on re-designated as Junior Engineer (QS&C) and those of Superintendent (B/R) Grade II were re-designated as Junior Engineer (Civil). The post of Superintendent (E/M) Grade II were re-designated as Junior Engineer (E/M).

4. It is in the aforesaid backdrop that we need to transpose ourselves to the year 1983, for the reason the origin of the dispute in W.P.(C) No.4394/2008, W.P.(C) No.5915/2008 and W.P.(C) No.6237/2012 takes us back to the said year.

5. There was a projected requirement of a large number of Civil Engineers and Electrical and Mechanical Engineers to man the posts of Superintendents (B/R) Grade II and Superintendents (E/M) Grade II and further factoring promotions from Grade II to Grade I, the Office of the Engineer-in-chief, Military Engineering Service, carried out an exercise to work out the likely posts which had to be filled up in the near future of Superintendent (B/R) Grade II and Superintendent (E/M) Grade II.

6. On December 09, 1982 a letter was sent by the Engineer-in-Chief to the Chief Engineers of the five commands intimating as under:-

*“PLANNING OF RECRUITMENT OF PERSONNEL IN THE
GRADE OF SUPDT B/R AND SUPDT E/M GDE II*”

As a result of the recent promotions of Supdt B/R and Supdt E/M Gde II to Supdt Gde I and keeping in view the likely increase in the establishment during the next year it is expected that nearly 700 to 1000 Supdt B/R and E/M Gde-II will have to be recruited to make good the deficiencies in these categories. Command wise break down of the approximate requirement of personnel is estimated as under:-

<i>Command</i>	<i>Approximate requirement of Superintendent</i>	
	<i>B/R Gde II</i>	<i>E/M Gde II</i>
<i>Southern Command</i>	<i>250</i>	<i>60</i>
<i>HQ Eastern Command</i>	<i>50</i>	<i>25</i>
<i>HQ Western Command</i>	<i>280</i>	<i>20</i>
<i>HQ Central Command</i>	<i>160</i>	<i>50</i>
<i>HQ Northern Command</i>	<i>60</i>	<i>15</i>
<i>Total</i>	<i>800</i>	<i>170</i>

2. In order to meet the requirement on the ground, it is essential to plan the recruitment action well in advance. Please therefore, advised the CE Zones to probe all State Govt/Central Govt employment exchanges and ascertain availability of suitable candidates (Diploma holders) for appointment to the above posts. Please also cause letters to be issued by employment exchange to various diploma courses institutions on openings available.

3. Board of officers with presiding officers not below the rank of Lt.Col/SE will be convened by CE Command to interview and select suitable candidates to be sponsored by employment exchanges.

4. In order to reduce the posting of personnel from one state to another to the barest minimum. It will be helpful if the recruitment is made from the concerned region for filling up the vacancies existing/likely to occur in that reasons.

5. *The result of the communication made to various employment exchanges as per para 2 above may be intimated to this HQ by 10 Mar 83.*

6. *Please acknowledge.”*

7. From a perusal of the letter dated December 09, 1982, it is apparent that the number of vacancies listed are not definite, for the reason the expression used in the letter is ‘*approximate requirement of personnel is estimated.*’

8. Since the four writ petitions concern the cadre of buildings and roads i.e. B/R, suffice would it be to highlight that in the five commands, 800 posts were the approximate requirement; with the allocation being as indicated in the letter in each command.

9. The letter brings out a phenomenon which may be difficult to envisage today; lack of qualified Civil Engineers in the country as of the year 1982 and this is evidenced from the fact that the letter advised the Chief Engineers to probe all State Governments and Central Government Employment Exchanges to ascertain the availability of suitable candidates and additionally to send information of the proposed recruitment to institutions offering diploma courses in Engineering.

10. As noted hereinabove, in the year 1983 a decision was taken to have a separate stream/cadre of Surveyors vis-a-vis Superintendent (B/R) and thus the decision pertaining to the posts of Superintendent (B/R) conveyed vide letter dated December 09, 1982 was operated, as a matter of fact, by calling upon the empanelled candidates, having a degree or a diploma in civil engineering, to chose whether they opted to join as a Surveyor or a

Superintendent and depending upon the option exercised the appointment was made.

11. Each command completed the selection process and drew up the select list as per a merit position. Pertaining to the Western command, a select list was prepared, and the position of the number of empanelled candidates is a little fussy; in any case learned counsel for the parties conceded that the select list did not reach the figure of 280, which was the projected approximate requirement in the Western command. It is also not in dispute that this select list which was prepared in the year 1983 was given approval of on June 29, 1983, and only 53 empanelled candidates joined : 24 as Superintendent (B/R) Grade II and 29 as Surveyor Assistant Grade II.

12. We now enter into an area of a factual controversy between the parties.

13. On January 03, 1984, a circular, under the caption 'Economy in non-plan expenditure of Government', was issued by the Ministry of Finance, Department of Expenditure, Government of India, notifying to all Ministries that as a result of economic measures taken by the Government of India to tide over a financial crisis wherever action was not taken to fill up existing non-operational vacancies the same would lapse. On January 07, 1986 the ban imposed vide circular dated January 03, 1984 was lifted by the Central Government and in respect of which we find that on December 04, 1986 the Engineer-in-Chief issued a letter to all the commands that since the ban was revoked by the Government, the five commands under him should proceed to fill up vacant posts (of all categories) under the five commands. Based thereon, in the Western command, undisputedly 20 appointments were effected in the year 1987 and 1988 from out of the panel prepared in the year

1983 for the posts of Superintendent (B/R) Grade II and in the same years i.e. 1987 and 1988 few appointments were made to the post of Surveyor Assistant Grade II from the panel prepared in the year 1983; and we are unable to note the exact number of posts of Surveyor Assistant Grade II filled up because neither party could throw any light on the exact number, except that everybody spoke of '*a few appointments being so made*'. We need to highlight that in the other four commands this was not so done.

14. Seniority lists were being drawn up for the post of Superintendent (B/R) Grade II and Surveyor Assistant Grade II and pertaining to the latter post, the undisputed position is that seniority lists were drawn up in the year 1989, 1992, 1994, 1996 and 2002, all of which were never challenged by anybody and we find that all the lists specifically record that they pertain to the '*All India Seniority of Surveyor Assistant Grade II*', and to said extent, learned counsel Sh.A.K.Behera and Sh.M.K.Bhardwaj conceded that in the order dated December 20, 2012 disposing of OA No.521/2011 which order is challenged in W.P.(C) No.894/2013, the Central Administrative Tribunal has wrongly noted the fact that the said seniority lists were drawn up command wise. The principle adopted in all the seniority lists to determine seniority is the date of initial joining, irrespective of the merit position in the select panel drawn up command wise and irrespective of the date when approval to a select panel was accorded command wise.

15. It appears that prior to the year 2002 when the updated seniority list, on All India basis, of Surveyor Assistant Grade II was finalized, an issue had been raised in the year 2000 as to whether the seniority lists had to be drawn up with reference to the merit position of the candidates in the select panels which were being drawn up on year to year basis. Those who were desirous

of the seniority lists being re-drawn were the ones who had joined in the year 1987 and 1988, and we note that these were the person who had joined as Surveyor Assistant Grade II and Superintendent (B/R) Grade II from the select panel approved in the Western command on June 29, 1983.

16. There existed an OM No.9/11/55-RPS dated December 22, 1959, issued by the Ministry of Home Affairs, Government of India, on the subject of the principle to be adopted in determining seniority. Making a reference to Office Memorandums dated June 22, 1949, February 03, 1950, April 27, 1951 and August 04, 1956, the Office Memorandum dated December 1959 required seniority to be drawn up, in case of posts to be filled up by direct recruitment, in the order of merit in which candidates were selected, but subject to a proviso; and since the proviso needs an interpretation as it was debated upon between learned counsel for the parties, we quote the main provision along with the proviso; it reads as under:-

“Notwithstanding the provisions of para 3 above the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment on the recommendations of the UPSC or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of subsequent selection;

Provided that where persons recruited initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit.”

17. On July 03, 1986, vide Office Memorandum No.22011/7/86-Estt.(D), though using a different language on the subject of seniority position, in sum and substance the same principle of fixation of seniority as was prescribed

by the Office Memorandum dated December 22, 1959 was retained.

18. It is thus apparent that the Engineer-in-Chief in the Military Engineering Service was adopting the principle of continuous officiation followed by regular appointment, irrespective of the merit position in the select panel, for the reason the posts of Superintendent (B/R) Grade II and Surveyor Assistant Grade II were Group 'C' posts and as per Regulation 88 of '*Defence Services Regulations, 1968*' the posts were being filled up by the Chief Engineers of the five commands as the delegates of the power by the Engineer-in-Chief on temporary capacity for two years, followed by confirmation by the Engineer-in-Chief.

19. But, on May 02, 1990, the Constitution Bench of the Supreme Court had rendered an opinion reported as AIR 1990 SC 1607 *Class II Direct Recruits Engineering Officers' Association Vs. State of Maharashtra* resulting in an Office Memorandum No.20011/5/90-Estt.(D), dated November 04, 1992 being issued, modifying the principle pertaining to seniority laid down in the Office Memorandum dated December 22, 1959; to bring the same in conformity with the law declared by the Constitution Bench of the Supreme Court; but made it clear that seniority already determined according to the existing principles on the date when seniority lists were drawn up would not be re-opened. The changed position was to accord seniority with reference to the order of merit indicated at the time of initial appointment and not according to the date of confirmation.

20. The appointees from the select panel approved on June 29, 1983, to the post of Superintendent (B/R) Grade II and Surveyor Assistant Grade II in the Western command in the year 1987 and 1988 started claiming seniority as per their merit position in the select panel approved on June 29,

1983. They started pleading that but for the ban imposed on January 03, 1984, which was lifted on January 07, 1986, and in respect of which the Engineer-in-Chief passed an order on December 04, 1986, they would have been appointed in the year 1983 or the year 1984, for the reason as of the year 1983-84 in terms of the Office Memorandum No.22011/2/79-Estt.(D) dated February 08, 1982 the requirement of the Government of India instructions was to exhaust a select panel irrespective of the length of time.

21. It is not in dispute that relating to the Western command the select panel which was approved on June 29, 1983, the merit list prepared was of less than 280 persons. And we highlight that the 280 posts were not definite posts. As per the letter dated December 09, 1982, the number of vacancies/posts intimated to the Chief Engineers of the five commands was the approximate requirement. Further position which is admitted is that out of this select panel, which was of less than 280 person, only 53 had joined, on different dates, in the year 1983 as also the year 1984 (*the last one having joined on June 29, 1984*), out of which 24 had joined as Superintendent (B/R) Grade II and 29 as Surveyor Assistant Grade II.

22. It is the admitted position that in no other command were any appointments made after one year of the respective select panel drawn up in the year 1983 in the respective command.

23. Reverting back to the facts, as noted above, the seniority list drawn up in the year 1989, 1992, 1994, 1996 and 2002 were applying the principle of date of joining on temporary basis subject to confirmation to reckon seniority and all the lists drawn up were reflecting an All India Seniority on said basis. In this manner, the intra-panel seniority issue itself got resolved notwithstanding that in some commands the select panel was approved

earlier as compared to others. Further, this was the position with respect to appointments made even prior to the year 1984; having no concern with the appointments made in the five commands pursuant to the letter dated December 09, 1982. This is the admitted position. It was only in the year 2000 that the 20 persons appointed as Superintendent (B/R) Grade II and a few persons appointed as Surveyor Assistant Grade II from out of the select panel approved on June 29, 1983 pertaining to the Western command started raising the issue of seniority being determined with reference to the merit position in the select panel, and later on a few more joined the chorus.

24. On May 01, 2000 a letter was addressed by the Engineer-in-Chief to the Chief Engineers of the 5 commands, which reads as under:-

“1. All India MES Civilian Engineers Association, during their Meeting held at this HQ on 06 March, 2000 pointed appoint that the seniority of Direct Appointee may please be fixed on the basis of merit achieved by an individual in the select panel.

2. A case of similar nature was referred to DOP&T through Min of Def, Govt. of India, Min of Personnel P&A Pension (DOP&T) have ruled that ‘the seniority in such a cases may be fixed as per his merit position at the time of his selection for appointment and there is no question of linking it with the date of joining his senior’.

3. In view of above, the seniority of directly appointed personnel may suitably be fixed as per instruction contained in DOP&T OM No.22011/7/86-Estt (D) dated 03 Jul 86, if and when any representation to this effect is received from the present incumbent to avoid court cases/litigations.

4. Please also note and circulate the instructions to your lower formations to fix the seniority in accordance with instructions contained in DOP & T letter dated 03 Jul 86 for

appointments made in future.

5. CEWC only: *In the light of above, a list of candidates submitted by All India MES Civilian Engineers associations and applications pending with this HQ is enclosed herewith as per Appendix 'A' for review. Please examine each case on merit and reflex seniority where applicable.*

6. *Please intimate progress/factual position on each case by 30 June, 2000."*

25. Satish Kumar and seven of his colleagues, appointed as Superintendent (B/R) Grade II, re-designated as Junior Engineer (Civil) filed OA No.734-HR/2002 before the Chandigarh Bench of the Central Administrative Tribunal praying therein that the seniority list of Superintendent (B/R) Grade II, re-designated as Junior Engineer (Civil), be drawn up in light of the letter dated May 01, 2000. In their pleadings they pleaded that the seniority had to be reckoned with reference to the merit position in the select panel.

26. Without interpreting the letter dated May 01, 2000 and without opining upon the correctness or otherwise of the stand taken by Satish Kumar and others, vide decision dated August 07, 2002, the Bench of the Tribunal at Chandigarh simply disposed of the Original Application directing that the Engineer-in-Chief would look into the matter and after hearing the applicants shall pass an appropriate order.

27. Neither did the Engineer-in-Chief look into the matter as directed nor did he hear Satish Kumar and others, but the department, read the order in question as if it contained a direction that the seniority list be recast and doing so, applying the principle that seniority has to be determined with

reference to the merit position in the select panel, with inter panel seniority being with reference to the date when the panels were approved, re-casted a seniority list on July 29, 2004, and this resulted in a large scale change of the seniority position assigned in the previous seniority lists.

28. Relevant would it be to highlight that in the year 1983, for the first time a decision had been taken to appoint Civil Engineers as either Surveyor Assistant Grade II or Superintendent (B/R) Grade II and that from the same select panel, depending upon the option exercised, people were appointed either as Surveyor Assistant Grade II or Superintendent (B/R) Grade II and further that when the select panel drawn up in the year 1983 pertaining to the Western Command was operated in the year 1987 and 1988, appointments were made to the said two posts of Surveyor Assistant Grade II and Superintendent (B/R) Grade II, the department applied the principle of merit position in the select panel only for Junior Engineer (Civil) i.e. the erstwhile Superintendent (B/R) Grade II but continued with the seniority list of Surveyor Assistant Grade II, re-designated as Junior Engineer (QS&C) with reference to the date of initial joining on temporary basis followed by confirmation.

29. Some of the persons who were aggrieved, marching under the banner of one K.Krishnakumar, filed OA No.680/2004 before the Ernakulam Bench of the Central Administrative Tribunal challenging the seniority list notified on July 29, 2004; and it appears that in the pleadings, K.Krishnakumar and others even questioned the appointments made in the year 1987 and 1988 from out of the panel which was approved in the Western command on June 29, 1983.

30. Deciding OA No.680/2004 vide order dated September 07, 2005, the

Ernakulam Bench of the Tribunal, in paragraph 13 of its decision, noted the said contention i.e. of a panel approved in the year 1983 being operated twice i.e. first within one year of the panel being drawn up and secondly after five years thereof, but regrettably did not express any final opinion and disposed of the Original Application directing that the seniority list dated July 29, 2004 should be treated as a provisional seniority list and that a time would be granted for representations to be made there against and the exact grievance pleaded by K.Krishnakumar and others would be considered and decided and thereafter a fresh seniority list would be drawn up.

31. The Engineer-in-Chief constituted a Committee comprising Col.Indeever Sood (Col. Personnel), Sh.D.K.Tyagi (Director P&L), Lt.Col.Rajeev Manglik (OIC-Legal) and Sh.N.K.Nirmal (A.E.-Civil) a Member of All India Association of Junior Engineers, and the Committee was of the categorical view that the latter inductees could not claim the benefit of seniority with reference to their merit position. Even the Director (Personnel) as per his opinion dated January 28, 2006 opined in conformity with the opinion of the Committee, which opinion we note was after hearing the representation permitted to be made by the Ernakulam Bench of the Central Administrative Tribunal and would thus be in the nature of a decision.

32. Notwithstanding the report of the Committee and the decision of the Director (Personnel), a final seniority list of Junior Engineer (Civil) was circulated on December 21, 2006 adopting the principle that seniority would be reckoned with reference to the merit position in the select panel with date of select panel in different commands entitling the appointees to en-block seniority vis-a-vis appointees of the other command with reference to the

date when panel approval was granted in the five different commands.

33. It was this seniority list of Junior Engineers (Civil), erstwhile Superintendent (B/R) Grade II which was challenged by the private respondents before us in W.P.(C) No.4394/2008 and W.P.(C) No.5915/2008. They filed OA No.164/2007.

34. Vide decision dated May 26, 2008 OA No.164/2007 filed by the private respondents in the two writ petitions was allowed and the Tribunal held that the previous principle on which seniority was determined i.e. date of initial temporary appointment followed by confirmation would be the principle to determine the seniority. The Tribunal held so on the ground that merit position reflecting seniority could not apply when seniorities had to be determined inter panel as against intra panel.

35. Two different set of persons have challenged the same decision dated May 26, 2008 vide W.P.(C) No.4394/2008 and W.P.(C) No.5915/2008.

36. Just as Superintendent (B/R) Grade II, re-designated as Junior Engineer (Civil) were fighting the battle for seniority even erstwhile Surveyor Assistant Grade II, re-designated as Junior Engineer (QS&C) were risen from the slumber and the first litigation on the subject commenced when Original Application registered as OA No.662/2004 was filed before the Principal Bench of the Tribunal by Dharamvir Singh and Ram Niwas praying that the seniority of Junior Engineer (QS&C) should be fixed with reference to the merit position in the select panel. The said Original Application was disposed of by the Tribunal vide order dated September 24, 2004 in view of a letter dated August 05, 2004 addressed by the Director General (Personnel) to Dharamvir that the grievance raised by him would be considered by the department in light of the DOPT instructions. Needless to

state the Tribunal opined that the department would look into the matter keeping in view instructions issued by DOPT. Dharamvir and Ram Niwas filed another Original Application registered as OA No.2673/2006 before the Principal Bench of the Tribunal raising a grievance that despite letter dated August 05, 2004 their grievances were not looked into and seniority list of Junior Engineer (QS&C) was not being revised notwithstanding the seniority list of Junior Engineer (Civil) being revised. Vide order dated August 27, 2007 OA No.2673/2006 was disposed of by the Tribunal directing that seniority list be prepared in accordance with the Rules and law on the subject.

37. In the meanwhile Satish Kumar and three others shot an arrow by filing CP No.99/2006 in OA No.734-HR/2002 alleging that order dated August 07, 2002 disposing of OA No.734-HR/2002 had been violated. They alleged that the directions contained in the order dated August 07, 2002 had been violated because no seniority list had been revised as required to be done in terms of the letter dated May 01, 2000. The Tribunal dismissed CP No.99/2006 vide order dated October 10, 2006 observing that no such direction as was pleaded was given by the Tribunal in the order dated August 07, 2002.

38. The department revised the seniority list of erstwhile Superintendent (E/M) Grade II, re-designated as Junior Engineer (E/M), applying the principle of merit position in the select panel being determinative of seniority within the panel and inter panel seniority with reference to the date of approval of the select panel. In light of the revised seniority list one Gurdyal Singh and a few others filed OA No.126-PB/2009 pleading therein that in light of the fact that persons junior to them in the revised seniority list

were drawing high salary and were receiving the salary from a date prior to when they joined their salary be fixed from the date persons junior to them joined and not only increments be given but actual salary be paid for said period.

39. Deciding OA No.126-PB/2009 vide order dated September 28, 2010 the Bench of the Tribunal at Chandigarh granted partial relief directing that salary of the applicants would be paid with reference to the date of their joining being notionally treated when persons junior to them joined without any arrears to be paid.

40. In a nut shell, though the reasoning of the Tribunal may be otherwise, the same is of stepping up of pay of a senior if person junior to him is receiving higher salary. The department challenged the decision of the Tribunal before the Punjab and Haryana High Court by and under W.P.(C) No.13055/2011 which was disposed of by the High Court vide order dated July 25, 2011 observing that the mandamus issued by the Tribunal vide order dated August 07, 2002 in OA No.734-HR/2002 resulted in a revised seniority list being issued and consequences thereof had to flow.

41. In the meanwhile in W.P.(C) No.4394/2008 and W.P.(C) No.5915/2008 which had been filed before this Court by Junior Engineer (Civil), erstwhile Superintendent (B/R) Grade II who were aggrieved by the decision of the Tribunal dated May 26, 2008, a stay of the impugned order passed by the Tribunal was granted, but before that the department revised the seniority list in compliance with the direction issued by the Tribunal on May 26, 2008 i.e. drew up the seniority list with reference to the date of initial joining service.

42. Junior Engineers (QS&C), erstwhile Surveyor Assistant Grade II,

filed OA No.2621/2010 and OA No.2636/2010 pleading before the Tribunal that since the decision of the Tribunal dated May 26, 2008, pertaining to Junior Engineer (Civil), erstwhile Superintendent (B/R) Grade II had been stayed by this Court, the department be directed to prepare a seniority list of Junior Engineer (QS&C) on the principle of merit position in the select panel.

43. The two Original Applications were dismissed by the Tribunal vide order dated January 05, 2011, which has been challenged in W.P.(C) No.6237/2012, observing that the law declared by the Tribunal in the decision dated May 26, 2008 in OA No.164/2007 was binding on the Tribunal unless set aside, notwithstanding it being stayed by a Division Bench of this Court.

44. One B.D.Sharma and others filed OA No.521/2011 before the Central Administrative Tribunal at New Delhi questioning the seniority list dated September 16, 2010 of Junior Engineer (QS&C), erstwhile Surveyor Assistant Grade II, which we note is an extension of the seniority list earlier drawn up applying the principle of date of joining. B.D.Sharma and others prayed before the Tribunal that seniority had to be reckoned, intra panel, with reference to the merit position in the panel. Vide impugned decision dated December 20, 2012 the Tribunal allowed the Original Application directing that the seniority list of Junior Engineer (QS&C) be revised by granting seniority as per the merit position in the select panel.

45. The said decision has been challenged by Govind Gopal and another in W.P.(C) No.894/2013.

46. A perusal of the impugned decision passed by the Tribunal would reveal that Govind Gopal and his colleague who were opposing the Original

Application had predicated the bar of delay and laches by drawing attention of the Tribunal to the fact that seniority lists for the post in question were drawn up for the first time in the year 1989 and extended in the years 1992, 1994, 1996 and 2002, which were never challenged and thus it was too late in the day to challenge the said seniority list, which were drawn up on the principle of date of initial joining being determinative of the seniority. The Tribunal has admittedly erroneously trivialized said bar of limitation by incorrectly observing that the seniority list drawn up in the years 1989, 1992, 1994, 1996 and 2002 were command wise. Learned counsel Sh.A.K.Behera and Sh.M.K.Bhardwaj conceded that the said lists were on All India basis. On merits, the view taken by the Tribunal is that reflected in the letter dated May 01, 2000, the Government's decision was to revise the seniority list with reference to merit position in the select panel being the criteria.

47. Since the narrative of the facts have consumed 18 pages, before we proceed to note the rival contentions and simultaneously deal with the same, since the issue pertaining to seniority has been litigated at different points of time by Junior Engineers (E/M), Junior Engineers (Civil) and Junior Engineers (QS&C), we remind the reader of our opinion that initially they were only two category of posts, being, Superintendent (B/R) Grade II and Superintendent (E/M) Grade II. Pertaining to buildings and roads the works were being executed by Superintendent (B/R) Grade II till the year 1983, when for the first time a decision was taken to create a cadre of Surveyors commencing from the post of Surveyor Assistant Grade II. The educational qualification for the post of Superintendent (B/R) Grade II and that of Surveyor Assistant Grade II, being the same, empanelment was done by

common selection process and a select panel was drawn up of those who had a degree or a diploma in civil engineering. Depending upon the option exercised by the incumbent he was allotted the cadre either of Surveyor Assistant Grade II or Superintendent (B/R) Grade II.

48. As noted in para 16 above OM No.9/11/55-RPS dated December 22, 1959, making a reference to the OM's dated June 22, 1949, February 03, 1950, April 27, 1951 and August 04, 1956 required seniority to be drawn up in posts filled up by direct recruitment in the order of merit in which candidates were selected, but subject to a proviso, being that, where persons were initially recruited on temporary basis and later on confirmed, in an order different from the date of merit indicated at the time of appointment, the seniority had to follow the order of confirmation and not the original order of merit. As noted in paragraph 17 above, vide OM dated July 03, 1986, using a different language, same principle of fixation of seniority was retained.

49. It was in this backdrop of the facts and the past litigation that Sh.A.K.Behera and Sh.M.K.Bhardwaj learned counsel who appeared for the writ petitioners of WP(C) 4394/2008, WP(C) 5915/2008 and WP(C) 6237/2012 urged that but for the ban imposed by the Government as per its letter dated January 03, 1984 which was lifted by the Government on January 07, 1986 resulting in the Engineer-in-Chief writing a letter on December 04, 1986 to all the commands to fill up vacant posts, the empanelled candidates in the Western command as per the select list approved on June 29, 1983 would have been appointed and thus the five years interregnum cannot operate to their disadvantage. Learned counsel urged that whereas four out of five commands did not treat the Government

of India letter dated January 03, 1984 as a ban if the recruitment process has commenced, the Western command construed the same otherwise.

50. This plea was opposed by Sh.Vinay Kumar Garg on the plea that the Western command did not interpret the Government of India letter dated January 03, 1984 as imposing a ban if recruitment process had commenced. And for which plea learned counsel drew attention of this Court to the fact that in the year 1987, appointments had been made in the Western command by initiating a fresh process of selection. Learned counsel urged that the life of the panel approved of on June 29, 1983 was one year evidenced by the fact that the last appointment made from out of the said panel was on June 29, 1984. The said appointment was that of Ram Niwas, the petitioner No.5 of WP(C) 6237/2012. Learned counsel urged that from the twin facts it is apparent that somebody contrived in the Western command to create a story of a ban on recruitment as per the Government of India letter date January 03, 1984 and the same being lifted on January 07, 1986.

51. With reference to the seniority list dated April 01, 2004 of Junior Engineers (Civil), erstwhile Superintendent (B/R) Grade II we find that at serial No.736, 737 and 738 are the names of one Gurminder Singh, Satinder Pal Singh and Ashok Kumar respectively who were at merit position No.2,3 and 4 of a merit list drawn up on December 31, 1987.

52. It is thus apparent that in the Western command nobody formed an opinion pertaining to the letter dated January 03, 1984 as is claimed by Sh.A.K.Behera and Sh.M.K.Bhardwaj, Advocates. If this was so, it remains unexplained as to why a select panel was prepared afresh in the year 1987 and approved on December 31, 1987.

53. With reference to the letter dated December 09, 1982, contents

whereof we have noted in paragraph 6 above, it is apparent that the Engineer-in-Chief had determined an approximate requirement of the personnel and not definite determinate vacancies. Further, the Defence Services Regulations 1968 required Group C posts to be filled up by the Chief Engineers on temporary capacity for two years, confirmation to be made by the Engineer-in-Chief. The Defence Services Regulations, 1968 make it clear that the Chief Engineers as the delegatee of the power of appointment which is otherwise vested in the Engineer-in-Chief. The letter dated December 09, 1982 confirms said fact for the reason it is the Engineer-in-Chief who determined the approximate requirement of the personnel and called upon the Chief Engineers of the five commands to make the appointments.

54. It is in said backdrop that we need to consider the next submission advanced by Sh.A.K.Behera and Sh.M.K.Bhardwaj, Advocates premised on the Office Memorandum dated February 08, 1982, No.22011/2/79-Estt.(D).

55. The said Office Memorandum concededly requires a select panel to be exhausted irrespective of the length of time.

56. We additionally note that apart from relying upon the OM dated February 08, 1982, Sh.A.K.Behera, learned counsel relied upon the ratio of the law declared in the opinions reported as 1984 (Suppl.) SCC 687 Prem Prakash Vs. Union of India & Ors., 1991 (3) SCC 47 Shankarsan Dash Vs. Union of India 1992 (Suppl.) 3 SCC 84 Union of India & Ors. Vs. Ishwar Singh Khatri & Ors., 1996 (8) SCC 637 Pilla Sitaram Patrudu & Ors. Vs. Union of India & Ors., 1998 (5) SCC 246 Surender Narain Singh & Ors. Vs. State of Bihar & Ors. and 2008 (7) SCC 728 Balwant Singh Narwal & Ors. Vs. State of Haryana & Ors.

57. With reference to the decisions cited and OM dated February 08, 1982 suffice would it be to state that the same would be applicable if a definite number of vacancies are declared to be filled up. The OM in question would have no application when the number of vacancies proposed to be filled up are not definite.

58. In the instant case, we have already noted that the vacancies were not declared to be filled up as definite. The vacancies were clearly referred to as the approximate requirement of personnel. Initial appointment was temporary. Thus, none of the decisions cited by Sh.A.K.Behera, Advocate have a relevance because they concerned definite number of notified vacancies.

59. We would be failing not to note that in the opinion reported as 2007 (8) SCC 161 State of Rajasthan vs. Jagdish Chopra and the opinion reported as 1987 (Suppl.) SCC 401 State of U.P.vs. Rafiquddin, the Supreme Court categorically held that the life of a select panel is normally one year and that a select list cannot be used as a reservoir of vacancies. The Supreme Court, in Rafuquiddin case (supra), comparing a recruitment to a cricket match said that *'the result of a particular examination must come to an end at some point of time, like a dead ball in cricket.'*

60. We may summarize the position in fact as also in law pertaining to the instant writ petitions. The Engineer-in-Chief, vide letter dated December 09, 1982 did not notify a declared number of vacancies of Superintendents (B/R) Grade II nor of Superintendent (E/M) Grade II. Approximate 800 posts of Superintendent (B/R) Grade II and 170 posts of Superintendent (E/M) Grade II were proposed to be filled up clearly indicating that the same were an approximate requirement. In the five different commands the

proposed approximate requirement were allocated. The posts of Superintendent (B/R) Grade II were later on bifurcated by retaining a few with the same nomenclature and a few as Surveyor Assistant Grade II without specifying the number in each cadre and leaving it to the option of the candidate to choose the stream. The two posts were later on re-designated as JE (Civil) and JE (QS&C). The four commands i.e. Southern, Eastern, Central and Northern made recruitments pertaining to the letter dated December 09, 1982 without any break i.e. did not read the circular dated January 03, 1994 as imposing a ban on recruitment for the reason the circular expressly made it clear that it was not to be applied if recruitment process had been initiated. As regards the Western command, from the select panel drawn up and approved on June 29, 1983, with the number not being clear but less than 280, only 53 empanelled candidates joined; 24 as Superintendent (B/R) Grade II and 29 as Surveyor Assistant Grade II. The last empanelled joined on June 29, 1984. It is apparent that the panel was operative for one year only. A fresh selection in the Western command was initiated in the year 1987 with a select panel drawn up on December 31, 1987 with appointments made from out of the said panel in the year 1988. The Government of India letter dated January 07, 1986 followed by the Engineer-in-Chief's letter dated December 04, 1986 was used as a cover up to appoint 20 persons as Superintendent (B/R) Grade II from out of the panel drawn up on June 29, 1983 and a few appointments were made to the post of Surveyor Assistant Grade II from out of the said panel. The cover up is writ large for the reason a fresh selection process was initiated in the year 1987 in the Western command and pertaining to the select list prepared appointments were effected prior to a few appointments which were effected

in the year 1988 relating to the panel of the year 1983. Further, the posts in question as Group C posts and as per Regulation 88 of the Defence Service Regulation, 1968 initial appointment was temporary by the Chief Engineer as delegatee of the Engineer-in-Chief; initial appointment was for two years and thus as per the office memorandum dated December 22, 1959 the seniority had to be fixed with reference to the date of joining subject to confirmation. There being no declared number of vacancies; the same being anticipated and likely, the requirement under the OM dated February 08, 1982 to fill up all declared vacancies not being applicable, the panel could not operate beyond one year and indeed we find as a matter of fact the panel being operated for one year evidenced by the last appointment of the 53rd candidate being made on June 29, 1984.

61. The undisputed position is this that seniority list were notified from time to time commencing from the year 1989 as and when more people i.e. the seniority list which was initially drawn up was updated from time to time. Nobody raised an issue pertaining to the said seniority lists which were drawing up the seniority applying the principle of date of initial joining on temporary basis followed by confirmation. The law declared by the Supreme Court in the decisions reported as 1998 (2) SCC 523 B.S.Bajwa vs. State of Punjab, 2010 (12) SCC 471 Shiba Shankar Mohapatra & ors. vs. State of Orissa & Ors., JT 2011 (3) SC 254 UOI & Ors. vs. V.A.Durairaj (since dead) through LRs and 2012 (7) SCC 610 Vijay Kumar Kaul & Ors. vs. UOI & Ors. guides us that it is a principle of law that since delay defeats equity, if a seniority position, even if wrong, is allowed to enure for a long period of time, the settled position cannot be upset. Besides as per the law declared in the decision reported as 2002 (7) SCC 561 Suraj Prakash Gupta

vs. UOI, 2010 (12) SCC 635 Ashok Pal Singh vs. U.P.Judicial Service Association, and 2011 (3) SCC 267 Pawan Pratap Singh vs. Reevan Singh lay down the law that a direct recruit cannot claim seniority from a date anterior to his joining/substantive appointment/birth in service.

62. Much was sought to be urged with reference to the letter dated May 01, 2000, being the conscious decision as alleged, pertaining to fixation of the seniority as per merit position.

63. We have noted the contents of the letter in para 24 above. The said letter makes a reference to an OM dated July 03, 1986 and directs, in para 3, which was relied upon by Sh.A.K.Behera and Sh.M.K.Bhardwaj, Advocates, that seniority of directly appointed personnel has to be fixed as per the principle in paragraph 2 i.e. merit position at the time of selection. But para 4 of the letter has not to be ignored. It clearly indicates the futuristic action of the directive contained in the letter.

64. As regards the various litigations which were fought before the Benches of the Tribunal at Chandigarh and Ernakulam, we have noted the same in paras 25 to 29 and 36 to 40 of our opinion above, and suffice would it be for us to highlight that neither decision dealt with the merits of the controversy. The decisions were merely directory of looking into the grievances raised by the applicants and pass appropriate orders.

65. We need to make a special reference to the decision of the Tribunal at Chandigarh in OA No.126-PB/2009 dated September 28, 2010 and it being upheld by the Division Bench of the Punjab and Haryana High Court in WP(C) 13055/2011 vide order dated July 25, 2011. The two decisions were with reference to the claim made by Gurdayal Singh and few others who were Junior Engineers (E/M). They were relying upon a seniority list

drawn up for said cadre applying the principle of merit position in the select panel being determinative of intra-panel seniority and taken forward pertaining to inter-panel seniority with reference to the date of approval of the various select panels. The grievance which they raised was of receiving less salary than persons who were shown junior to them. Needless to state these persons were the ones who joined earlier and thus started receiving salary from the date when they worked and earned increments. Gurdayal Singh and others did not implead any individuals as respondents. The decision of the Tribunal affirmed by the High Court is to the effect that Gurdayal Singh and others would be notionally placed in service from the date person junior to them joined service and increments paid while fixing the pay, but arrears not to be paid.

66. In our opinion the decisions of the Tribunal and the High Court are simply affirmative of the principle of stepping of pay i.e. where a person senior receives salary less than the person in the seniority list, the pay of the senior to be stepped and brought at par with that of the junior.

67. The said decisions cannot be treated as binding precedents because the issue of seniority was not raised. The limited issue raised was the effect of the seniority assigned.

68. Before bringing the curtains down we cannot but write that instant case is a classic case of misuse and abuse of power resulting in multifarious litigations consuming valuable time of the Courts and the Tribunal. Nepotistic appointments were made in the year 1988 by giving effect to a select panel in the Western command which was approved on June 29, 1983 and was operated only for one year till June 29, 1984. The panel obviously lapsed evidenced by the fact that a fresh selection was made in the year 1987

when a select panel was approved of on December 31, 1987 and appointments made. Some smart and cunning fellow in the department contrived upon a strategy of contrivance and mislead the authorities to believe that the Government of India letter dated January 03, 1984 was treated as a ban in the ongoing recruitment process and that the ban was lifted when letter dated January 07, 1986 was issued by the Government and reflected in the Engineer-in-Chief letter dated December 04, 1986; and under cover of the said smoke screen got appointed 20 persons as Superintendent (B/R) Grade II and a few as Surveyor Assistants Grade II, and may be a few as Superintendent (E/M). Not only did these persons get nepotistic appointment but they create havoc by indulging in repeated litigation claiming seniority with reference to the merit position in the select panel. But for the fact that these persons have now acquired a right due to passage of time, the appointments made in the year 1987-88 have continued for 25 years, one would have been constrained to even strike down the said appointments.

69. It is apparent that a smoke screen was created by somebody interested because admittedly neither the Eastern nor the Central nor the Southern and nor the Northern command treated any ban imposed by the ban order dated January 03, 1984 to the ongoing process of recruitment which had already commenced. The fact that even the Western command did not treat the same as a ban order is evidenced from the fact that the panel approved in the Western command on June 29, 1983 was operated till June 29, 1984. Further is the fact of Western command preparing a fresh select panel at a fresh selection process in the year 1987.

70. The result of our discussion would be that WP(C) 4394/2008, WP(C)

5915/2008 and WP(C) 6237/2012 are dismissed and WP(C) 894/2013 is allowed. Impugned order dated December 20, 2012 challenged in WP(C) 894/2013 allowing OA No.521/2011 is set aside and OA No.521/2011 is dismissed.

71. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(V. KAMESWAR RAO)
JUDGE

August 27, 2013
mamta/skb