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

Reservedon: 02.09.2014
Pronounced on: 21.01.2015

+ W.P.(C) 209/2013, C.M. NOS.439/2013, 10048/2013, 14089/2013, 2708/2014, 7494/2014, 7498/2014 & 10251-10253/2014

SHRI RAVINDER KUMAR JHA AND ORS.....Petitioners

Through: Ms. Jyoti Singh, Sr. Advocate with Sh. Padma Kumar, Sh. Sameer Sharma and Sh. Amandeep Joshi, Advocates.

Versus

UNION OF INDIA AND ORS.

Through: Sh. N. Nageshwar Rao, ASG with Sh. Kirtiman Singh, CGSC with Sh. Waize Alinoor, Advocates, for UOI.

Sh. M.K. Bhardwaj, Advocate, for Respondent Nos. 3 to 37.

Sh. Sandeep. P. Aggarwal with Ms. Soumyaajit Pani, Advocate, for impleaded respondents.

Sh. Amit Gupta, Advocate, for the applicants in C.M. No.10251/2014.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioners are aggrieved by an order of the Central Administrative Tribunal (CAT) dated 27-09-2012 in OA 248/2012. The

present writ petitioners were impleaded as contesting respondents in those proceedings before the CAT. The original applicants (referred to as “the applicants”) had filed the application, challenging the revision in seniority in the cadre of Upper Division Clerks (UDC) in the Central Secretariat Clerical Service (CSCS). By the impugned order, CAT accepted their contentions and allowed the application.

Facts of the case

2. The parties belong to the CSCS, and are governed by the CSCS Rules, 1962. CSCS consists of two cadres, i.e. Lower Division clerks (LDCs), and Upper Division Clerks (UDCs), and a separate cadre Unit in respect of those two grades of CSCS exists for each Central Government Ministry. The select list for UDCs in each such cadre unit is determined by the Department of Personnel & Training (“DoPT”). All LDCs who have completed eight years approved service and possess the Benchmark “Good” in their Annual Confidential Reports/Annual Performance Appraisal Reports (“ACRs/APARs”) are eligible for promotion as UDCs on seniority-cum-merit basis. The CSCS Recruitment Rules (RRs) also provides for accelerated promotion to the UDCs' level. 75 % of UDCs vacancies are filled up by way of Seniority-cum-Merit (i.e. “seniority quota”), and the balance 25% UDC vacancies are filled up by way of a Limited Departmental Competitive Examination (“LDCE”), the eligibility criteria for which is five years of qualifying service, with no prescribed benchmark. LDCE is governed by the CSCS (Upper Division Grade LDCE) Regulations, 1966 (“LDCE Regulations”). LDCE promotees to the cadre of UDC do not have to wait for three more years for their turn for promotion by virtue of seniority-cum-merit quota (SQ) eligibility qualifying service, and can

“jump” the queue, to occupy 25% of the vacancies in the cadre of UDCs. Those who do not appear in the LDCE tests, or are not successful in it, wait out their turn to become UDCs by virtue of seniority against the 75% seniority-cum-merit (SQ) quota for the recruitment to the UDCs grade, or might choose to take their chance in the next two LDCE processes conducted in between, after completion of their sixth and seventh years of service.

3. There was, apparently, acute stagnation in the posts of Deputy Secretary, Under Secretary, Section Officer and Assistants of Central Secretariat Service (hereafter referred to as "CSS") of the Central Government. To remove such stagnation in the cadres of CSS and CSCS, the Government of India decided in the year 2001 to re-structure the cadre of CSS, including its feeder cadre of CSCS. A Committee was constituted for this purpose and it submitted its report in February, 2002. The recommendations of the said Cadre Restructuring of CSS were considered by the DoPT, and some of the recommendations were placed before the Union Cabinet. The Cabinet approved these recommendations on 03.10.2003. Some of the recommendations approved by the Cabinet were (a) the creation of 10 posts in the grade of Director; (b) fixation of cadre strength of Deputy Secretary at 330 and Under Secretary at 1400 by creation of 54 posts; (c) fixation of cadre strength of Section Officers to 3000 by creating additional 1405 posts. No additional posts in the Assistants' grade was created, as the percolation of vacancies in the Assistants' grade and UDC grade from the additional posts created in higher posts was to remove the stagnation in these grades as well. This was mentioned in the Cabinet Note. Resultantly, an overall 1469 additional posts were created in 2003 in

CSS and thereafter, the sanctioned strength of various posts in CSS fixed as on 03-10-2003 was as follows: (i) Director: 110; (ii) Dy. Director: 330; (iii) Under Secretary 1400; (iv) Section Officer 3000 (v) Assistants 4904 (No additional vacancies were created for this cadre).

4. The vacancies in the posts of Deputy Secretary, Under Secretary and Section Officer, it is contended, were filled up against Select List year 2003 (Select List Year means a recruitment Year and runs from 1st July to 30th June of the next year) and resulted in a chain of vacancies in the grade of Assistants. These vacancies in Assistants' grade were also filled up against the Select List year 2003, but after several years, in the following terms:

(a) The posts in Deputy Secretary were filled up in 2008 by O.M. No. 4/1/2007-CS.I (D) dated 26-12-2008, against Select List Year 2003.

(b) The posts in Under Secretary were filled up in 2009 by O.M. No. 51161/2007-CS.I dated 25-08-2009 against Select List Year 2003.

(c) The posts in Section Officer were filled up in 2006 and 2008 through O.M. No. 5/25/2004-CS.I dated 05-06-2006 and 12-08-2008, against Select List Year 2003.

(d) The posts in Assistant were filled up in 2009 through O.M. No. 7/3/2003-CS.II dated 14-07-2009 against select List Year 2003.

5. In terms of the Union Cabinet approval, the chain of vacancies, arising out of the first Cadre Restructuring of CSS in the Assistants' grade were to be filled up 50% by seniority and 50% by special LDCE. The Central Government constituted a Committee to ascertain the exact vacancies arising against the Select List year 2003 in the Assistants' Grade. That Committee determined the figure to be 2151 (1469 chain of vacancies percolated down from promotions in higher posts such as Director, Deputy

Secretary, Under Secretary and Section Officer and from 10% cut each year by not filling total sanctioned strength 682 vacancies were restored). The Committee therefore recommended the filling up all 2151 posts in the Assistants' grade to remove acute stagnation in the grade of Upper Division Clerk, as they were stagnating for more than 20 years. The recommendations of the Committee were approved by the DoPT, and all these 2151 chain of vacancies of Assistants' grade were filled up from eligible Upper Division Clerks of CSCS in the year 2009 against Select List Year 2003. The next step concerned the filling up of the said vacancies in the UDC cadre (after promotion to the cadre of Assistants). Here, the 2151 vacancies were notified by amendment of CSCS Rules on 08-11-2010. These vacancies were made effective for UDC cadre from 03-10-2003. The Central Government issued office Memorandum to fill these vacancies. The Central Government also later issued a seniority list, calling for comments and objections from the concerned officials, which sought to revise the seniority in the cadre of UDCs by two different Memoranda- on 05-10-2010 (for the selection year 2006) and on 20-10-2010 (for the selection year 1993-2005).

Proceedings before the CAT- the applicants' contentions

6. The applicants questioned the revision in seniority, contending that it amounted to giving effect to retrospective seniority from the year in which UDC vacancies accrued and from points in time when actually there were no vacancies with there being no resultant promotions. The applicants relied on the decisions of the Supreme Court in *State of Bihar vs. Akhoury Sachindra Nath* : 1991 SCC (L&S) 1070, *State of Bihar vs. Bateshwar Sharma* 1997 (4) SCC 424 and *State of Uttaranchal vs. Dinesh Kumar Sharma* 2007 (1)

SCC 683, in which it was held that seniority cannot be given with retrospective effect. They also relied on *Uttaranchal Forest Rangers Association (Direct Recruit) & Ors. vs. State of U.P. and Ors* 2006 (10) SCC 346. The Applicants argued that the date of occurrence of vacancies could not therefore be relevant for the purpose of determining the seniority. They contended that the Central Government mis-applied OMs dated 3.7.86, 4.11.92 and 3.3.2008. It was also contended that the *ante-dated* promotions given with retrospective effect were *inter alia*, to the applicants' juniors, who had actually appeared in and failed in the LDCE examinations held from 2004 onwards. The applicants also relied on the fact that their seniority had been finalized way back in 2005, and an order in respect of that was also issued in that regard in 2011. The Central Government's action, declaring that the said list was only a provisional seniority list- and not a final one- was also questioned.

7. The applicants further argued before CAT that the presumption of *ante-dated* availability of vacancies in the year 2003, the failure to consider that when all the yearly identified vacancies in the UDCs grade of CSCS had been consumed on a year to year basis, resulting in retrospective promotion and seniority to certain persons, would be detrimental to their accrued rights, i.e., incumbent UDCs promoted earlier on substantive basis. These entrants, shown to be part of the cadre on the basis of having qualified the LDCE held in various years since 2004 onwards, were likely to be promoted to the posts of Assistants (which is the entry grade in CSS).

8. The applicants argued that they fulfilled the eligibility conditions for appearing at the LDCE, and had appeared in the LDCE examinations held during the years 2004 to 2009, and the Staff Selection Commission (SSC,

for short), which had conducted those examinations, had in the year-wise select lists from the years 2004 to 2009 recommended 678 candidates for appointment as UDCs against 25% LDCE quota, including their names. Such being the case, they contended that the *en-masse* promotion of new candidates, based on subsequent developments which occurred in 2009, in the absence of authorization under the relevant rules, was illegal.

9. The applicants had lastly relied on Rule 11 of the CSCS Rules 1962 especially Rule 11 (3), read with its Third Schedule, and the CSCS (Preparation of Common Seniority Lists) Regulation, 1971, arguing that those included in the Select List constituted for promotion to the UDCs' grade shall be senior to those included therein after such constitution of the Select List, and that an official, if included in the Select List, if he refused to be appointed to the UDC grade, for any reasons acceptable to the Appointing Authority, shall lose his entitlement on the basis of that Select List, and shall, on his subsequent appointment to the same UDC grade, at any time thereafter, be placed immediately below/after the official who was last appointed to that UDC grade from the Select List just prior to his own appointment. Thus, submitted the applicants, the subsequent creation of posts on account of an unrelated development could not result in a situation where their settled seniority could be undone.

Contentions of the present Writ Petitioners

10. The present writ petitioners had originally not been made parties in the proceedings before CAT; they sought impleadment- which was granted. They contended to having entered CSCS through 85% quota of direct recruit LDCs, through All India Competitive Examinations conducted by the SSC in the various years from 1989 to 1996. They contended that, on the other

hand, the applicants entered CSCS in the LDC grade through the same 85% quota of direct recruitment only later, in the years 1996-97. The petitioners therefore submitted that they were never junior to the applicants in the cadre of LDCs. The petitioners submitted that as entrants in the feeder grade of LDCs only in the year 1996-97, the applicants were ineligible for induction on seniority-cum-merit (SQ) basis for into the Select List of UDCs for the year 2003, because in that year, they did not possess the requisite 8 years' service in the feeder grade as LDCs, and none of them had qualified the LDCE examination for the year 2003. The petitioners therefore, challenged the *locus standi* of the applicants to maintain the proceedings before CAT. The petitioners also relied on the events leading up to the Committee's recommendations suggesting cadre restructuring of CSS, to remove stagnation both in CSS and CSCS, and its report of February 2002; the Union Cabinet's approval of the Committee's recommendations in 2003, effective from July of 2003, as the Select List Year was from July, to the June of next year. Consequent to this development, many additional posts of Section Officers and Under Secretaries were created and filled up against the CSS Select List Year 2003. The resultant vacancies in the CSS entry grade of Assistants, which had percolated down from the Section Officers' grade, had also been filled up then itself, against the CSS Select List of Assistants in the Year 2003, by promoting officials from among the stagnating UDCs of CSCS. The petitioners stated that the action of the official respondents, in filling up the CSCS resultant vacancies- in the posts of UDCs from among the eligible LDCs, in the Select List Year 2003 was proper.

Contentions of the Central Government before CAT

11. The position of the Central Government before the CAT was similar to that of the writ petitioners in this case. It also submitted that the administrative delay in processing promotional orders in respect of various CSS and CSCS cadres was due to shifting from decentralized to centralized cadre management in DoP&T, and further that effectuating the Committee report took some time. It was submitted also that the applicants never challenged the Central Government's policy or the Cabinet decision, dated 03.10.2003, nor did they have any right to challenge such policy decision belatedly. It was further submitted that with the present decision, the LDCs recruited up to Select List 1995 were to become eligible for seniority-cum-merit based SQ quota promotions to UDCs' grade against the Select List Year 2003, by virtue of their having completed 8 years of service as on that date the fact is that such promotions were delayed, solely due to administrative delays. If such promotions were made in the year 2003 itself, before issuance of the Select List for the Year 2004 in the grade of UDCs, there would not have been any controversy. The Central Government justified the promotions due to the *ante-dated* restructuring of CSS Cadres stating that it had become due in the year 2003 itself. The supervening delay could not mean that what was justifiable is now not permissible under the rules, on the ground that it is a retrospective promotion.

12. It was pointed out that all the vacancies of UDCs intimated against the Select List year 2004 onwards were *ad-hoc* vacancies, and that the LDCE for UDCs was conducted by the SSC against for the Select List Year 2004 onwards only for filling up of the ad-hoc vacancies, and since there is no explicit provision under the CSCS Rules 1962 for according promotions

against the ad-hoc vacancies, the applicants' contentions that the resultant CSCS vacancies, which have arisen out of the process of filling up of the vacancies created in the CSS due to re-structuring of that Cadre, had been fully or partially consumed against the Select Lists for the years from 2004 onwards, was untenable in law.

13. The Central Government relied on the fact that the extended CSS Select List of Assistants' grade for 2003, for promotion of 2151 UDCs against the restructured CSS Assistants' vacancies, was issued on 14.07.2009, along with the Select List of Assistants' grade for 2004 to 2006 also being issued on the same date. The 2151 UDC vacancies arising due to restructuring of the CSS cadre, arose due to the creation of more number of CSS posts in the hierarchy of CSS promotions in the year 2003, and not against any 75% seniority-cum-merit (SQ) Quota vacancies, or against the 25% LDCE quota vacancies, available in the Select List year 2004 onwards. It was contended this aspect could not be overlooked. It was pointed out that out of such resultant 2151 UDC vacancies in terms of the rules prescribed under the CSCS Rules, 1962, UDCs' Select List for the year 2003 was proposed to be extended, and 25% of the extra UDCs vacancies, i.e. 538, were proposed to be filled up by conducting a LDCE, and remaining 75% vacancies of UDCs, i.e., 1623 vacancies were proposed to be filled through seniority-cum-merit SQ quota. The official respondents had further justified the Notification of the draft Common Seniority List of UDCs for Select List Years 2003 to 2005 through OM dated 20.10.2011, and thereafter its finalization through the impugned OM dated 16.12.2011. It was stated that this revision was the result of the cadre restructuring in the CSS and it

further submitted that when on cadre restructuring of the CSS in the year 2009, effective from 2003, 2151 vacancies were caused in the grade of Assistants, UDCs belonging to the Select List Years 1971 to 1992-93 were promoted (in 2009) to the grade of Assistants, against the Select List Year 2003, and, thereby, it became imperative to take follow up action to fill up the resultant 2151 vacancies in the grade of UDCs, in the ratio of 538 to 1623, effective in 2003 itself. It was also submitted that all the Petitioners already had 8 years' approved service in the LDC grade in the year 2003, and were, therefore, eligible for promotions against the Select List Year 2003 under 75% seniority-cum-merit SQ quota. It was submitted that like in the cadre of Assistants (in CSS) in the cadre of UDCs, too, the posts were reflected in amendments. For the case of UDCs, amendments to CSCS Rules were made on 08-11-2010 (effective from 03-10-2003). The UDC cadre stood increased by 2151 – from that date; the total cadre was 5377. This development went unnoticed by CAT which erroneously presumed a lower cadre strength. They were actually waiting for their promotions for more than 21 years. It was submitted by them that the applicants tried to confuse the issue at stake by wrongly quoting “resultant vacancies” as “unfilled vacancies”.

Findings and Observations of CAT

14. The CAT, based on its appreciation of the submissions of the parties and the materials placed before it, concluded as follows:

“...the official respondents failed to appreciate that the whole issue concerns two different services altogether, the Central Secretariat Clerical Service (CSCS, in short) consisting of the cadres of LDCs and UDCs, and the Central Secretariat Service

(CSS, in short), consisting of the cadres of Assistants/Section Officers/Under Secretaries/Deputy Secretaries/Directors and above. In none of notings on DoP&T files, the pleadings in this case, or in the case-law cited by the learned counsels of the official respondents as well as the Intervenor Private Respondents, it has been held by any Court or Tribunal that the juniority and seniority in a given lower Service would be carried over to another higher service, even when the movement is from one organized Service (CSCS) to another entirely different organized service (CSS).

88. CSS is a different organized service altogether. The appointment from UDCs, the highest pay scale of CSCS, to the posts of Assistants, the entry level lowest cadre in the CSS, is not automatic, and also the UDCs of CSCS do not constitute the only feeder Cadre or source of recruitment for the CSS Assistants' cadre. On incumbents moving from the CSCS Service to CSS Service, their seniority of CSCS in the grade of UDCs has no relevance for the purpose of determining seniority in the grade of Assistants of CSS, since there are more than one modes of entry into the Assistants_ grade of CSS, and a number of factors get involved even in the process of induction of UDCs of CSCS into Assistants_ cadre of CSS.

89. Therefore, an appointment of a person even on an ad-hoc basis in the entry level Assistants_ grade of CSS, does not give rise to any vested right in favour of another person, who is still in the CSCS, who has till that date not yet entered the CSS Assistants_ cadre, and still holds an appointment in substantive capacity in another service, CSCS. Therefore, whether the appointment of a person in the cadre of CSS Assistants_ cadre is on ad-hoc basis or regular basis, it can have no effect whatsoever on the promotional channels of any other persons who are still in the LDCs_ or UDCs_ grades of the CSCS cadre. The Articles 14 and 16 of the Constitution of India do not provide for equality in the negative terms. Equality can only be among equals, and pay parity can also only be sought against a person who is equal.

90. In none of the cases cited by all the three sides, a case of parity being provided when a person had left one organized service, and moved to another service, has been considered by either any Bench of this Tribunal, or by the Hon_ble High Court of Delhi, or any other High Court, or by the Hon_ble Apex Court. But the view being relied upon here has been expressed by a concurrent Bench of this Principal Bench of this Tribunal, in its judgment dated 10.05.2012 in OA No.3984/2011, Rajender Mohan Saxena & Ors. Versus Union of India & Ors., in which one of us was a Member of that Bench.

91. Thus, while the restructuring of the CSS cadres in various grades, by increasing or decreasing the number of sanctioned posts in various grades of CSS, can have a fall out legal effect and implication on the other lower cadres within the CSS, it cannot have any legal effect on another Organized Service, CSCS, even though it may have led to an administrative eventuality of sudden vacation of a large number of posts in the UDCs grade of CSCS cadre. The two services being separate Organized Services altogether, while the creation of _X_ number of extra posts of Deputy Secretaries can lead to _X_ number of vacancies in the cadre of Under Secretaries, creation of _Y_ number of new posts of Under Secretaries can lead to the creation of _Y_ number of vacancies of Section Officers, and creation of _Z_ number of posts of Section Officers can lead to _Z_ number of posts being vacated in the Assistants_ cadre of CSS, it is held that no legal implication or effect can flow from a re-organization of the CSS cadres, to another Organized Service, i.e., CSCS.

92. Therefore, it is held that only an administrative effect or eventuality of the sudden vacation of a number of UDCs_ posts would follow, but no consequential legal implication can be said to flow from/result from the reorganization or restructuring of one Organized Service to another Organized Service. Therefore, it is further held that the re-organization of CSS cadre, which was given effect to in the year 2009, even though it may have been deemed to have been given effect to

(for the purposes of the decision of the Cabinet regarding restructuring of the CSS) in the year 2003, cannot result in any follow up legal implication upon the structure and constitution in that year 2003 of the other Organized Service of CSCS, in which the vacancies of LDCs and UDCs have been in the meanwhile continued to be notified all along, from year to year, to the SSC, and the concerned identified UDCs_ posts have been continued to be filled up 25% through the LDCE, and 75% through seniority cum-merit (SQ) based promotions, year after year from 2004 to 2009. This answers all the contentions raised in this connection by all the three sides in the instant case.”

The CAT also held as follows:

“..it is held that the presumption wrongly raised, that promotion of 2151 UDCs, many of whom had long since been working on ad-hoc basis as Assistants, and whose names had in-effect been stopped being counted against the strength of UDCs by many Cadre Controlling Authorities of the CSCS, will necessarily have an effect of creating the exactly equal number of 2151 UDCs_ vacancies, is not acceptable, and as has been rightly brought out in the DoP&T file notings itself, only 1707 resultant vacancies of UDCs have resulted for being filled up, and these vacancies too have occurred only in 2009, which now require to be filled up. Therefore, the contention of the applicants that at least some (444, i.e., 2151-1707=444) vacancies of UDCs had already been consumed while declaring the yearly Select Lists between the years 2004 to 2009 merits consideration and weightage. This discussion also answers the issue raised by the Intervenor Private Respondents, which was discussed at para 23 and 49/above, and by the applicants, discussed at para 35 and 36/above.”

It was also held that once a Select List is published under Rule 11 (3), and seniority determined on its basis, that determination is unalterable, as it crystallizes the rights of an official to a seniority slot or position. The fiction created by the action of the Central Government in ostensibly treating

vacancies as having arisen in 2003, when in fact there were no vacancies and promotions had been made on different dates and then assigning notional seniority positions, was therefore unsupported in law.

Contentions of the Petitioner and the Union of India

15. The writ petitioners contend that the CAT fell into error of law in holding that the applicants' seniority was affected by giving retrospective effect to the rules. It was submitted that the petitioners' promotions were in respect of the Select List for 2003, even though it was made much later. This, submitted the petitioners, was because of the delay which occurred in giving effect to the recommendations of the committee, which meant that posts in the higher cadre had to be filled, after which the cadre of UDCs could be said to have vacancies. Being UDCs who joined that cadre in 1995, their turn for promotion in SQ arose in 2003, after completion of the prescribed 8 year period. On the other hand, the applicants were entrants in the feeder grade of LDCs only in the year 1996-97 and were ineligible for induction on seniority-cum-merit (SQ) basis into the Select List of UDCs for the year 2003. In that year, they did not possess the requisite 8 years' service in the feeder grade as LDCs, and none of them had qualified the LDCE examination for the year 2003.

16. It was also submitted that the applicants were ineligible to participate in the LDCE quota for 2003 and could not therefore have articulated any grievance against the petitioners. Furthermore, they became eligible for the seniority quota promotions in the UDC cadre much later. Since they were ineligible for SQ promotions for the year 2003, their grievance in the guise of loss of seniority could not have been entertained and adjudicated upon by the CAT.

17. It was submitted that the impugned order of the CAT amounts to giving a premium on the administrative delay which occurred in filling the chain vacancies. The petitioners stressed that the CAT was aware of the Central Government's thinking that those eligible for SQ promotions to the UDC cadre had a right to be considered for promotion as of 2003, and that this would not amount to retrospective promotion, as was evident from its noting noticed in Para 32 of the impugned order. It was submitted that there can be no denial of the fact that even for the cadre of Assistants, a similar exercise was carried out, in 2009 – after which the filling up of UDC vacancies for 2003 was taken up.

18. Ms. Jyoti Singh, counsel for the petitioners, argued that the Union cabinet approved the recommendations of Cadre Restructuring Committee of CSS in the year 2003 and the policy decision of the Government went unchallenged by the applicants. Their challenge to the resultant action of the Government, which led to promotion of the petitioners, could therefore, not have prevailed. All additional posts created in the grade of Director, Deputy Secretary and additional posts created in the grade of Under-Secretary and Section officer in the year 2003 had to be filled up in the select List Year 2003; a Recruitment Year based on Select List year- starts from July to June of next year. So, the additional posts of Section Officer and Under Secretary (in CSS) were filled up against the Select List year 2003. The resultant vacancies in the grade of Assistant, which percolated down from Section Officer Grade have also been filled up against select List year 2003 from stagnating UDCs, though in 2009..

19. The promotion process in respect of CSS posts (i.e. Director to Assistant) was unduly delayed due to administrative reasons. Delay also

occurred in filling up the resultant vacancies in the grade of UDC against the Select year 2003. In the meantime, DoPT had issued promotions from LDC grade to UDC grade against the normal vacancies for the Select List years 2004 to 2009. Furthermore LDCs recruited up-to Select List year 1995 were to become eligible for promotion to UDC grade against the select List year 2003. It was their promotions that were unduly delayed. Had that been made in the year before issue of Select List year 2004 in the UDC grade, the applicants could not have claimed any grievance; there would have been no so called “retrospective promotion”.

20. The Petitioners also rely on letter No.12/ 1/2011, dated 11.1.2012 (Annexure-PR-1 to their reply before the CAT) to say that it clearly reflects these facts and also the *bona fide* action of the official respondents inasmuch as the letter clearly indicates that the official respondents took care of both the categories, i.e., (i) to be considered against 75 % on seniority basis and (ii) to be considered against 25 % through LDCE. In this view of the matter, because the applicants were in not eligible for the select list year 2003 or had not participated in the relevant LDCE for 2003 or are not intending participate against LDCE for such quota even at this stage, they cannot say that the persons who are meeting the eligibility condition as per rules, should not be considered and promoted by the official respondents.

21. It was argued that the Petitioners who had over 21 years’ approved services in the LDC Grade for promotion against the Select List Year 2003 under 75 % seniority quota, actually awaited for more than 21 years for inclusion of their name in select List 2003, as was done in the case of Assistants to Directors of CSS against the resultant vacancies arising out of CSS cadre restructuring. Counsel also submitted that the CAT omitted to

notice that the cadre restructuring exercise also meant the amendment to the CSCS Rules of 1962 by the CSCS (Amendment) Rules, 1962 which had the effect of increasing the cadre strength of UDCs and correspondingly, by operation of the amended Rule 12, abolishing vacancies in the feeder grade of LDCs. Rule 5 of the CSCS Rules, substituted by the 2010 amendment read as follows:

“Authorised Permanent Strength and temporary strength of the Service-

(1) The authorised permanent strength of the two grades of the Service in each cadre as on 3rd October, 2003 shall be as specified in the Second Schedule.

(2) After the 3rd October, 2003, the authorised sanctioned strength of the two Grades in each cadre shall be such as may from time to time be determined by the Central Government from time to time.”

The Second Schedule to the Amendment Rules listed the details of posts in the UDC cadre, in various Ministries and Departments. The total number of UDC cadre posts in 33 departments and Ministries was 5377. These clearly established that the vacancies came into existence by operation of law, in 2010 when they arose after the amendment to the rules.

22. The Central Government states in its affidavit, and argues that permission of the DoP&T to fill up the resultant cadre restructuring vacancies of 2151 in the grade of UDCs was granted and action taken in accordance with provisions contained in the Third Schedule of CSCS Rules, 1962 and no violation of the said rules has occurred. It is pointed out that CAT, in its impugned order erred in assuming that the total authorized

permanent strength of UDCs was 2300 (as noticed in paragraphs 69,70,73 and 74 of the impugned order) whereas in accordance with the amended CSCS rules 2010, the authorized strength in the grade of UDCs is 5377, which was overlooked by CAT which wrongly concluded that 2151 vacancies could not be in existence when the authorized strength of UDCs was only 2300. The Central Government relies on the Second Schedule to the Central Secretariat Clerical Services (Amendment) Rules 2010 (GSR 901 (E)) dated 08-11-2010. The said Second Schedule is extracted below:

“(See sub-rule (1) of rule 5)

Authorised sanctioned strength of the two grades of the Central Secretariat Clerical service in each cadre unit as on 03.10.2003

<i>SI No.</i>	<i>Name of Ministry/Department</i>	<i>Sanctioned strength of Upper Division Clerks of Central Secretariat Clerical Service as on 3.10.2003</i>	<i>Sanctioned strength of Lower Division Clerks of Central Secretariat Clerical Service as on 3.10.2003</i>
1	Agriculture and Co-operation	243	247
2	Civil Aviation	86	86
3	Coal	17	17
4	Commerce	184	185
5	Corporate Affairs	29	29
6	Consumer Affairs	18	17
7	Defence	197	198
8	Education	246	246
9	Environment and	71	72

	<i>Forests</i>		
10	<i>Expenditure</i>	371	364
11	<i>Fertilizers</i>	51	54
12	<i>Food and Public Distribution</i>	83	82
13	<i>Health and Family Welfare</i>	237	237
14	<i>Home Affairs</i>	550	568
15	<i>Industrial Policy and Promotion</i>	244	237
16	<i>Information and Broadcasting</i>	421	420
17	<i>Labour</i>	164	164
18	<i>Legal Affairs</i>	62	63
19	<i>Mines</i>	29	30
20	<i>Petroleum and Natural Gas</i>	27	27
21	<i>Planning Commission</i>	99	94
22	<i>Posts</i>	82	83
23	<i>Power</i>	163	163
24	<i>Rural Development</i>	54	53
25	<i>Road Transport and Highways</i>	88	78
26	<i>Science and Technology</i>	71	70
27	<i>Steel</i>	31	32
28	<i>Supply</i>	255	254
29	<i>Social Justice and Empowerment</i>	61	64
30	<i>Telecommunication</i>	212	217
31	<i>UPSC</i>	260	259
32	<i>Urban Development</i>	472	488
33	<i>Water Resources</i>	199	199
	<i>Total</i>	5377	5397

23. The Central Government also states that the decisions taken with the approval of Minister of State (Personnel) on 30.12.2011 were as follows:-

i) The vacancies caused in the grade of UDC as a result of promotion of 2151 UDCs to the grade of Assistants consequent upon cadre restructuring of CSS will be filled up against the Select List year 2003.

ii) As per the extant Recruitment Rules in 2003, 75% of vacancies will be filled up through Seniority Quota and 25% through LDCE quota. As such out of 2151 vacancies in the grade of UDC in the extended Select List of 2003, a total of 1614 were to be filled up by SQ candidates and 537 by LDCE qualified candidates in the proportion of 3:1.

iii) The seniority quota vacancies were to be filled up by eligible LDCs who had completed 8 years of approved service as on 01.07.2003.

As for LDCE slots, candidates who had qualified the LDCE 2003 and their ACR dossiers were called for by SSC but could not be recommended for appointment due to non-availability of vacancies in the Select List year 2003 under LDCE mode, were to be first accommodated against the available vacancies and for remaining slots, SSC will be requested to conduct Special LDCE for the Select List year 2003 (extended) and all the LDCs who had rendered 5 years of Service as on 01.07.2003 would be eligible to appear in the examination.

24. It is argued that DoPT has the right to prepare and revise the Select List from time to time in terms of Rule 2(hh) of CSCS Rules, 1962 (Rule 11(3) of CSCS Rules 1962) and Third Schedule to the CSCS Rules, 1962. In fact, the applicants challenged O.M. No.20/53/2008-CS.11(B) Vol.11 dated 16L1 December 2011 on the basis of a common Seniority List issued by O.M. No.20/53/2008-CS.II dated 24-06-2011, which was modified by OM dated 20-10-2011 as draft final seniority list. The Central Government also

argued that 2151 vacancies in the grade of UDCs occurred due to the filling up of the 2151 vacancies in the Grade of Assistants against the UDCs of 2003 Select List consequent upon the cadre restructuring of Central Secretariat Service in 2003. A decision was, therefore, taken with the approval of competent authority to fill up those 2151 UDC vacancies against Select List year 2003 in accordance with the ratio of 3:1 (3 candidates from Seniority Quota and 1 candidate from Limited Departmental Examination quota) as fixed under the Central Secretariat Clerical Service Rules, 1962. Thus, out of the resultant 2151 vacancies in the grade of UDC, 25% of the vacancies i.e. 538 are to be filled up through Limited Departmental Competitive Examination as laid down in the CSCS Rules, 1962.

Contentions of the Applicants

25. Mr. M.K. Bhardwaj, learned counsel for the original applicants, submitted that this court should not interfere with the order of the CAT. He submitted that having promoted the applicants against the regular vacancies for the year 2004 onwards and even assigned their seniority positions, the Central Government could not have sought to retrospectively appoint the petitioners in the guise of filling “chain vacancies”. He relied upon an official noting of the DoPT dated 02-12-2011 to the effect that vacancies in the CSCS could not be filled in the same analogy as those in CSS. He relied on the notings in the Central Government files which were considered by the CAT. They are as follows

“It may be recalled that consequent upon Cadre re-structuring of CSS in 2003, 2151 UDCs were promoted in the grade of Assistant against the select list year 2003 (extended). The order

of promotion of 2151 UDCs to the grade of Assistants against the select list year 2003 (extended) was issued vide this Department's OM No.7/3/2003-CS-II dated 14th July 2009. Though the orders were issued in the year 2009, the Cabinet while approving the proposal for re-structuring of CSS in 2003, had approved filling up of all these vacancies in the grades of CSS against the select list year 2003.

2. Since 2151 UDCs were promoted to the grade of Assistants against the select list year 2003 (extended), representation from Associations and reference from individuals were received to consider filling up of resultant vacancies in the grade of UDC by eligible LDCs against the select list year 2003 only, despite the fact that physical vacancies in the grade of UDC had occurred in 2009. Accordingly the matter was examined with reference to whether the 2151 vacancies in the grade of UDC may be taken to the Select List Year 2003 as was being done in all grades of CSS, consequent upon Cadre Review of CSS 2003, as per rules in vogue; or in 2009 i.e. when the UDCs physically vacated the lien of the post, CSCS Rules provide for filling up of UDC posts 75% by SQ and 25% by LDCE. Since LDCE for the years 2003 to 2008 had already been held the issue of filling up of LDCE vacancies also arose.

3. The matter was referred to Establishment Division of this Department, who clarified that since the resultant vacancies pertain to the year 2003, the vacancies in the grade of UDC may be filled up against the Select List year 2003 which would be as per prevailing CSCS Rules and procedures.

4. Subsequently, on the direction of the Hon'ble MOS(PP), Addl. Secretary (S&V) met delegations represented by various Associations on 9.9.2011 to discuss the issue. Since doubts were raised regarding timing of the occurrence of the vacancies and the matter was re-examined. It was considered whether these vacancies may be filled up against the Select List Year 2009 since the UDCs physically vacated the lien of their post in the year 2009.

5. The matter was again referred to Estt. Division who vide their note on page 26/ante have observed that the proposal of the CS Division to treat all the vacancies that occurred in UDC Grade as vacancies for 2009 is not as per provisions of statutory recruitment rules. Any approach to prepare the Select List of UDC in a manner different from that being allowed for other Grade(s) will have ramification for CSS/CSCS/CSSS cadre(s) as a whole. As such Establishment did not agree to the proposal of this Division and advised to take appropriate administrative decision by relaxing Rule 24(1) of the Central Secretariat Clerical Service Rules, 1962 if necessary, with the approval of the competent authority for filling up these vacancies against Select List year 2003.

6. The matter was again discussed in detail during a meeting between JS(E) and JS(CS). It was concluded that these vacancies should be treated as vacancies for Select List Year 2003 in accordance with extant Rules/Regulations and as has been done in all other grades of CSS. It was also observed that this decision is not likely to raise similar demands from CSSS because the year of cadre restructuring is the parameter for considering the creation of notional vacancy. The cadre restructuring of CSSS has been done in the year 2010 and promotions have accordingly been made. Hence this will not give rise to demand in CSSS for having any benefit from the SL year 2003 as being proposed to CSCS, which is based on the Cadre Restructuring of CSS-2003.

7. As regards mode of filling up of vacancies, as per the existing rules 75% have to be filled up through Seniority Quota and 25% through LDCE quota. Hence, out of 2151 resultant vacancies in the grade of UDC in the extended Select List of 2003, a total number of 1613 slots will be filled up by SQ candidates, as has been done in all grades of CSS in accordance with the Rule, Regulations and 538 by LDCE qualified candidates in the ratio 3:1. As far as the seniority quota is concerned those who are eligible and have completed 8 years of approved service as on 1.7.2003 would be considered for promotion against the select list year 2003 (extended). As a

result all SQ candidates upto the Select List year 2007 may be shifted to Select List year 2003.

7A. As for LDCE slots, since LDCE in the grade of UDC upto the year 2009 has already been considered, it was felt that those who had qualified LDCE in 2004 to 2008 should not be unfairly disadvantaged and mode of filling up should be adhered to. For this purpose, it is proposed that we may first consider nominating the candidates who had qualified the LDCE 2003 and whose ACR dossiers were called for by SSC but could not be recommended for appointment due to non-availability of vacancies in the SL year 2003 under LDCE mode. For the remaining slots, we may approach SSC with a request to conduct a Special LDCE for the Select List year 2003 (extended) and all the LDCs who had rendered 5 years of service as on 1.7.2003 would be eligible to appear in the examination. Even though the proposed exercise may take some time, we may be able to satisfy the majority of the demand of the Associations.

8. In the past the proposal regarding number and mode of filling up vacancies arising in Assistant Grade was approved by MOS(PP). Since the present proposal is to fill up vacancies as per Rules and Procedure approval of Hon'ble PM may not be required and we may submit the proposal for approval of MOS(PP). Accordingly the following proposal may be submitted to MOS(PP) for approval through Establishment Division :-

- i) The vacancies caused in the grade of UDC as a result of promotion of 2151 UDCs to the grade of Assistants consequent upon cadre restructuring of CSS will be filled up against the Select List year 2003.*
- ii) As per the extant RR in 2003, the vacancies will be filled up by 75% through Seniority quota and 25% through LDCE quota. As such out of 2151 vacancies in the grade of UDC in the extended Select List of 2003, a total number of 1613 slots will be filled up by SQ candidates and 538 by*

LDCE qualified candidates in the proportion of 3:1.

- iii) The seniority quota vacancies will be filled up by eligible LDCs who have completed 8 years of approved service as on 1.7.2003.*
- iv) As for LDCE slots, candidates who had qualified the LDCE 2003 and their ACR dossiers were called for by SSC but could not be recommended for appointment due to non-availability of vacancies in the SL year 2003 under LDCE mode, will be first accommodated against the available vacancies and for remaining slots, SSC will be requested to conduct Special LDCE for the Select List year 2003 (extended) and all the LDCs who had rendered 5 years of Service as on 1.7.2003 would be eligible to appear in the examination.*

Sd/-

(J. Minz)

Under Secretary (CS-II)

~~DS (CSH) — on leave~~

~~Director (CS-I) as link officer~~

~~JS (AT&A)~~

We had met on 13/12 and agreed.”

26. It was argued that the decision of the Central Government to conduct Special LDCE for the Select List year 2003(extended) and to promote them against the Select List of 2003 is violative of Articles 14 and 16 of the Constitution of India in as much as it resulted in shifting of the Select List year 2004 onwards on account of promotion to the grade of UDCs against the Select List Year 2003. This would create an anomaly and those appointed as UDCs through LDCE for the Select List years 2004, 2005, 2006, 2007 & 2008 would be adversely affected because those now sought

to be promoted against the extended Select List year 2003 would be placed senior to such earlier LDCE promotees in the seniority list of 2003. It is submitted that for this reason the Government treated the finalized Common Seniority List up to the year 2005 as draft and merely finalized the Common Seniority List upto 2003. As a consequence, the Central Government unsettled the Select List and seniority from the year 2004 onwards.

27. It was argued that the CAT consciously drew the distinction between the benefit to be rendered to employees for purposes of promotion and for the purpose of seniority in a grade. It was submitted that while the first concerns eligibility for promotion to a higher post and the other concerns seniority for being considered for promotion to a higher post. It was argued that any rule or policy affecting the seniority of others was violative of *Article 14 and 16 of the Constitution and impermissible. Reliance was placed on the judgment reported as State of Bihar v. Akhoury Sachindra Nath, 1991 Supp (1) SCC 334 where it was held that:*

“It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law respondents 6 to 23 cannot be made senior to respondents 1 to 5 by the impugned government orders as they entered into the said service by promotion after respondents 1 to 5 were directly recruited in the quota of direct recruits.”

Likewise, the applicants relied on [*Uttaranchal Forest Rangers' Association \(Direct Recruit\) v. State of U.P.*](#), (2006) 10 SCC 346 to the following effect:

*“We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to adversely affect the direct recruits appointed validly in the meantime, as decided by this Court in [*Keshav Chandra Joshi v. Union of India*](#) [1992 Supp (1) SCC 272] held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits..”*

Mr. Bhardwaj also argued that the mere existence of a vacancy is not enough to enable an employee to claim seniority. The date of actual appointment in accordance with the required procedure becomes important in such a case. He relied on *State of Uttaranchal v. Dinesh Kumar Sharma*, (2007) 1 SCC 683 and *Nani Sha v. State of Arunachal Pradesh*, (2007) 15 SCC 406. Reliance was also placed on the judgment reported as *P. Sudhakar Rao v. U. Govinda Rao* 2013 (8) SCC 693.

Analysis and Conclusions

28. Before analysing the facts and contentions, it would be first essential to notice what the CAT's findings were in respect of the vacancy position. The CAT observed as follows:

“...the total of the re-assessed year-wise UDC vacancy positions as intimated yearly by the Cadre Controlling

Authorities to DoP&T totals up to 3204, while the persons already actually promoted from the year 2003 to 2009 were 3627, it appears to us that it cannot be anybody's case that at least some portion of the 2151 vacancies of UDCs, which have arisen in 2009 as a result of the promotions of UDCs to Assistants' Grade, have not actually been consumed and subsumed in the promotions from LDCs' grade to UDCs' grade already actually given over the years 2004 to 2009.

77. When the re-assessed vacancy position of UDCs of 3204 over the years is less than the actually filled up 3466 UDC vacancies over the years 2004 to 2009, it is quite clear that the 33 Cadre Controlling Authorities of the as many CSCS cadres had not seen eye to eye with the DoP&T about the interpretation of what is a "post", and what is a "vacancy". It appears that most of these 33 Cadre Controlling Authorities have, after having given ad-hoc promotions to UDCs as Assistants, and much before their substantive promotions granted in 2009, already wrongly counted those UDC vacancies as "vacant liens" also, and had reported them as "vacancies" for the purpose of inclusion in the subsequent years' Select Lists, even though the lien of the incumbents on those UDC posts had not yet been vacated and extinguished, just because of their ad hoc promotion as Assistants, and such UDCs gave up their lien against their substantive posts of UDCs, and acquired a lien against the Assistants' entry Grade cadre of CSS much later, only in the year 2009.

78. However, since 2151 UDCs were so substantively promoted to the grade of Assistants in the year 2009, against the Select List year 2003 of Assistants' Cadre, and by then the Select Lists of UDCs had been finalized upto the year 2006, and the Select List under the LDCE conducted in 2007 for the posts under 25% selection quota for the year 2007 had also been finalized, the relevant Staff Associations demanded for passing on the benefit of the 2151 "resultant vacancies" in the grade of UDCs also against the Select List Year 2003 itself. The DoP&T then requested all the cadre units to revise the vacancy position in

the grade of UDCs from the Select List Year 2003 onwards, which has led to the present O.A. being filed.”

29. The CAT then went on to discuss an internal noting dated 01-03-2011 which stated that the Select List of SQ of UDCs for the years 2004, 2005 and 2006 had been finalized by the time the order for promotion of 2151 UDCs to the grade of Assistant for the Select List Year 2003 (extended) were issued. Subsequently, the Select List of 2007 was also finalized. The note stated that more than 600 officials had been appointed as UDC though LDCE for the Select List years 2004, 2005, 2006, 2007 and 2008. The note reasoned that *“if the Select List of 2004, 2005 and 2006 are reviewed it may lead to litigation by the UDCs who have qualified the UD grade LDCE for the years 2004 to 2008 as their seniority would be adversely affected. We have already received number of representations in this regard.”* Considering that under the recruitment rules, vacancies in the grade of UDC were to be filled up by 75% through seniority and 25% by LDCE quota, relaxation of the rules were – it was stated in the note *“be required for deviating from the percentage of filling up of Limited Departmental Examination and Seniority quota for the select list year 2003 onwards. It would be difficult to justify the relaxation of Rules with retrospective effect at this late stage.”* The other difficulty highlighted was that since the UDC grade is decentralized and reservation roster too was maintained by respective cadre units, they would experience difficulty in maintaining the roster as the percentage between LDCE and SQ would change due to shifting of some of the vacancies of the Select List year 2004 to 2009 to Select List year 2003. The note further observed that

“(vi) As per the revised vacancy position, the LDCE Quota in respect of Select List Year 2004 to 2008 would be more than 25% as the nomination against the LDCE vacancy up to the year 2008 is already complete.

(vii) Select List vacancies of a particular year arise on account of physical vacation of the posts by the incumbents due to retirement/VRS/resignation/promotion etc. during the period of the Select List Year i.e., 1st July to 30th June of that year. The UDCs included in the Select List of Assistants for year 2003 (extended) had physically vacated their posts only after 14.07.2009 (date of issue of the extended Select List). 5. It may be mentioned here that this Department has already completed the process of promotion for the Select List year upto 2007. Further the UDCs of LDCE for the Select List year 2008 have also been nominated by this Department.”

30. The note then went on to suggest the following courses of action:

“(i) As per the CSCS Rules, LDCs who have completed eight years of approved service are eligible for promotion to be grade of UDC. For the Select List year 2003, the LDCs upto Select List year 1995 are eligible for promotion as UDCs.

(ii) As per the CSCS Rules, LDCs with five years of approved service are eligible for appearing in the LDCE. Had the process been completed timely, the LDCs who had qualified the LDCE would have become eligible for promotion to the grade of UDC. Hence we may consider those LDCs who had qualified the LDCE upto Select List year 1995.

(iii) Since the promotion orders of 2151 UDCs as Assistants were issued in July, 2009, we may consider the promotion of LDCs as UDCs for the Select List year 2009 since the actual vacancies became available only in the year 2009.”

31. The CAT then discussed further:

“The view of the official, who suggested these options, however, did not get appreciated and accepted, as is apparent from the subsequent file notings. A subsequent suggestion was made on 17.03.2011 that 417 vacancies may be notified for filling up for the Select List year 2008 in the seniority quota (SQ), which will cover the LDCs of Select List Year 1993-1994 (part). Thereafter, the zone of consideration of Select List Year 2009 would be issued, which would cover all the eligible LDCs upto the select list year 2001, totaling to around 1200. However, the subsequent noting dated 18.05.2011 discloses the total disconnect between the 2151 promotions accorded on 14.07.2009 to the UDCs as Assistants, most of whom were already working as ad-hoc Assistants, and the resultant UDCs_vacancies. It is apparent from the file notings that the substantive promotions of 2151 UDCs to the grade of Assistants in 2009 had resulted in only 1707 vacancies of UDCs being created for being filled up (and not 2151). This had happened because the total strength of UDCs cadre had been 5148 earlier, and after upgradation of 1467 posts of UDCs to the posts of Assistants, the sanctioned strength of UDCs had initially come down to 3681, which, according to the Website, appears to have been reduced to 2300 now. Also, the total number of incumbents in the grade of LDCs, who could have been considered eligible for promotion to the grade of UDCs itself was only 1642, which is less than even the 1707 identified vacancies, as had been reported earlier, after re-assessment, and both these numbers 1642 and 1707 are much less than the 2151 LDCs now sought to be promoted as UDCs. Thus, it is clear that number of 2151 LDCs are not at all available for being promoted (since most of them have been already promoted as UDCs in the interregnum).”

32. It would be evident that the basic premise which the CAT went by was that after up-gradation of 1467 posts of UDCs to the posts of Assistants, the sanctioned strength of UDCs had initially come down to 3681. Crucially, the CAT assumed that this figure had further reduced:

“..which, according to the Website, appears to have been reduced to 2300 now. Also, the total number of incumbents in the grade of LDCs, who could have been considered eligible for promotion to the grade of UDCs itself was only 1642, which is less than even the 1707 identified vacancies, as had been reported earlier, after re-assessment, and both these numbers 1642 and 1707 are much less than the 2151 LDCs now sought to be promoted as UDCs.”

This assumption, or factual premise was entirely erroneous. The notification amending the CSCS Rules, in 2010, was dated 08-11-2010. It clearly mentioned – in the Second Schedule that the total sanctioned strength was 5377. In the light of this fact, the entire matrix of calculations based on which the impugned order was written, was without any foundation. Clearly, CAT did not take into account the 2010 Amendment to the CSCS Rules, 1962. Its factual assumption therefore, that there could not have been 2151 vacancies, was erroneous. On 10-2-2011 one Shri Sushil Kumar had sought replies to various queries, including the vacancy position. A comprehensive reply was given on 04-03-2011 under the RTI Act. That is part of the record. One of the queries posed was the break-up of regular vacancies after the issuance of the extended list of Assistants on 14-07-2009, in the light of inclusion of 2151 new posts in the UDC cadre. The year wise break up for 2003-09 was furnished; the aggregate vacancies worked out to 3204 for the relative period. All these facts clearly reveal that the CAT's assumption that there were no vacancies for the same period- based on its reading of the rules (i.e that the total cadre strength of UDC was 2300) is unsustainable.

33. The second aspect on which the CAT's findings are erroneous is that it overlooked the circumstance that the applicants were ineligible to be

considered for promotion when the present Petitioners were in fact considered for Selection Year 2003. Their averment as regards appearing in the LDCE is as follows:

“4.5 That as the applicants were fulfilling the eligibility conditions for appearing in the limited departmental competitive examination, therefore on receipt of information about the examination, the applicants applied in accordance with rules. The limited departmental competitive examination for inclusion of Officers Including the applicants was held on year 2004-2009. On the basis of aforesaid examination, the SSC recommended 678 candidates for appointment as UDC including the applicants in the Central Secretariat Clerical Service in select list year 2004. The details of the applicants date of promotion and their seniority position in the select list of the relevant years is given herein in tabulated form.”

Clearly, as between their claim (for promotion to UDC as of 2003) and that of the Petitioners, the latter had a superior one. They could not be promoted for want of vacancies; apparently they could not be promoted even later, for want of vacancies. None of the applicants was promoted in the LDCE quota, in 2003. They were otherwise ineligible for promotion. Consequently they could not have claimed to be aggrieved by the consideration of the Petitioners' case for SQ promotions, once the vacancies became available, especially when the vacancies existed as of October 2003 by virtue of operation of law.

The CAT's findings of impermissibility of retrospective seniority

34. The applicants had contended that all available vacancies in various grades of CSCS as well as other grades had been filled up and consequently the Central Government issued OM dated 14-11-2006 notifying all the

Ministries/ Departments that number of vacancies required to be filled up in a given recruitment year through various modes of recruitment, prescribed under the relevant rules should be assessed as accurately as possible with due regard to the all relevant considerations. That OM was relied on to say that all the available vacancies of UDC were utilized by promoting eligible officers and unutilized vacancies were carried forward to the next year and consumed. Now, this contention could not have been given much importance, because the elaborate consultations in 2011 were preceded by amendment to the rules with effect from 8th November 2010. That amendment had the effect of increasing the cadre strength of the UDCs, with effect from 3rd October, 2003. The resultant vacancies which fell to the SQ share were 1618 and those which fell to LDCE quota were 538. These facts had the effect of undermining the impugned findings. The court here notes that the Applicants were not aggrieved by the amendment to the Rules which increased the cadre strength; they did not challenge it. Moreover, the retrospectivity accorded to the amendment too went unchallenged. In these circumstances, it could not have been said that all vacancies had been exhausted and that the vacancies arose only after 2009, when the Assistants were actually promoted. Like in their case, the actual vacation of the posts – coupled with operation of the amendment rules, with effect from 2003 meant that the vacancies in the cadre of UDCs existed at that relevant time, i.e October 2003 and had to be based on a Select List to be drawn as of that point in time. This necessarily meant that those eligible for the SQ as of that date could be considered for the SQ vacancies and those eligible for the LDCE quota vacancies (which arose over and above what was actually filled in 2003) could be considered. For the same reason, the regularity of the

examinations for filling LDCE quota for the years 2005-2009 or the promotions given on the basis of the SQ in 2007, did not mean that when vacancies arose on account of the amendment to the rules (in December 2010, with effect from 03-10-2003) there was anything intrinsically wrong; the situation altered considerably, paving the way for filling 2151 vacancies for Select Year 2003. This was based upon the express intention to create the vacancies from 2003; in turn it had to result in a consequential action filling those vacancies from that date.

35. *Uttaranchal Forest Rangers' Association (Direct Recruit)* is an authority for the proposition that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely appointed validly in the meantime. The Supreme Court had relied on *K.C. Joshi & Ors vs Union of India*, 1992 Suppl (1) SCC 272 which ruled that promotions given outside the quota can result in seniority (of such promotes) only from the date of the vacancy within their quota arises; the intervening service being considered fortuitous. The Court further relied on *State of Bihar & Ors v. Akhouri Sachidananda Nath & Ors*, 1991 Suppl. (1) SCC 334. All these were considered in *P. Govinda Rao* (supra) which echoed and reiterated these observations, and stated that retrospective seniority cannot be given to those not borne in the cadre over the employees/officials appointed prior to them. Earlier too, in *Pawan Pratap Singh & others v Reevan Singh & Others* (2011) 3 SCC 267 the Supreme Court had culled out the principles which should be made applicable in seniority in cadres where direct recruits and promotes join the

service from two separate channels of appointment/recruitment. The relevant summation of the law in that decision is extracted below:

“(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure there from in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

xxx xxx xxx

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.”

36. There can be no doubt that retrospective seniority cannot be given to a promotee (or a direct recruit) so as to affect the seniority rights of an existing member of a cadre. The question here is whether retrospective seniority was accorded to the Petitioners in the manner that is impermissible. If the applicants were promoted as UDCs for the period 2004-2007 according to their turn, after clearing the LDCE test, in respect of the 25% quota provided under the Rules and if the petitioners were given retrospective promotion on the basis of the restructuring report accepted by the Union Cabinet, there is no doubt that such action would be legally vulnerable. However, in the present instance, certain other features are peculiar to this case. They are:

(1) The Union Cabinet approval led to increase in cadre strength of UDCs: the cadre was increased by 2151 posts;

(2) The cadre strength increase was followed up by an amendment to the CSCS Rules, on 08-11-2010.

(3) The amendment was given retrospective effect, as evident from the following amended Rule 5:

“5. Authorized sanctioned strength .- (L) The authorized sanctioned strength of the two grades of the service in each cadre as on the 3rd October 2003, shall be as specified in the Second Schedule.

(2) After the 3 October, 2003, the authorized sanctioned strength of the two grades in each cadre shall be such as may be determined by the Central Government from time to time.”;

(4) The applicant/respondent did not challenge the amended rule, or the retrospectivity given to it. The CAT also completely overlooked this material aspect.

(5) The cadre strength, indicated in the Second Schedule to the amended rules – of the UDCs- was 5377. This too went unnoticed by the CAT, which erroneously assumed the figure to be 2300.

(6) In the case of Assistants’ cadre, the 2151 posts were filled (by the UDCs) by recourse to the power of relaxation, through an extended panel dated 14-05-2009. The relaxation was indicated in the reply to the query of the said Sushil Kumar, (query no. 8) where it was indicated by the Central Government that *“...2151 vacancies in Assistant Grade were filled up through Seniority Quota of the Select List of Assistant of CSS for the year 2003 (extended) by relaxing the*

provisions of Rule 12 (2) (a) of the CSS Rules, 2009, by the competent authority...”

(7) Although the 2151 vacancies arose in 2009, the effect of the retrospective rule was that they were deemed to have arisen w.e.f 03-10-2003.

(8) The DoPT had indicated the mode of filling these vacancies in the light of the new development, after extensive consultations – and obtaining the approval of the concerned Union Minister, by Office Memorandum dated 03-05-2012. The relevant extract of OM dated 03-05-2012 (No. 12/1/2011-CS.II (B)) issued by the DoPT is as follows:

“OFFICE MEMORANDUM

*Subject: Extension of Select List 2003 of UDCs of CSCS-reg.
The undersigned is directed to say that it has been decided, with the approval of the Competent Authority, to extend the Select List Year 2003 of UDCs by including the names of additional 2151 UDCs in the Select List Year 2003 against the vacancies caused in the grade of UDCs for the Select List Year 2003 consequent upon promotion of 2151 UDCs to the Assistant Grade subsequent to the Cadre Restructuring of OES. Accordingly, it has been decided to extend List by filling up 2131 slots in the Select List Year 2003 (extended) in the following manner:*

(1) The 2131 slots will be filled up in accordance with CSCS Rules/Regulations as applicable at that time by 75% through Seniority Quota (SQ) and 25% through LDCE quota. As such, out of 2151 vacancies in the grade of LJDC in the Select List of 2003 (Extended), a total number of 1614 slots will be filled up by

SQ candidates and 537 by LDCE qualified candidates in the ratio of 3:1.

(ii) The seniority quota slots will be filled up by eligible LOCs who had completed 5 years of approved service as on 01.07.2003.

(iii) As for LDCE slots, candidates who had qualified the LOCE 2003 and their ACR dossiers were called for by SSC but could not be recommended for appointment due to non-availability of sufficient number of vacancies in the SL year 2003 under LDCE mode, will be first accommodated against the available vacancies and for remaining slots SSC will conduct Special WCE fbi UDC for the Select List Year 2003 (extended) and all the LDCs who had rendered five years of service as on 01.07.2003 would be eligible to appear in the Limited Departmental Competitive Examination.”

(9) The applicant/respondents’ plea of their unjustified loss of seniority was based on the assumption that all vacancies which had been filled during the period 2005-2009 (in the LDCE quota for UDCs) were regular. The argument therefore was that subsequent vacancies which became available in 2009 could not be filled with retrospective effect. This is apparent from their plea in the application:

“4.7 That it is relevant to note that all the available vacancies in various grades of CSCS as well as other grades are filled up, therefore the respondents issued OM dated 14.11.2006 bringing in the notice of all the Ministries/ Departments that number of vacancies required to be filled up in a particular recruitment year through various mode of recruitment, as prescribed under the relevant rules should be assessed as accurately as possible with due regard to the all relevant considerations. From the aforesaid OM, it is evident that all the available vacancies of UDC were utilized by promoting the eligible officers. The unutilized vacancies were carry forward

to the next year and consume. Copy of said OM is annexed as Annexure A-6.

4.8 That thereafter, in the year 2005, 2006, 2007, 2008, 2009 the examinations were held and the all available vacancies in the LDCE quota were consumed on the basis of said examination. The seniority quota vacancies were also consumed upto 2007 by holding year wise DPC. The details of the vacancies consumed in the aforesaid years are given herein below in tabulated form.”

(10) The respondent/applicants’ claim of being prejudiced hinged entirely on the fact that the common seniority list was – in their reckoning finalized on 24th June 2011. The developments which took place in the meanwhile, i.e approval of the Committee report, assimilation of 2151 vacancies after their inclusion in the cadre strength, through an amendment, creation of those posts w.e.f 03-10-2003, in effect inject fluidity to the entire process. Therefore, even though the common seniority was declared as “final” in June 2011, it could not be said that the applicant/respondents’ rights had acquired a settled character. This meant that the process of assimilation (of the 2151 UDC posts and their filling up) could have – and did- potentially result in the review of that seniority list.

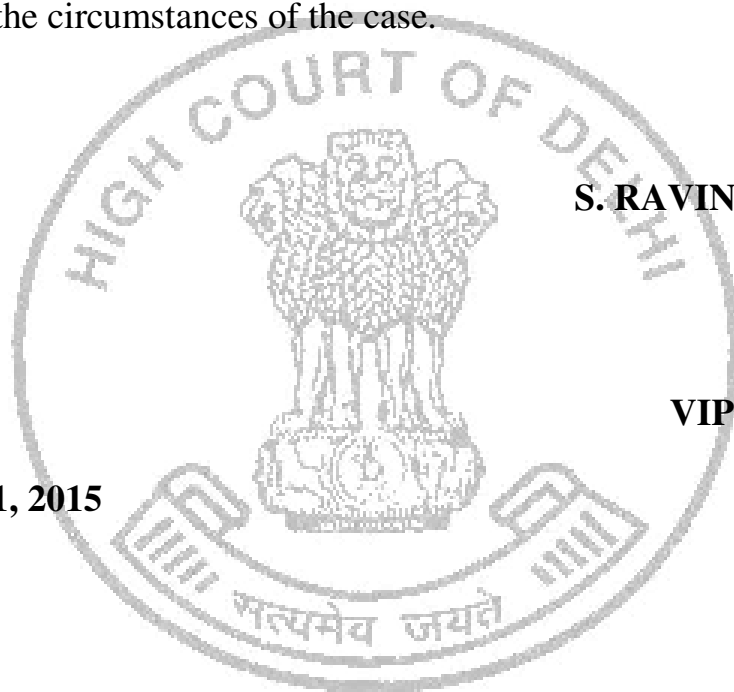
These peculiar features meant that the Central Government’s eventual decision in promoting the present Petitioners, with effect from the date the vacancies arose in 2003, on the basis of their eligibility- since they were entitled to be considered for UDC cadre that year, was not a “retrospective promotion”. It was the filling up of vacancies which were created with effect from a date prior in point of time, and effectuating that decision (i.e post

creation with effect from a past date- the decision being unchallenged even till date) by filling the posts from those eligible to be considered at that relevant time. No exception can be taken to this course, additionally because the OM of 03-05-2012 indicated a fair method of filling the posts, i.e in accordance with rules, after accommodating those LDCE candidates who could not be promoted for want of vacancies in 2003, and conducting review DPC for SQ promotees on the one hand and a special LDCE for those who could not avail that benefit for the intervening period.

37. There is yet another dimension to the controversy. The decisions relied on by CAT and the applicants, to say that retrospective assignment of seniority is arbitrary, dealt with cases where the two sources of recruitment were by promotion and direct recruitment. In the present case, the CSCS Rules applicable to the cadre of UDCs exclusively required – at the relevant time, appointment only by promotion. Of this source (promotion) 75% was to be seniority based (SQ) whereas the rest (25%) was to be on the basis of a limited departmental examination (LDCE). For SQ, the minimum eligibility prescribed was 8 years' service in the grade of LDC; for LDCE quota, the candidate could compete if she or he had completed 5 years in the feeder cadre (LDC). Concededly, the petitioners were senior to the applicants in the LDC quota and were eligible to be considered for the UDC cadre in the seniority quota. However, they could not be considered, because there were no vacancies then. Even the applicants were promoted to the LDCE vacancies subsequently. In these circumstances, when the sources of recruitment were the same, i.e promotion, the only difference being the method of promotion (seniority and limited departmental exam) the claim of

being adversely affected made by the applicants could not have been of the same order as in the case of retrospectively promoted or regularized promotees, who may not enter the cadre regularly.

38. For the foregoing reasons, it is held that the findings and reasons given by the CAT in the impugned order are not sustainable. The impugned order is consequently set aside. The writ petition is consequently allowed; the applications are disposed of in the above terms. There shall be no order as to costs, in the circumstances of the case.



S. RAVINDRA BHAT
(JUDGE)

VIPIN SANGHI
(JUDGE)

JANUARY 21, 2015