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

RESERVED ON: 15.12.2014

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PRONOUNCED ON: 04.11.2015

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W.P. (C) 139/2000

UOI Petitioner

versus

MANISHA SHARMA & ORS. Respondents

W.P. (C) 8444/2003, C.M. Nos.13633/03, 4217/06 & 2383/07

UOI Petitioner

versus

NIRUPMA KUMAR & ORS. Respondents

W.P. (C) 12413/2006, C.M. No.9498/06

UOI & ANR Petitioners

versus

NEELAM SANGHI Respondent

Present: Mr. Jagjit Singh with Mr. Shivanshu Bajaj and Ms. Nisha,
Advocates for petitioners.

Mr. Nilansh Gaur, Advocate for R-1 in W.P.(C)8444/03
with respondent no.1 in person.

Mr. K.R. Sachdeva, Advocate for R-4 in
W.P.(C)8444/2003.

Ms. Manisha Sharma, respondent no.1 in person in W.P.(C)
139/2000.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

S.RAVINDRA BHAT, J.

1. The Union of India (hereafter "UoI" or "the Union") is aggrieved by the orders of the Principal Bench of the Central

Administrative Tribunal ("CAT") dated 10-9-1999 in O.A. 1659/93 and O.A.2141/1997 and 17.07.2003 (in O.A. 2037/98 with O.A.239/2000, O.A. 1194/1998, O.A. 2055/2000, O.A. 1057/2002 and O.A. 965/2002) whereby the respondents' (hereafter called "the applicants") seniority in the Indian Railway Accounts Service ("IRAS") was directed to be restored to the original position, reckoning *inter-se* seniority of direct recruits to that service solely on the basis of merit in the All India Civil Services Examination (hereafter "Civil Services Examination" or "CSE" or "UPSC Examination") held for that purpose. The position of the Union and the Railways establishment in the proceedings before CAT was that *inter-se* seniority had to be reckoned on the basis of combined performance in the entrance examination and performance evaluation/appraisal at the end of the training, in accordance with instructions issued in that regard on 03.07.1987 ("impugned circular").

2. Briefly stated, the nine applicants in O.A.No.1659/93 (respondents in W.P. 139/2000, hereafter "Manisha Sharma batch") belong to the 1986 batch and the applicant in O.A.No.2141/97 (respondent in W.P.(C) 12413/2006, hereafter "Neelam Sanghi batch") belong to the 1988 batch of candidates selected by the Union Public Services Commission ("UPSC") for All India Services. All the applicants in both proceedings were allotted IRAS after they successfully competed in the All India Civil Services Examination. The applicants in the *Manisha Sharma* batch aver that many of them were ranked high in the combined merit list declared by the UPSC for the All India exam (achieving ranks such as 186, 299, 303, 412 and

353) and could have easily secured allotment in the Indian Police Service, Indian Revenue Service or some other cadre, but that they preferred to opt for the IRAS. They were asked to report immediately to the Lal Bahadur National Academy of Administration, Mussoorie, which they did. Ms. Nirupma Kumar, the applicant in the third batch, was selected in the CSE held by UPSC in 1990; her merit position was No. 1 in the IRAS based on the UPSC result. She joined the service on 16.09.1991 and successfully completed her training period on 10.09.1993.

3. The Indian Railway Accounts Service Recruitment Rules, 1966 - framed under proviso to Article 309 of the Constitution of India (which are applicable to the respondents and hereafter called "the IRAS Rules") - do not provide for the mode of determining *inter-se* seniority amongst the direct recruits and the question of seniority in the said service has been so far governed by executive instructions. The rules provide for the constitution of the Service, methods of recruitment, recruitment through competitive examination/promotion, transfer and other related subjects. The Appendix to the IRAS Rules provide, *inter alia*, that the probationers will be required to undergo a course of training at the Railway Staff College and pass the tests prescribed by the authorities. The rules also provide that the recruits will receive training at the specified Institutions, including the National Academy of Administration, Mussoorie. During the period of training if, in the opinion of the Union, the work or conduct of any probationer is unsatisfactory, the Union has the power to discharge the probationer from its services. Probationers are also required to pass

the end of the course test at the National Academy of Administration failing which their first increment was to be postponed.

4. Note (k) of the IRAS Rules, as amended in 1972, provided that in all matters not specifically provided for in the Rules, the officers, including probationers are to be governed by provisions of the Indian Railway Codes and any other orders issued by the Ministry of Railways from time to time. Before 03.07.1987 the fixation of *inter-se* seniority of direct recruits to the IRAS was premised upon the relative seniority of such officers was determined by the order of their merit in the select list prepared by the UPSC. This was in accordance with paragraph 4 of the General Principles for Determination of Seniority in the Central Services laid down by the Department of Personnel and Training ("DoPT") vide its Office Memorandum ("OM") NO. 22011/7/86 Estt. (D) dated 03.07.1986, which reads as follows:

"41. Direct Recruits. 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 a subsequent selection.

Provided that where persons recruited initially on 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."

5. Before the 1986 batch of recruits who were successful in the Civil Services Examination joined IRAS, the seniority of probationers

of the eight organized services of the Railways was based only on their merit order in the UPSC Examination. Based on directives issued by the DoPT, from the 1986 batch and onwards, the seniority of the probationers is based on the instructions of the Railway Board dated 03.07.1987 which provide for the fixation of seniority of these direct recruits based on their combined performance during the probationary training and in the UPSC Examination. The instructions dated 03.07.1987 were issued as a consequence of a decision taken in the DoPT's meeting dated 13.06.1986 where all the Central Government services were advised to make suitable amendments to their rules so as to provide for taking into account marks obtained during training period including the Director's assessment for determining the seniority, so as to make the probationary training more effective. It is submitted that such a provision is available even before 1986 in the Indian Administrative Service and the Indian Police Service Recruitment Rules. It was with a view to bring uniformity in the matter and to ensure that the probationers do take their training seriously, which is of vital importance in the Railways that the instructions (dated 03.07.1987) were issued by the Railway Board. The implementation of these instructions has inevitably resulted in a change of positions in the seniority list as compared to the UPSC merit order in the aforesaid eight organized services of the Railways.

6. The *Manisha Sharma* group of applicants approached the CAT complaining that the seniority list published for IRAS in 1993 for the first time, after over 5 years, sought to fix their *inter-se* seniority with other direct recruits not only on the basis of merit indicated in the

UPSC examination, but also, additionally based on their performance appraisal during the period of probation. According to them at each stage, when the issue of seniority could have been considered, i.e. completion of probation successfully, appointment to IRAS, grant of junior administrative grade, etc. the Union had shown their seniority based on the order of merit in the UPSC examination. It was for the first time, while preparing the said seniority list that the alleged performance in the probation process was taken into account. It was alleged that the authorities never indicated the level of performance contemporaneously, even though such an obligation existed under the guidelines of 03.07.1987. It was submitted that the appraisal said to have been made by the Director and shown to the CAT could not be believed, because other records and details of marking were never disclosed to the applicants during the period of six months required for the purpose in terms of the guidelines of 03.07.1987.

7. In the first order, the CAT allowed the *Manisha Sharma* group of applications, in O.A. No.1659/93 and held, *inter alia*, that:

(1) Conditions for implementation of the 03.07.1987 circular were not fulfilled inasmuch as all probationers did not complete their training together and were assessed at different points of time. Though there were 37 probationers, the joining time of all were not the same. This meant that some joined the earlier training batch and others, later ones. The lack of uniformity in assessment of candidates therefore prejudiced the applicants.

(2) The Directors' assessment evaluation and award of marks was palpably arbitrary, apparent from the fact that even those who failed to clear as many as three times in departmental tests were given very high marks, leading to considerable improvement in their seniority positions. The assessment was not based on any periodic feedback to the candidates. Taking the case of Ms. Manisha Sharma, it was noticed that she was awarded 229 marks out of 350, without any break up or periodic assessment. She had topped in the UPSC entrance, but as a result of the performance during training, her position slipped to number 10. Although probationers were in training for a long time, their appraisal based on performance was not assessed on any known methodology. Records were not maintained to facilitate periodic evaluation. Marks for practical and field training were not either awarded and in any case never disclosed. This was unlike in the IAS where candidates were shown the result of their performance during training. The CAT held that "*the entire system lacked "transparency, fair play and objectivity"*". It was also held that the assessment was contrary to Para 6.4 of the scheme (dated 03.07.1987) which required communication of the performance within six months of completion of training.

(iii) Marks were to be awarded by the Principal of the RSC in terms of the instructions; however, this was never done and the second respondent director awarded marks unilaterally, again contrary to Para 10.53 of the instructions.

(iv) Most applicants were given the senior scale and also confirmed in the service after completion of probation, in the order of merit secured as per the UPSC merit list. In other words, the CAT found that before the impugned seniority list, the applicants were granted seniority on the basis of their *inter-se* UPSC merit ranking, rather than the combined performance in UPSC and during training period.

(v) No applicant was communicated with the marks secured or obtained by her/him during the training; such marks were not communicated even during the proceedings, much less during the training period.

Reference to the Full Bench and its findings

8. When the second batch of applications (preferred by the respondents in W.P. 8444/2003, hereafter called “the Nirupma Kumar batch” i.e. applicants in O.A.No.2037/ 1998, along with which another application, i.e. O.A. No. 239/2000 too was heard) was filed, another Bench of CAT differed (by decision dated 18.10.2001) from the Bench which decided the *Manisha Sharma* batch (dated 10.09.1999). The later Bench deciding the *Nirupma Kumar* batch heard the applications and was of the opinion that the IRAS rules were silent on the question of fixing *inter-se* seniority of direct recruits and consequently, the officials could not complain that their seniority was wrongly or unfairly fixed, given that the instructions of 03.07.1987 fixed the relevant principles. That circular/order was in force when the applicants had been appointed; they were even made aware of it, because a term of their appointment expressly stated so. However, the

Bench referred the matter to a larger, three Member Bench of the CAT, to avoid conflicting opinions.

9. In the Full Bench decision (dated 17.07.2003) the correctness of which has been questioned by the Union in all these writ petitions– the CAT, through its majority opinion written by the Administrative Member (the Vice Chairman, Ms. Lakshmi Swaminathan dissenting) held that the 03.07.1987 guidelines were *ultra vires* the IRAS Rules inasmuch as the DoPT guidelines of 03.07.1986 had not been validly overridden. The opinion of the Administrative Member (with which the Judicial Member agreed by way of a short concurring opinion) took note of a meeting held by the DoPT on 16.06.1996 with all Cadre Controlling Authorities of various Group ‘A’ services. The Centre was concerned about the lack of attention for probationers’ training over the years. It felt that once selected by the UPSC and allocated a service, the probationers buoyed up with the sense of security of tenure and tended to become unconcerned and casual in the attitude towards the training. Several of them once selected to a service, sought to improve their chances, on account of which, while during training they were spending most of the period in preparation for the next examination. The Central Government deemed it necessary to make probationary training more effective and purposeful. DoPT, therefore, indicated that it would be in the fitness of things to consider the feasibility of including the marks obtained during probationary training also for a purpose of determining the *inter-se* seniority of probationers in a batch. The Cadre Controlling Authorities were,

therefore, advised by the DoPT by its letter dated 05.08.1996 to give effect to this by amending the necessary Recruitment Rules for the purpose. The said order stated, *inter alia*, that:

“The accepted principle is that the relative seniority of all direct recruits is determined by the order of merit in which they are selected for such appointment on the recommendations of the UPSC, as ordained by the DOP&T’s OM No.22011/7/86/Estt. (D) dated 3.7.1986. This position is inviolate and can be changed only in consultation with UPSC, through DOP&T, as brought out in the Ministry of Home Affairs OM No.9-11/55 RPS dated 22.12.1959, which is still in force. It could, therefore, be changed, if the RRs in respect of any service, which are issued following the above consultation permits or provides for the same. It is, therefore, clear that the relative position of seniority can change only on the basis of change in the rules. The administrative instructions issued cannot make any inroad into this settled position.”

Commenting on the fact that individuals from the same batch were sent for different training programmes, the Administrative Member (who wrote the lead majority decision) also said:

“This plea has no basis at all. It is very likely that different standards of evaluation and markings would be present in different Universities, but in a single test, to which those from different backgrounds are called all have to be treated alike. And this is the requirement of equality. The assessment has to be comparative among all the probationers, as the result of the assessment has a bearing on their career. [T]he point at issue here is that assessments made by different individuals, at different periods are thrown together to arrive at merit and seniority which is bad.” (Para 43)

As to the plea of illegality of the 03.07.1987 guidelines, the said order held as follows:

“It is thus clear that the criterion for determination of inter se seniority has already been fixed by the nodal ministry, which was binding on all the Ministries/Depts including Railways. Respondents could not have made any deviation therefrom unless the general principles were got amended by making provisions in the recruitment rules (RRs), in consultation with DOP&T and UPSC. As noted above no such consultation has taken place and the respondents have on their own chosen to amend the general instruction of the nodal ministry by administrative instructions. This is what is sfrowned [sic, for ‘frowned’] upon by the Hon’ble Supreme Court, by directing in a number of decisions, including that of P D Aggarwal & Anr. vs. State of UP & Ors., Ex. Capt. K. Balasubramanian, State of Haryana vs. Shamsher Jung Bahadur (supra). The instructions of 3.7.87, issued by the Railway Board cannot therefore seek to supplement on replace [sic] the instructions of the nodal Ministry or the IRAs RRs. Being inconsistent with them they are also invalid. The said instructions would therefore have to fall. All actions taken in pursuance thereof have to follow suit.”
(Para 39)

10. The same order later held that non-communication of marks for the training period was also arbitrary and consequently its inclusion for fixing seniority, vitiated:

“Once the marks obtained during the training are made the basis of refixation of seniority, propriety and fairness demand that they are communicated. Denial of the same would be unjust. Here the respondents have used the non-communication of the marks to the cost and prejudice of the applicant. It is significant that the relative marks obtained by the candidates in the instant OA had not been made available for Tribunal’s perusal in spite of the undertaking given by the learned Senior Advocate for the respondents in his written submission dated

21.5.2003 and my directions for the same, given in the Court. Possibly after the faux pas trade in Manisha Sharma's OA No. 1659/1993, wherein marks were produced before the Tribunal, respondents chose not to risk further. The only interference one can draw is that the respondents had exhibited an avoidable secrecy which aids only subjectively." (Para 45)

Union's contentions

11. It is contended on behalf of the Petitioners/Union of India that the applicants cannot claim to be unaware of the fact that their performance during training was an element which went into the fixation of *inter-se* seniority. It is pointed out, in this context, that a specific condition to this effect was incorporated in the Terms and Conditions governing their appointment. Para 5.2 of the conditions provides as follows:

"5.2 The inter-se seniority of Group A Probationers of a particular examination batch and of a particular service, on their confirmation to Junior Scale, will now be decided on the basis of marks obtained by them during the probationary period and marks obtained by them in the Union Public Service Commission Competition, (or during apprenticeship training for SCRA's)."

It is argued for the Union that the first time that the seniority list was issued was in 1993 (for direct recruits of the 1988 batch) and then on 03.12.1997 for the 1991 batch. This took into account the relevant Rules and instructions with regard to the *inter-se* seniority of directly appointed officers of the IRAS, based on the CSE, 1990. Though the *inter-se* seniority indicated in the list was considerably delayed, that itself did not entitle the applicants to say that their seniority positions

had been unsettled by the impugned lists. *Inter-se* seniority was settled for the first time when the impugned lists were published.

12. The Union of India questions the impugned orders stating that the CAT could not have held that in the circumstances of the case and the relevant Rules and instructions issued had to be ignored and only the marks obtained by the applicants in the UPSC competition will count. *Inter-se* seniority could not be determined only on the basis of the marks obtained in the UPSC competition, ignoring the marks obtained by appointees during the probationary period. It is averred and urged by the Union that Note (k) of the IRAS Rules, as amended in 1972, provided that in all matters not specifically provided for in the Rules, the officers, including probationers are to be governed by provisions of the Indian Railway Codes and any other orders issued by the Ministry of Railways from time to time. In these circumstances, the applicability of the instructions of the 03.07.1987 was not only undeniable, but unquestionable. Learned counsel submitted that the statutory rule nowhere mandated that only one set of instructions would prevail and bind the authorities for all times to come. No doubt the advent of the 03.07.1986 circular of the DoPT meant that *inter-se* seniority of the direct recruits were to be determined and fixed according to the *inter-se* merit in the UPSC examination process. Yet, the Railways, like other departments and establishments had been given the flexibility to determine the method of implementing the decision in accordance with the meeting and decisions taken at the level of the Union Government when all departments agreed on 13-06-

1986. It is thus stated that once DoPT in principle wished that the concept of introducing performance during probation was to be given weightage for determining *inter-se* seniority of direct recruits (along with weightage to their UPSC performance) the *manner* of achieving that policy was left to individual departments. Accordingly, urges the Union, the CAT erred in holding that the policy of 03.07.1987 violated statutory rules.

13. It is stated that whatever be the compulsions of other departments, whether Central Group A services or otherwise, in resorting to amendments to the recruitment rules - to give effect to the DoPT directive of 13.06.1986, the fact remained that as far as IRAS was concerned, the matter of *inter-se* seniority was governed by statutory instructions, and continued to be so. In this regard, it is pointed out that even though the DoPT memorandum of 03-07-1986 requires *inter-se* seniority to be based on recruitment result merit, yet the decisions taken in the 13.06.1986 DoPT meeting were specifically for the Central Services and had to be implemented. Thus, the fixation of seniority by including the element of performance during training was required in the OM dated 03.07.1987 in respect of IRAS.

14. It is submitted that the CAT should not have held that the impugned Office Memorandum violated a statutory rule. There was no statutory rule in the IRAS Rules, which directed fixation of seniority solely based on UPSC merit. It was highlighted that there are sound policy premises for requiring appraisal of a candidate's performance during his training and probation period, given that she or he would

have to acquire understanding of the constitutional, social, economic and administrative framework within which she or he would have to discharge duties. Furthermore, candidates have to display a complete sense of involvement in the training which is for two years duration. This period also provides young probationers with the opportunity to overcome their weak points and develop social abilities. The Central Government had observed that those allocated to certain services were completely neglecting training and frequently seeking leave *en masse* to prepare for the Civil Services (Main) examinations to better their chances creating a complete vacuum in training institutes. As a result, those on probation were debarred from appearing in later Civil Service Exams and permitted to join later.

15. In the proceedings (in W.P.(C)8444/03) it is pointed out that there is no question of disparity or discrimination in the manner of performance appraisal of those joining later. Here it is pointed out that if a candidate from one batch reports according to the instructions and another from the same batch seeks leave, is granted it and joins later, both sets of candidates have to undergo the same *kind* of training. The training pedagogies, in terms of the content, subjects, etc. are identical. Both sets of candidates would have to report to the same training institutions. Therefore, the question of discrimination would not arise.

16. It is argued in the petitions, by the Union that if the order of the Full Bench is allowed to stand, there would be serious repercussions inasmuch as the seniority of almost 2000 officers would have to be

undone and reworked. It is submitted that the order would also have serious ramifications because officers in other Central Group A services whose seniority has been determined by giving weightage to performance during probation, might have to be re-worked.

Contentions of the Applicants

17. Ms. Upamanyu Hazarika, Senior Counsel, Ms. Manisha Sharma, the applicant in W.P.(C) 139/2000 and Sh. Divang Thakur, learned counsel, make submissions on behalf of the respondent/applicants.

18. It was stated that the majority opinion in the Full Bench decision as well as the earlier ruling in *Manisha Sharma* batch of applications (O.A. Nos. 1659/1993 and 2141/1997), are well-reasoned and does not call for interference. It is stated that the principles governing determination of *inter-se* seniority of direct recruits was embodied in an instruction contained in the Railway Board's Circular dated 30.11.1976. The applicants place reliance upon the said circular and submit that the circular was produced by the Union of India itself in reply to M.A. 1235/1996 in Manisha Sharma's application (reply in the form of an affidavit dated 02.08.1996). It is highlighted that the principles contained in this letter/circular dated 30.11.1976 were formulated with the approval of the President, i.e. the competent authority. Reliance is placed upon Principle (ii) which reads as follows:

“Unless otherwise stated, officers appointed to the Indian Railways Accounts Services (Class-I) on the basis of a competitive examination held by the Union Public Service Commission shall count service for seniority from the date they commence earning increments in the regular scale as Assistant Officers subject to the condition that the inter se seniority of officers in each service recorded as probationer in a particular year will be regulated by their place in the order of merit.”

19. The applicants urge that these principles were never superseded and that the subsequent OM dated 03.07.1987 did not, therefore, apply. It is also urged in this context that the subsequent impugned Memorandum was not issued with the approval of the President. Learned counsel for some of the applicants/UoI is estopped from contending to the contrary because of the specific pleading in this regard with respect to the Principles dated 30.11.1976. It was further argued that a later Presidential order dated 23.04.1991 reiterated the principles of 30.11.1976.

20. It is next argued that within the Railways, several amendments were made to recruitment rules of different services, such as Indian Railways Service of Engineers (IRSE), Indian Railways Engineering Service; Indian Railways Electrical Engineers Service Rules and the Indian Railways Engineering (Mechanical) Service Rules, etc. Likewise, the recruitment rules pertaining to service conditions of Indian Railways Accounts Service personnel itself was amended several times – three times in 1972, twice in 1973 and subsequently even in 1979. In these circumstances, the UoI was conscious of its obligation, in the light of the DoPT decisions and minutes of meeting

dated 13.06.1986, which necessitated amendment to the rules in the manner known to law to effectuate the decision. Thus, not having amended the law and the rules for IRAS, which was the essential basis for implementing the decision to give weightage to training period performance, the UoI could not have achieved the purpose indirectly by mere executive instructions. It was argued additionally in this context that the principles contained in the instructions dated 30.11.1976 and the subsequent DoPT Memorandum of 03.07.1986 crystallized the norm, i.e. *inter-se* seniority of direct recruits must be based upon their merit position in the UPSC examination. Any deviation through executive instructions was not only unauthorized but contrary to the existing norms. To that extent, the executive instructions sought to supplant the rules.

21. It was submitted that in both the batches of cases, not only were officers at significantly lower positions of merit assigned higher places of seniority relative to the applicants, even the UoI's own understanding of the rules and the governing instructions showed that *inter-se* merit was the only known and applicable criteria for determining direct recruits' *inter-se* seniority. It is stated in this context that at all relevant and material times such as appointment to the services, confirmation, assignment of Junior Time Scale, promotion to the time scale under Rule 19(2)(a) etc., seniority taken into consideration was based solely on the merit in the UPSC examination. It was submitted that Rule 19(ii)(a) of the IRAS Rules requires that, "*appointments to the posts in senior scale shall be made*

by promotion in the order of seniority subject to the reduction of unfit officers in the junior scales". The applicants argued that the promotions to the senior scale were made on the basis of their merit in the UPSC examination, thus the UoI was estopped or precluded from contending that performance during the training and probation could be given some weightage. Having conceded that the applicants were entitled to a specific seniority position and granted service benefits, the UoI could not legitimately in 1997 have gone back and reflected a contrary position in the seniority list already published in 1993.

22. It was argued that in both batches of cases, the assessment of marks *vis-à-vis* Director's appraisal was utterly arbitrary. The observations of the Bench which decided the *Manisha Sharma* batch of cases was particularly highlighted in this regard. Ms. Manisha Sharma urged that the findings of the CAT have nowhere been disputed in that several individuals junior to her had repeatedly failed in the departmental examinations but yet given better ranking and marks in the Director's appraisal. Furthermore, the Director's appraisal and the marks awarded was contrary to instructions as found by the CAT because during the period of training spanning up to two years, the officers concerned were never communicated the marks awarded or told about any deficiencies or shortcomings observed during training. Most importantly, the CAT also held that the marks were made known only at the stage of hearing, much after the six months period mandated by the instructions contained in the OM dated 03.08.1987. Similarly, learned counsel appearing in the other

cases highlighted the findings contained in the two majority opinions with regard to lack of transparency and arbitrariness in the award of marks. It was submitted that the marking of a probationer's performance was never communicated during any phase of training. Learned counsel submitted that the CAT was of the opinion that the instructions relied upon by the UoI, i.e. the guidelines of 03.07.1987 were incomplete, as it contained no guidelines for assessment of direct recruits who could have been awarded 50-50 marks or 1/3rd of total number during period of training and probation. No guidelines, for such assessment or the break-up in terms of different steps or components were given. Learned counsel argued that by reason of such omissions, the entire scheme was rendered unworkable.

23. It was next argued that the Ministry of Railways and the Railway Board were subsequently asked by DoPT to incorporate decisions contained in the DoPT minutes of meeting dated 13.06.1986 by amending the rules. The letters/communications issued by DoPT in 1993 were relied on in support of this argument. This supported their assertion that in the absence of an amendment, the existing rules, i.e. determination of *inter-se* seniority of direct recruits based upon their performance in the UPSC.

24. Reliance was placed upon the amendments made to the Indian Postal Service (Group-A) Rules in 1994 to give effect to the decision of the DoPT dated 13.06.1986. The original rules framed in 1987 were amended. It was specifically stated that while fixing *inter-se* seniority of direct recruits in the Junior Time Scale, the marks obtained by them

in the Civil Services examination as well as the marks obtained in the Probationer's training had to be taken into account. It was thus argued that the UoI construed and interpreted relevant decisions of the DoPT on 13.06.1986 as implying only one thing i.e. need to amend recruitment rules to effectuate the policy. In the absence of such amendment, mere instructions could not have been used to determine seniority by including weightage to marks given during probation.

25. It was lastly argued that both the majority opinions of the Full Bench decision of CAT as well the earlier Division Bench that training of one set of selected candidates who are successful in a common CSE in a particular year, in different batches meant application of two different sets of criteria and their inclusion in the same seniority list was illegal. This amounted to discrimination – because those evaluated along with a later batch cannot be equated with their batch mates who were trained and evaluated in an earlier training batch. This it was argued, amounted to treating equals unequally. Learned counsels argued, therefore, that the findings of the CAT should not be disturbed.

Points for determination

26. From the preceding narrative and contentions, the following points arise for consideration:

(1) Are the CAT's findings with regard to the validity of the OM dated 03.07.1987 sound and justified?

(2) Are the findings in the impugned orders with regard to assignment of *inter-se* seniority ranking, based on the working of the OM dated 03.07.1987 warranted and sustainable?

Analysis and Findings

Re Point No.1 (“Are the CAT’s findings with regard to the validity of the OM dated 03-07-1987 sound and justified?”)

27. The majority of the Full Bench- comprising both the Administrative and Judicial Members, was of the opinion that the impugned OM was contrary to statutory rules. The record would reveal that the Appendix to the IRAS Rules, 1966 as amended in 1972, resulted in the addition of Clause (k), which stated that in all matters, specifically not provided under the Rules, the orders of the Central Government would apply:

“(k) In all matters not specifically provided for the officers (including probationers) shall be governed by provisions of the Indian Railway codes, as amended from time to time, and any other orders in force issued by the Ministry of Railways from time to time.”

Prior to the introduction of the impugned OM, concededly the Railways had stated that *inter-se* seniority of direct recruits was to be based on their merit in the UPSC examination.

28. What exactly was the DoPT decision of 13.06.1986? A look at the document itself would be instructive in this regard. The said document is part of the record, entitled “*Minutes of Cadre Controlling Authorities of the Services, Recruitment to which is made through civil*

services examination.” The Minutes record discussion on two items, i.e. grant of permission to candidates appointed to a service to reappear in the Civil services Examination and measures for making probationary training more effective. Para 14 (i) noted that unlike rules of IAS and IPS, seniority of direct recruits was based only on their merit in the CSE (combined services exam) and that *“No account was taken of the performance during probationary training for final fixation of seniority.”* The Minutes then recorded as follows:

“15. The Secretary (Personnel) emphasized that if probationary training is to be made effective, then some account will have to be given to performance during that training. He also drew attention to the remarks of the Prime Minister in the meeting of the Parliamentary Consultative Committee of the Ministry of Personnel held in November 1985 that no rigorous effort was being made to discharge unsuitable officers during the probation especially when the rules provided the opportunity for such discharge. In any case, even if the extreme step of discharge is not taken, it is only reasonable for the Ministry of Personnel to insist that performance during probationary training should be taken into account for fixing the seniority of the officers belonging to the same batch. Hence, the cadre authorities of Central Services were requested to make suitable amendments in their rules so as to provide for the inclusion of marks of the Probationer's Final Examination and Director's Assessment while drawing up the final seniority list of officers of the same year of allotment.

16. If no account is being taken in respect of the Director's Assessment, it will be for the cadre authority to decide as to what should be the marks that should be provided for this purpose. Having regard to the fact that the maximum marks for the Civil Service Examination are 2050, the marks for the probationer's final examination and the Director's assessment should not be kept at a very low level. Even if the inclusion of

such marks is now being made for the first time, and reasonably high percentage should be assigned for the final examination on conclusion of probation and the Director's assessment.

17. Additional Secretary, Ministry of Home Affairs, mentioned that the recommendation of the Central Police Establishment Board has been that the marks in the UPSC examination as was the position much earlier, before the revised syllabus was brought into force from 1979 examination. This would mean that the Civil Services Examination will count for 50 per cent and performance during probation will count for the balance of 50 percent, in arriving at the final seniority list. Secretary (Personnel) observed that since the proposal of Ministry of Home Affairs was in the direction in which Ministry of Personnel was moving, he found no objection to the proposal.

18. As regards the contention that the Director's assessment will be subjective in nature and would particularly affect the officers in small cadres, Secretary (Personnel) explained that in the National Academy of Administration, the assessment by the Director was broken into a number of component parts with marks assigned to each part. For example, syndicate work, book review, participation in co-curricular activities, participation in games and extra-curricular activities, performance during village visit etc. were all separately assessed by a different member of the faculty and hence it would not be correct to say that the Director's assessment is subjective in nature. If a similar practice is followed by other training institutions, then the apprehension that assessment will be subjective will be largely removed in the minds of some of the participants. Secretary (P) agreed that details of the procedure being followed by the National Academy of Administration Mussourie would be forwarded to the different cadre authorities.

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20. Concluding the discussion, Secretary (P) thanked all the participants and requested them to arrange for immediate

action for amendments to the concerned rules so that probationary training was made more effective on the lines suggested by the Ministry of Personnel."

In the earlier part of the Minutes, it was recorded that the Director's assessment marks was proposed to be increased from 600 to 1200.

29. The CAT agreed with the applicant's submission that the 03.07.1987 circular, to the extent it directed inclusion of marks awarded during training, for IRAS probationers, to determine *inter-se* seniority of direct recruits, was contrary to statutory rules. This conclusion, according to this court, is unsound and legally indefensible. No doubt, executive instructions cannot replace or supplant statutory provisions or statutory rules. In *Gurdial Singh Fijji v State of Punjab*, AIR 1979 SC 1622, the Court specifically held that:

"Clause (2) of Regulation 5 provides that selection for inclusion in the Select List shall be based on merit and suitability in all respects, with due regard to seniority. In other words, the test for inclusion in the Select List is merit-cum-seniority. Neither the Indian Administrative Service (Recruitment) Rules, 1954 under which the Regulations are framed nor indeed the provisions of the All India Services Act, 61 of 1951, under which the Rules are made, furnish any guidelines for assessing merit or suitability of a candidate for inclusion in the Select List or provide for the consideration of any particular data before a candidate can be brought on the Select List. Every executive authority is charged with the obligation of organising its services so as to ensure maximum efficiency. The ideal of maximum efficiency cannot be achieved unless persons who are selected for public offices possess integrity in as high a measure as ability. Integrity is indeed the sine qua non of merit and suitability: no person can be considered as possessing merit and suitability if he lacks in character and integrity. If, as provided by Regulation 5, selection for inclusion in the Select

List has to be based on merit and suitability in all respects, and the Rules and Regulations do not furnish guidelines for a proper assessment of these requirements, the government would have the power to prescribe the criteria for determining whether the requirements are fulfilled by any particular candidate. The prescription of the Regulation for inclusion in the Select List is merit-cum-seniority. The executive decision which is contained in resolutions 1.1 and 1.2 effectuates the purpose of that prescription. Undoubtedly the government in the exercise of its executive authority cannot supersede a statutory rule or regulation but it can certainly effectuate the purpose of a rule or regulation by supplementing it. Resolution 1.2 provides that the Selection Committee should consider the question of suitability of officers with reference to their integrity and should specifically record in its proceedings, that it is satisfied from the remarks in the confidential reports of the officers selected by it for inclusion in the Select List, that there was nothing against their integrity. Resolution 1.1 requires the Chief Secretary of the concerned State Government, who is the sponsoring authority, to record a certificate in respect of all eligible officers, whose cases are placed before the Selection Committee for consideration, that the State Government certifies the integrity of the officers with reference to the entries in their annual confidential reports. These resolutions of the Government of India do not transgress the requirement of the Regulations but are in furtherance thereof. The circumstance that the Chief Secretary has to record a certificate does not confer upon him unguided or unfettered discretion to assess the integrity of the officers by granting or refusing the integrity certificate at his sweet will. The State Government has to certify the integrity of the eligible candidate "with reference to the entries in his annual confidential reports". We are, therefore, quite clear that the Letters Patent Bench of the High Court was in error in striking down resolution 1.1 as being ultra vires of Regulation 5. Both the resolutions 1.1 and 1.2, are in our opinion within the scope of the Regulations and are valid."

Other decisions of the Supreme Court too have emphasized that administrative instructions can supplement, but not replace or supplant statutory rules. (Ref. *State Of U. P. & Ors, Appellant v Daulat Ram Gupta*, 2002-(4)-SCC 98; *Dr. S.K. Kacker v All India Institute Of Medical Sciences*, 1996-(10)-SCC 734). In *Daulat Ram Gupta (supra)* the Supreme Court held that the power to issue guidelines cannot control the manner of use of statutory power, or its discretion.

30. In this Court's opinion, the fundamental mistake in the CAT's Full Bench majority decision is that it proceeds on the notion that the earlier two OMs (dated 30.11.1976 and DoPT Memorandum of 03.07.1986, requiring fixation of *inter-se* seniority on basis of UPSC merit) have *statutory* effect. They clearly have no such effect. The 1976 memorandum was issued by the Railways, in exercise of the power conferred by the IRAS Rules (i.e. Note (k) of the Appendix). There is no dispute that the said rules do not stipulate the principle on which such seniority is to be determined, but leave it for executive determination, through guidelines or executive orders. Both the 1976 circular/memorandum as well as the 03.07.1986 OM are instances of such executive instructions, no more no less. In these circumstances, it is incomprehensible how those instructions or executive order acquired a greater legal efficacy to be equated with statutory rules. The 03.07.1987 circular had the effect of replacing the earlier ones, and requiring determination of *inter-se* seniority on the basis of a different principle, i.e. the one which accorded with the decisions taken by the DoPT meeting of 13.06.1986.

31. An allied contention must now be examined. The Petitioners argue that the decision taken in the minutes of meeting of the DoPT on 13.06.1986 specifically required “*immediate action for amendments to the concerned rules so that probationary training was made more effective on the lines suggested...*” (Ref Para 20 of the DoPT memorandum dated 13.06.1986). The petitioners contend that in the absence of any consequential amendment, the Union could not have through mere executive instructions, sought to change the method or principle for determining seniority of direct recruits. The argument has little merit. Firstly, as held earlier, there existed no rule in the IRAS rules, which spelt out a principle that was applicable for determination of seniority of direct recruits. The field was governed by executive instructions. This position remained unchanged; one set of instructions requiring the application of UPSC merit was replaced by the impugned memorandum, requiring weightage for both UPSC merit as well as probationary training performance. Secondly, the DoPT’s exhortation to amend the rules must be understood in the context as an obligation to replace the principle of determining seniority, rather than as a diktat to do it in a particular manner. If one sees the matter from this perspective, the fact that the DoPT reminded the Union and the Railways later (in the letters dated 24.09.1993 and 04.10.1993) of the need to amend the rules, is only an iteration of the resolve to have the principle embodied in a stable manner, *not as a direction to amend the rules, without which the existing principle would be inapplicable*. Another fact which requires to be noticed at this stage is that the impugned circular and its contents were re-iterated in a later order

dated 23.04.1991, which, after referring to the earlier principles – contained in the OM of 30.11.1976 - stating that “*inter se seniority of officers in each service recruited as probationers in a particular year will be regulated by their place in the order of merit, as determined by the instructions contained in the Railway Board’s letter No. E (TRG)086(13)/3 dated 3.7.87 as amended from time to time.*” This circular/ order dated 23.04.1991 expressly mentioned the approval of the President- like in the case of the earlier circular containing the principles of 30.11.1976. Thus, the decision to replace the criteria for determining seniority of direct recruits into one whereby weightage was to be given on the basis of probationary performance was a conscious one, and reiterated at different times.

32. The argument of the applicants, based on their promotion to senior scale, being made on the basis of Seniority (under Rule 19 of the IRAS Rules) though attractive lacks merit. There was no exercise of fixing *inter-se* seniority of direct recruits. No doubt, the promotions are an indication that the Union or some officer had proceeded on the footing that the applicants were entitled to that promotion. Under the rules, their eligibility could not have been questioned. However, the first occasion when the seniority of the applicants had to be fixed arose when the seniority list was actually framed and published. At that stage, their seniority was determined on the basis of the impugned circular.

33. The Petitioners had relied on several amendments – some of them to the IRAS Rules, others to the Railway Engineering Services

etc., to contend that recourse to amendments was often made. They also relied on amendments made to the Indian Postal Service Rules and the rules governing probationers in the Indian Administrative Service, to say that in the absence of a similar amendment to the IRAS rules, the 03.07.1987 memorandum was inapplicable and had no legal effect. This argument too, in this court's opinion is without substance. What might compel other cadre controlling authorities to amend rules relating to different services would be dependent upon the structure of those rules and the exigencies of the particular service or services. Those considerations may not be relevant for IRAS. Having regard to the scheme of the IRAS rules (which left the issue of *inter-se* seniority open and flexible, to be determined by the Central Government) the fact that in other services, rules were amended whereas for IRAS they were not, is irrelevant.

34. This court is further of the opinion that the Full Bench majority order finding that the applicants were not put to notice of the fact that their probationary performance would be given weightage for determining seniority, cannot be sustained. As noticed earlier, Clause 5.2 of the terms and conditions contained in the appointment letter specifically alluded to the principle of weightage given to probationary period performance (along with UPSC merit). The finding that the OM of 03.07.1987 was specifically not disclosed to the probationers/applicants who were only governed by the recruitment rules and IRAS is without merit. Once there is a reference to the rules— statutory rules in the present case - which in turn, keep

the question of seniority determination open to be decided according to extant guidelines, the question of putting the probationers to specific notice in regard to one or other guideline does not arise.

35. For the above reasons, this Court is of the opinion that the impugned office memorandum dated 03.07.1987 cannot be held to be illegal or *ultra vires* for the reasons which persuaded the CAT - in its majority Full Bench order - to do so. The said memorandum is valid. The Full Bench majority opinion is to this extent set aside.

Re Point No. 2 ("Are the findings in the impugned orders with regard to assignment of inter-se seniority ranking, based on the working of the OM dated 03-07-1987 warranted and sustainable?")

36. For a fuller or better understanding of the controversy surrounding this issue, it would be relevant to notice the OM of 03.07.1987, (the impugned circular) which specifically deals with the marking and performance of IRAS probationers, during training. The relevant provisions of the OM are extracted below:

"Sub: - Probationary training of Group 'A' Probationers of various services controlled by the Ministry of Railways.

Board have been considering the issue of streamlining the probationary training of Group 'A' services controlled by the Ministry of Railways, Railway Board. In order to make probationary training more effective, they have decided to take various measures as indicated below, para 2-11, in respect of probationers of Group 'A' services of all departments except RPF and Medical.

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4. Maintenances of Diary etc. by probationers –

During the two years period of probationary training, the probationers shall maintain a Diary to indicate their day-to-day activity which would be checked periodically by the 'Training Director', during probation.

5. Confirmation after probationary training -

No probationer will be confirmed in junior scale unless he/she has successfully passed all the examinations prescribed after completion of institutional training as well as all the department examination prescribed.

6. Determination of seniority of Group 'A' probationers of different services in junior scale after their confirmation –

The performance of Group 'A' probationers during the probationary training and during their posting against working post will be evaluated and marks will be awarded for each item of probationary training and for the performance while working against working post. The maximum marks for different items of probationary training and of their performance against working posts will be as under: -

Maximum marks for different items of probationary training –

Maximum marks for different items of probationary training -

Foundation Induction Course	Training in Professional Institute	Departmental Examination	Directors/Probationary training controlling Officer's assessment	Total marks scored during probationary period
300	300	300	350	1250

6.1 The detailed distribution of maximum marks in different items of probationary training will be as indicated in Annexure 'A'.

6.2 The inter-se seniority of Group 'A' probationers of a particular examination batch and of a particular service, on their confirmation to junior scale, will now be decided on the basis of marks obtained by them during the probationary period as indicated above and marks obtained by them in the U.P.S.C. Competition (or during the apprentice ship training for SCRA's). For the purpose of determining seniority in accordance with the revised procedure, Probationers' merit position would be adjudged on the basis of marks secured by them out of a maximum marks – 3300 – the maximum marks for U.P.S.C. competition would be 2050 and the maximum marks for performance during probationary period will be 1250.

6.3 In case of Engineering Service Examination, the maximum marks of UPSC competition are 1250. Therefore, for the purpose of determining seniority on the basis of above norms, the marks obtained by the candidate in the UPSC competition may be normalized by multiplying the factor of $2050/1250 = 1.64$. Similarly, in the case of SCRA's the maximum marks permissible during their 4 years apprenticeship period are 2400. The marks scored by them may be normalized by multiplying by a factor of $2050/2400 = 0.854$.

6.4 The record of marks obtained by various items by each probationer during probationary training shall be properly maintained by the Institution controlling centralized training (SE Rly. for IRSME Probationers). The concerned Institution will also be advised by the Ministry of Railways the marks obtained by each candidate in the UPSC examination (by each SCRA in his/her apprenticeship training). To enable Railway Board to determine inter-se seniority of probationers of one batch, the concerned Institution controlling the training (S.E. Rly. for IRSME) will send details of the marks obtained by each probationer of a particular batch and seniority on the following proforma arranged merit-wise, within six months of completion of probationary period. This record should be sent under a sealed cover addressed to the Secretary, Railway Board (by name). Proper secrecy should be maintained at every stage.

10. Guidelines for awarding of marks by Directors/Principal.

For award of marks under the column of Director's/Principal's assessment, the Directors (of IRICEN, IRISSET, IRIEEN), Principal of Railway Staff College, Vadodara and CME/South Eastern Railway, through the 'Training Director' of probationers, will follow the following guide-lines:

10.1 General Performance –

Marks under this column will be awarded by the 'Training Director' based on the overall behavior of the probationers, keeping in view –

- (i) General discipline;
- (ii) Participation in extracurricular activities during training;
- (iii) Behaviour with colleagues;
- (iv) Mental awareness and alertness;
- (v) Willingness to share and shoulder higher responsibilities and
- (vi) Attendance in Library.

10.2. Practical Training –

The 'Training Director' will keep a watch on the progress of training being received by the probationers in order to award marks against this column. He/She will take the following steps:

- (a) Interview the probationers at frequent intervals regarding the progress made by them.
- (b) Scrutinize at frequent intervals, the diaries and note-books kept and maintained by the probationers regarding the details of their day-today activities;
- (c) Carry out random inspection at the site of training;
- (d) Obtain a feed-back from officers under whom the probationers are undergoing practical training; and
- (e) Other steps as deemed appropriate.

10.3 Head of the Department's assessment

The 'Training Director' will obtain special reports from the co-coordinating head of department of the concerned service

of the Railway, other than for IRAS and IRPS, where probationers are working, regarding their performance during their third year of probation. These reports should cover all aspects of working and should quantify the performance of the probationers. However, in the case of probationers of IRAS and IRPS the marks against this column will be awarded by the Principal, Railway Staff College, Vadodara, based on the performance of the probationers, for which separate instructions will follow.”

Annexure A to the impugned circular spelt out the distribution of marks for the four different heads mentioned in the impugned circular. For the Foundation and Induction course, the maximum marks were 150 for each (total 300); for training in professional institute there were two phases, I and II, for each of which 150 marks (total 300 marks) could be awarded; the departmental exams section was split into three tests/exams with maximum 100 marks each (300 marks) and Director's Assessment was to be on the basis of 70 marks for General Performance; 210 for practical/field training and 70 marks for HOD's assessment (total 350 marks).

37. The findings of both the orders of CAT, (in the *Manisha Sharma* batch as well as the Full Bench majority opinion) were that the OM was not implemented in its letter and spirit. It was firstly held that comparing disparate groups, i.e. probationers from one batch who undergo training and probation periods at different points of time, would lead to iniquitous and anomalous results and discriminate one set of them. In particular, those probationers who were permitted to report later and undergo a subsequent batch of training, said the CAT,

could not have been equated with those who underwent training earlier. The second finding was that Railway authorities did not ever communicate the deficiencies in performance during probation; in particular the Director's assessment was held to be an arbitrary exercise.

38. The first question is how are those belonging to one UPSC batch of recruits to be dealt with for the purpose of probationary assessment? At the outset, the argument of the applicants that all selected in one recruitment year should be assessed together by application of common standards, appears forceful, even logical. Yet, given the fact that the Union permitted probationers to join later for individual exigencies, unless there is some fundamental flaw in the discretion exercised, the court would desist from interfering with the impugned circular. The mere fact that some co-recruits join later and undergo training along with a later batch, in the opinion of this court, would not mean that there is unfairness in the standards applied for judging probationary performance. Even in one examination process, frequently different examiners evaluate papers. Also, often, at the college or University level, students are unable to clear some subjects or seek to improve their performance. In such event, they attempt the paper again. If they do succeed and manage to secure ranking positions, it cannot be said by those who secured higher marks initially that they have a legitimate grievance. Here too, both probationers undergo the same training, in the same subjects or topics and identical practical or field experience. They are marked for the same attributes

and the maximum marks that can be allocated is part of a common scheme. In the circumstances that some of them report later and undergo training with a later batch, *ipso facto* does not lead to such differential treatment as to be characterized as discrimination or a finding that equals are treated unequally.

39. On the second aspect, the findings of the CAT in the *Manisha Sharma* case as well as the Full Bench majority opinion are pertinent. In the former (*Manisha Sharma's* case) the CAT noticed and found the following grave irregularities:

(a) 14 probationers of the *Manisha Sharma* batch failed repeatedly in departmental exams and some of them gained seniority over her, based on the Director's Assessment. According to the CAT, the failure was of such gravity that even probation could have been terminated.

(b) Ms. Manisha Sharma was the topper, securing the first position in the UPSC list for her batch. In the Director's Assessment, she was awarded 229 marks out of 350 without a break up of the necessary elements. This led to her seniority position slipping to Number 10. She was also never communicated her shortcomings or deficiencies during the two year probation period. The Director's assessment marks were not disclosed to her at all; they were disclosed in a sealed cover during the course of proceedings in CAT.

(c) Most telling was the finding of the CAT that for each session or term, the probationers were not given feedback about their performance and that "*the entire system lacked transparency, fair play*

and objectivity. In the IAS and IPS where this scheme was introduced the probationers were never kept in the dark. Within six months of the training and even during the training they knew the marks under each head....On the contrary, we have in the applicants' case a mysterious system that has been called oral feedback of probationers' performance conveyed to the Director who also did not convey what her assessment was during the course of training..." CAT also held that the assertion that the marks were displayed in the notice board could not be relied and was contrary to Para 6.4 of the OM dated 03.07.1987.

(d) Even in the other proceeding, i.e. the *Neelam Sanghi* batch (O.A. 2141/1997) marks were similarly never conveyed to the probationers during training. Here again, the marks were not assigned to individual heads or topics.

40. The irregularities found in the second batch of petitions, by the Full Bench majority order (in O.A.2037/1998) may now be dealt with. The following findings of the said majority order are relevant:

"It is seen that out of total marks of 3300, forming the basis for the determination of inter-se-seniority, the marks earmarked for the training schedule is shown at 1250 with UPSC marks at 2050 roughly, the marks given to the training institute works out to 1/3, that too without considering the marks obtained in the Foundation Course from LBSNAA which is also considered essential requirement of the training schedule. While it is true that evaluation of RSC training has been divided into seven components of the aspects of training, all those elements are not equally taken into consideration and Director or HOD is being given excessive power for purpose of assessment. It is seen that

350 marks are earmarked for the assessment of the Director/Probationers Training Controlling Officer. More than 25% training element is controlled by the Director while para 10.3 of the Scheme refers to HOD assessment, it is stated that in the case of probationers marks against this column would be awarded by the Director based on the performance of the probationers for which the instructions will follow. No such instructions are brought on record. The learned Senior Advocate for the respondents has stated that absence of such instructions would not vitiate the proceedings in any way as the Director is an officer of a rank of General Manager and he has in day-to-day [sic] touch with the probationers. In other words, according to the respondents, Director cannot do any wrong. Nothing has been brought on record to show that the Director or the Training Controller in respect of the probationers had maintained indication of performance to periodically monitor the performance of the probationers. This would clearly show that unfettered on unbridled power [sic] are vested in Director which could have been used by him in favour or against the probationers, as the case may be, if he so chose. [Para 42]

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44. Another point that had come up during the hearing is about the communication of marks obtained during the Probationary training. The applicant has affirmed throughout, that the marks obtained by her during the probationary training have never been communicated and that therefore the averment by the applicant cannot be correct. The same however is not borne out on record. Letter No. E (Trg)89 (22)/7 dated 26.7.90, deals with revaluation of answersheets and preservation of records, where under it is indicated that “records of marks awarded to the probationers during various facts of training should be preserved permanently after their publication on notice board and communication to the Probationers”. The only report on communication of results is the letter No. IRAS/CT/Relief-90 dated 10.9.93, issued by the Railway Staff College, Baroda – 4 which reads as under:-

45. *It only states that the applicant h[a]d cleared all papers. This communication[,] would have been issued only after the respondents had with them all the marks obtained [] by the applicant. However, in the affidavit filed by the respondents on 23.5.2001, it is indicated as such “It is confirmed that all probationers, including IRAS Probationers are apprised of the marks obtained by them in various examinations conducted at Rly Staff Colleges. The Provisions of Board’s letter No. E(Trg) Sig (22)/7 Dated 26.7.1990 are thus being fu[l]filled.*

“Whether or not displaying / communicating of marks to the IRAS Probationers of 1990/91 batches though displaying on the Notice Board was actually effected, cannot be said at this stage but as per practice and convention, these Probationers would have been kept apprised of the Results.”

Obviously, the marks, in spite of being available had not been communicated, as at that time it was only sufficient to indicate that the candidate had cleared the papers and the marks were not relevant for determining or disturbing inter se seniority Once the marks obtained during the training are made the basis of refixation of seniority, propriety and fairness demand that they are communicated. Denial of the same would be unjust. Here the respondents have used the non-communication of the marks to the cost and prejudice of the applicant. It is significant that the relative marks obtained by the candidates in the instant OA had not been made available for Tribunal’s perusal in spite of the undertaking given by the learned Senior Advocate for the respondents in his written submission dated 21.5.2003 and my directions for the same, given in the Court. Possibly after the faux pas trade [sic] in Manisha Sharma’s OA No. 1659/1993, wherein marks were produced before the Tribunal, respondents chose not to risk further. The only interference one can draw is that the respondents had exhibited an avoidable secrecy which aids only subjectivity.” [Para 45]

41. In W.P.(C)139/2000 (*UoI v Manisha Sharma & Ors*) the first applicant, Ms. Sharma had argued that though ranked at the top in the UPSC list (she secured 186 rank in the CSE and was the first in UPSC merit) she was ranked 10 on application of the weightage rule. She pointed to how she secured only 229 marks out of 350 in the Director's assessment, whereas an officer (Mr. S. Bhattacharjee) who was 537 in the UPSC merit list was given 302 marks by the Director. Likewise, she relied on a chart prepared for this purpose, based on the replies given to RTI queries, which showed wide fluctuation in the marks awarded by the Director. Among the 13 officers, the applicant was given low marks in the Director's assessment (229, being higher than only two other officers, Ms. Uma Gokhale and Ms. Kakoli Mitra) whereas those ranked much lower in UPSC were awarded significantly high marks in Director's assessment.

42. It is evident that the Director's Assessment report has resulted in a major disturbance in the rankings of the officers in these cases. The UoI made no worthwhile arguments assailing the factual findings of the CAT, with respect to non-communication of Director's assessment, not conveying periodic assessments, award of high marks in the Director's Assessment to those whose other performance levels were abysmal – some who had even repeatedly failed in departmental exams. The error is further compounded by the fact that guidelines envisioned in the Memorandum for assessment (by the Director) were not formulated- in either instance, i.e. for the 1988 and 1990 IRAS batch. For these reasons, we are of the opinion that the findings of the

CAT with respect to arbitrariness in award of marks and lack of transparency, in Director's assessment, have to stand.

43. This court notices that the Full Bench's factual discussion was restricted to the merits in O.A.2037/1998 (i.e. Ms. Nirupma Kumar). However, other applications were decided by the impugned order of the Full Bench. In some of these cases, O.A.1194/1998, O.A.2055/2000, O.A.1057/2002 and O.A.965/2002, the services involved are Railway Electrical or Railways Mechanical Engineering services. No factual discussion appears in the impugned Full Bench order as far as Director's assessments in these cases are concerned. Therefore, the matters are remitted for proper discussion and finding on facts, after hearing parties on the merits of their cases. It goes without saying that the CAT would be bound by this judgment with respect to the validity of the 03.07.87 OM.

44. The question now is what is the appropriate relief that the applicants are entitled to? The CAT - in both cases - directed "*restoration*" of seniority based on their merit in the UPSC. However, given that this court has upheld the OM of 03.07.1987, this course would not be appropriate. Instead we are of the opinion that the seniority of the applicants before the CAT - in the three applications before it- should be reworked by ignoring the Director's assessment awarded in respect of the 350 marks entirely. The same methodology would have to be adopted for other direct recruits who belong to the said applicants' batch(es). The Union of India is therefore directed to

redraw the seniority list after excluding the Director's assessment in all cases for the said batches.

45. It is inappropriate for us to comment on how much weightage, if at all, the Director's assessment must carry; but the fundamental guarantees of Articles 21 and 14 of our Constitution will entail certain requirements before the Director's assessments can pass Constitutional muster. If the Respondents choose to continue the employment of the Director's Assessment in determining final merit lists, such assessments must necessarily be written, and reasoned, to enable administrative or judicial review. Naturally, the assessment along with its reasons must be communicated to the concerned probationer.

46. This court would sound a note of caution that the greater the role that the Director's assessment plays in the final merit position, the stricter the safeguards must be, to check against arbitrariness. While this court does not require it in the present instance, a later court, upon weighing the context of the different components may impose additional requirements such as periodic communication of the performance while in probation, and several periodic assessments (instead of one final assessment) as is done in the case of IAS probationers.

47. The Union and Petitioners therefore succeed in part. The validity of the impugned OM is upheld. The award of marks for the Director's assessment, made in the applicant's cases, is held to be arbitrary. The Union of India and the petitioners are directed to re-

work the marks on the basis of the preceding paragraph no.44, in respect of the applicant/respondents and indicate the result, within 8 weeks from today. Based on the same, the relative *inter-se* seniority lists and consequential service benefits shall be worked out. The Petitioners shall ensure full compliance with this judgment within four months from today.

48. The writ petitions to the extent they concern O.A.1194/1998, O.A.2055/2000, O.A.1057/2002 and O.A.965/2002 are remitted for consideration and decision by the CAT on the factual matrix, in the light of the findings recorded on the validity of the impugned circular. The CAT shall render its decision at the earliest convenience, preferably within six months. The writ petitions are partly allowed, to the above extent and subject to the directions made. There shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

VIPIN SANGHI
(JUDGE)

NOVEMBER 04, 2015