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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P. (C) 2836/2010

Reserved on: December 7, 2015

Date of decision: January 21, 2016

V.K. MITTAL & ORS

..... Petitioners

Through: Mr. C. Hari Shankar, Senior Advocate with Mr. Pushkar Kumar Singh, Ms. C.M. Jaya Kumar, Ms. Ashley Cherian and Mr. Jagdish N., Advocates.

versus

**REGISTRAR GENERAL, HIGH COURT
OF DELHI & ORS**

..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. S.A. Saud and Mr. Milan Laskar, Advocates for R-1. Ms. Jyoti Singh, Senior Advocate with Ms. Tinu Bajwa, Mr. Amandeep Joshi and Mr. Sameer Sharma, Advocates for R-2 to 14.

**CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU**

J U D G M E N T

21.01.2016

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Dr. S. Muralidhar, J.

Introduction

1. Five promotee Private Secretaries ('PSs') of this Court have filed this writ petition under Article 226 of the Constitution of India against the High Court and 13 of their colleague PSs who are direct recruits ('DRs')

essentially questioning the notification dated 28th March 2009 issued by the High Court that confirms the Petitioners as well as Respondents 2 to 14 as PSs with effect from 20th March 2009. An incidental challenge is laid to the constitutional validity of Rule 5A of the Delhi High Court Staff (Seniority) Rules, 1971 ('Seniority Rules') as well as to an order dated 12th October 2009 whereby the technical resignations tendered by the DR PSs from the previous posts held by them were accepted, treating them as fresh recruits under the 75% DR quota for the post of PSs.

2. The essential grievance of the Petitioners, i.e., the five promotee PSs, is that they should have been confirmed substantively as PSs with effect from 17th February 2007, the date from which they were declared as having satisfactorily completed their probation. This in turn will make them senior to the DR PSs who are Respondents 2 to 14.

3. In the judgment that follows, this Court holds that the reliefs claimed cannot be granted and that the orders under challenge as well as Rule 5A of the Seniority Rules do not suffer from legal or constitutional infirmity.

The conspectus of the applicable Rules

4. The service conditions of the staff of this Court are governed by the Delhi High Court Establishment (Appointment and Conditions of Service) Rules, 1972 ('1972 Rules'). Seniority is governed by the Seniority Rules.

5. Prior to 8th February 2006, the 1972 Rules stipulated that the vacant posts in the cadre of PSs were to be filled in the following manner:

- (i) 25% by promotion on the basis of seniority-cum-merit in terms of the seniority list of Senior Personal Assistants ('SPAs') and
- (ii) 75% by selection on merit on the basis of written test and

interview, from the categories mentioned in Column 3 (b) (i).

In the event that the requisite number of candidates do not qualify for selection on merit in terms of provision of clause 3 (b) (i), the vacancy was to filled up by direct recruitment on the basis of written test and interview.

6. On 8th February 2006, 1972 Rules were amended by providing that the post of PS would be filled up 25% by promotion on the basis of seniority-cum-merit from the seniority list of SPAs of Class III and 75% by direct recruitment by way of selection on merit on the basis of written test and interview.

7. Prior to the above amendment which came to be notified on 15th February 2006, Rule 5 of the Seniority Rules provided as follows:

“5. Joint *inter se* seniority of confirmed employees in categories of equal status posts shall be determined according to their dates of confirmation in any of those categories.

Provided that if two or more employees are confirmed on the same date in categories of equal status their joint *inter se* seniority in categories of equal status posts shall remain the same as it was before their confirmation.”

8. By the notification dated 15th February 2006 Rule 5A was inserted in the Seniority Rules and it read as under:

“5A. The *inter se* seniority of direct recruits vis-a-vis promotees shall be determined in order of rotation of vacancies between the direct recruits and promotees based on the quota of vacancies reserved for both categories provided that the first vacancy will be filled by a promotee and the next three vacancies by direct recruits and so on and so forth.

Provided further the slot reserved for a direct recruit in the seniority list shall not be assigned to promotee even if there is

delay in recruitment process and appointment of a direct recruit against their quota of 75%.”

9. Consequently, as far as PSs are concerned, in addition to the quota of 25%: 75% as far as recruitment was concerned, there was a 'rota' put in place for arranging the seniority between promotees and direct recruits in the ratio of 1:3 whereby the first vacancy would be filled by a promotee and next three by DRs.

Relevant facts

10. By a notification dated 16th December 2005 issued under the order of the Chief Justice, 25 posts of PSs were created on the establishment of this Court.

11. By notification dated 17th February 2006 six Senior PAs, viz., Mr. Sardari Lal, Mr. Ram Singh, Ms. Neelam, Mr. Mukesh Kumar, Mr. V.K. Mittal and Mr. Sanjay Kalra were appointed as promotee PSs against the “vacant post of Private Secretary going to 25% promotion quota.” In the notes appended to the notification, it was stated thus:

“1. The inter-se seniority of the above promotee Private Secretaries *qua* direct recruits shall be governed by Rule 5A of Delhi High Court (Seniority) Rules, 1970.

2. The above officers shall be placed on probation initially for a period of one year and that expiry of the period of probation shall not result in their automatic confirmation.

3. The above appointments would be subject to the decision of Writ Petition No. 5645/93 titled as *L.R. Dawar v. Hon'ble the Chief Justice and Anr.*”

12. A written examination was held for filling up of 75% of the available posts of PS by way of direct recruitment both for the department

candidates as well as outside candidates on 30th April 2006. The result of the written test was announced sometime in May 2006. The shorthand test was held in June 2006 and the result thereof was declared sometime in July 2006. Interview for the DR candidates was held between 10th and 13th July 2006. The final result was published in the last week of July 2006.

13. By a notification dated 28th and 29th July 2006 issued by the High Court, 16 persons were appointed as PSs in the 75% DR quota with effect from 28th July 2006 with the stipulation that they would be on probation initially for a period of one year. Out of the 16, Respondents 2 to 9 and 11 to 14 who were appointed as PSs were departmental candidates who qualified through the selection process of DR PSs. The four remaining candidates, viz., Mr. Vinal Kapoor, Mr. Sunil Lakhina, Mr. Surender Pal and Mr. Rohtash Singh qualified as PSs having taken the examination as outside candidates. Except Mr. Vinal Kapoor, who is Respondent No. 10, the other three are not parties to the present petition.

14. The promotee PSs, who were appointed as such by notification dated 17th February 2006, completed one year's probation on 17th February 2007. At the meeting of the Selection Committee, comprising three Judges of this Court, held on 21st February 2007 the question of extension/termination of the probation of the six promotee PSs was considered along with other items on the agenda. The minutes of the said meeting on this aspect reads as under:

“1. To consider the matter regarding extension/termination of period of probation of six Private Secretaries.

And

2. To consider the matter regarding extension/termination of period of probation of five Senior Personal Assistants.

The Committee discussed the issue of probation of six Private

Secretaries namely S/Shri Sardari Lal, Ram Singh, Ms. Neelam, S/Shri Mukesh Kumar, V.K. Mittal and Sanjay Kalra and five Senior Personal Assistants namely Ms. Prem Bala Chhabra, S/Shri Sanjay Kapoor, Kulbhushan Singh, Ms. Manju Miglani and Shri Puran Singh Tariyal, who were appointed against the posts of temporary nature and were put on probation for a period of one year. In the ordinary course the appointment on probation pre-supposes the existence of a permanent post which did not exist in the instant case. The Chief Justice has looking to the workload, created 25 temporary posts of Private Secretary and 51 posts of Senior Personal Assistant against which these incumbents were appointed on probation. The work and conduct of these appointees have been found to be satisfactory. There should therefore be no difficulty in their confirmation against these posts provided the posts themselves are created on permanent basis. The Committee, therefore, recommends that:

(i) The temporary posts created by Hon'ble the Chief Justice by order dated 16th December 2005 may be made permanent as the workload has not diminished and the need to continue these posts subsists.

(ii) Upon conversion of these posts into permanent posts, the incumbents holding the same may be confirmed.”

15. Subsequently another meeting was held of the same Selection Committee on 19th July 2007. One agenda item in the meeting was to consider the conversion of 25 temporary posts of PS, along with 51 temporary posts of SPAs and 21 temporary posts of Personal Assistants ('PAs') into permanent ones. The Selection Committee was of the view that the power of the Chief Justice to create temporary or permanent posts was referable to Article 229 of the Constitution of India read with Section 4 of the Delhi High Court Act, 1966 and Rule 2 of the Delhi High Court Officers and Servants (Salaries, Leave, Allowances and Pension) Rules, 1970 ('1970 Rules'). The Selection Committee was further of the view that in terms of the above Rules, the power of the Chief Justice to create

temporary and permanent posts was not subject to the condition that the temporary posts must necessarily exist for a period of three years. Accordingly, the Selection Committee reiterated its recommendation to the Chief Justice to convert the temporary posts into permanent ones and to appoint the incumbents holding that said post against the same on permanent basis by declaring their probation to be completed successfully.” By Order No. 922/Estt/E1/DHC dated 7th August 2007, 25 temporary posts of PSs were converted into permanent posts.

16. Thereafter, on 22nd August 2007, Petitioner No. 2, Mr. Ram Singh, made a representation to the Chief Justice *inter alia* pointing out that hardship would be caused to the promotee PSs by Rule 5A of the Seniority Rules, the effect of which was that as and when a person was appointed to the post of PS against the 75% DR quota, the seniority of such DR would be fixed above the promotee PS appointed against the 25% promotion quota even though such promotee may have been promoted much earlier to the person appointed against the DR quota. Accordingly, it was prayed that notification inserting Rule 5A be quashed and “seniority of a person be directed to be fixed in the cadre as and when he is appointed to that particular cadre.”

17. By a separate letter dated 24th August 2007 addressed to the Registrar General (‘RG’) of the Court, Petitioner No. 2 pointed out that despite expiry of one year after promotion to the post of PS and the expiry of the period of probation on 17th February 2007, he had not received any communication regarding termination of the probation period.

18. An amendment was made to Rule 5A of the Seniority Rules on 21st November 2007 by which the words ‘Senior Personal Assistant’ occurring

therein was deleted. However, Rule 5A continued to apply as far as PSs were concerned.

19. On 3rd December 2007 each of the Petitioners received a communication from the Deputy Registrar (Estt.) of this Court to the following effect:

“I am desired to inform you that you have successfully completed your probation on the post of Private Secretary.”

20. However, since the actual date of completion of probation was not indicated in the letter, a further representation was addressed to the Deputy Registrar (Estt.) on 11th December 2007 by the promotee PSs. There was no response to this representation.

21. In the meanwhile, Respondent Nos. 2 to 14 who were appointed on 28th July 2006 as PSs in the 75% DR quota, completed their one year's probation on 27th July 2007. On 25th March 2008 identical letters were addressed by the Deputy Registrar (Estt.) of this Court conveying that each of them had successfully completed their probation on the post of PS on 27th July 2007. The letter added that “However, you will be confirmed as Private Secretary on your turn.”

22. On 28th February 2008, the Petitioner No.1 addressed a further representation to the Chief Justice reiterating the request of the promotee PSs for the deletion of Rule 5A of the Seniority Rules. On the same date another representation was made by the promotee PSs to the RG pointing out that the date of their successful completion of probation was yet to be intimated to them.

23. The Petitioners have produced copies of the file notings on the

decision taken in regard to the Petitioners' representations dated 11th December 2007. The note prepared by the Administrative Officer Judicial ['AOJ'] (Estt.) on 25th March 2008 on the said representations made a reference *inter alia* to the decision of the Selection Committee at the meeting held on 21st February 2007 (which was approved by the Chief Justice on 28th February 2007) and the minutes of the meeting held on 19th July 2007 which was approved by the Chief Justice on 25th July 2007. The note sought orders whether the promotee PSs "may be informed that they have successfully completed their probation on 17th February 2007 and they will be confirmed as Private Secretary on their turn." Under the said note, the Registrar (Admn.) wrote as under on 28th March 2008:

"Discussed with Registrar General. The above Private Secretaries have completed one year probation on 17th February 2007. This information be supplied to them."

24. On the basis of the above noting, letters were issued by the Joint Registrar (Estt.) to each of the Petitioners on 9th April 2008 stating:

"I am desired to refer to your application dated 11th December 2007 and to inform you that you have successfully completed your probation on the post of Private Secretary on 17th February 2007."

25. On 16th May 2008 the Petitioners made a grievance to the RG that despite their successful completion of probation they had not been issued orders of confirmation on the post of PS. Each of them had requested for issuance of a formal confirmation letter confirming their appointment to the post of PSs with effect from the date of completion of probation, i.e., 17th February 2007. A reminder was sent on 22nd August 2008.

26. By notification dated 21st October 2008, Schedule II to the 1972 Rules was amended, by providing that 25% of the posts of PS would be filled by promotion on seniority-cum-merit basis and 75% by selection on merit on

the basis of written examination. In effect, the possibility of outside candidates participating in the process for selecting DR PSs was eliminated. In other words, the PSs would be hereafter appointed only from the cadre of SPAs: 25% by promotion and 75% by way of selection on merit on the basis of written examination.

27. On 5th December 2008 the Petitioners addressed another representation to the Chief Justice stating that in view of the notification dated 21st October 2008 “Rule 5A was no longer applicable and had become redundant”, and that seniority in the cadre had to be fixed “on the basis of continuous length of service.” The Petitioners also pointed out that as result of the decision of the Supreme Court in ***B.S. Mathur v. Union of India (2008) 10 SCC 271***, whereby Rule 8 (2) of the Delhi Higher Judicial Service Rules (which according to the Petitioners is in *pari materia* with Rule 5A of the Seniority Rules) was set aside, the principle of continuous length of service was alone applicable for determination of seniority. Simultaneously, another representation dated 6th/8th December 2008 was made to the Chief Justice by the Petitioners praying for confirmation as PSs with effect from 17th February 2007.

28. The representation made by the Petitioners for deletion of Rule 5A was placed before a Selection Committee of three Judges on 17th February 2009. The minutes of the meeting in which the said issue was discussed reads as under:

“7. To consider the representation dated 5th December 2008 made by Sh. V.K. Mittal and three other Private Secretaries requesting therein for quashing the Rule 5A contained in Delhi High Court (Seniority) Rules 1971.

Considered. Rule 5A of Delhi High Court Staff (Seniority) Rules 1971 governing *inter se* seniority of direct recruits vis-a-

vis promotees in the cadre of Private Secretaries and Senior Personal Assistants was notified vide notification dated 15th February 2006. In so far as Senior Personal Assistants are concerned, the said Rule has already been deleted. There is further ground for not retaining the said Rule as judgment of Hon'ble Supreme Court in *B.S. Mathur & Anr. v. Union of India & Ors WP (C) No. 477/2007* holds that continuous officiation would determine the seniority. Accordingly, we recommend the deletion of Rule 5A for determining the *inter se* seniority of direct recruits vis-a-vis promotees in the cadre of Private Secretary also."

29. Thereafter on 28th March 2009 the impugned notification was issued making appointments of the Petitioners as well as Respondents 2 to 14 as 'Private Secretary Substantive Permanent' with effect from 20th March 2009. In the said notification, the names were arranged in terms of Rule 5A of the Seniority Rules. In other words, after showing Mr. Sardari Lal, a promotee PS at Serial No. 14, three DR PSs, i.e., Respondent Nos. 2, 3 and 4 were shown at Serial Nos. 15, 16 and 17. At Serial No. 18 was a promotee PS, Petitioner No. 2 Mr. Ram Singh, followed by three DR PSs, viz., Respondents 5, 6 and 7 at Serial Nos. 19, 20 and 22 respectively and so on.

30. Aggrieved by the above notification dated 28th March 2009, the Petitioners made another representation on 30th March 2009 pointing out that they had been confirmed on 17th February 2007 and that their seniority had to be fixed on the principle of continuous length of service as a result of the judgment in *B.S. Mathur (supra)*. A reference was also made to Rule 6 of the Seniority Rules which provided that *inter se* seniority of unconfirmed employees shall be determined on the basis of the continuous length of service. Thereafter the present petition was filed on 26th April 2010.

31. In response to the notice issued in the petition, replies were filed separately on behalf of the contesting Respondents (i.e., 2 to 14) and the High Court (Respondent No. 1).

32. It must be mentioned that as many as eight Benches of this Court declined to hear this petition. One of the reasons was that either the Petitioners or the contesting Respondents were working with one or other of the learned Judges on the Bench. After a series of such recusals, the petition came to be listed before this Bench first on 11th August 2015. It was noticed that one of the contesting Respondents was working with one of us (Muralidhar, J.). When this was conveyed to the counsel appearing for the parties, they expressed no objection to this Bench hearing the petition. The Court then noted: "However, learned counsel for both sides state that giving (*sic* given) the nature of the dispute and the fact that one or other of the parties to the petition are bound to be working with one Judge or the other, they do not have any objection to this Bench hearing the matter."

Counter affidavit of the High Court

33. In the counter-affidavit filed by Respondent No. 1, High Court, it is stated that the case concerning confirmation of PSs along with other posts, including AO (J) and Court Master was placed before the Committee of Judges in its meeting dated 3rd March 2009 and the Committee recommended confirmation. By an order dated 20th March 2009 the recommendations of the Committee were accepted by the Chief Justice. The notification for confirmation of the PSs was prepared on 20th March 2009 and issued on 28th March 2009. It is further stated by the High Court that the representation made by the Petitioners were placed

before the Committee of Judges on 30th March 2009, on 25th May 2009, and 23rd July 2009 but a decision thereon was deferred on each of the occasions. The subsequent representation dated 11th September 2009 was tagged with the earlier representation dated 30th March 2009 and placed before the Committee on 16th April 2010 but deferred. In the meanwhile, the present writ petition had been filed.

34. It is further stated in the counter-affidavit of the High Court that during the fixation of the pay of PSs in terms of the 6th Pay Commission Report, salaries of the departmental candidates who were appointed under 75% of DR quota of PSs were found to be lower in comparison to that of the outside candidates. Against the said anomaly, some of the departmental candidates made a representation which was placed before the Committee at the meeting held on 23rd July 2009. The Committee then recommended as under:

“We have been informed that in the year 2006 an open examination for the post of Private Secretary was held in which some departmental candidates also appeared and were selected, but the Registry did not obtain technical resignation from them. As a result, their pay was fixed, their pay was fixed treating them as promotees. However, consequent upon implementation of the recommendations of the Sixth Pay Commission, certain anomalies have crept in the matter of fixation of pay of departmental *vis-a-vis* outside candidates, who were selected as Private Secretary by order dated 28th July 2006. On perusal of the representations as well as the office note, we find that the anomaly can be set right if the departmental candidates are made to tender technical resignation from their previous posts from their date of appointment so as to treat them as direct recruits and to fix their pay at par with the outside candidates as Private Secretaries.

We, therefore, recommend that all the departmental candidates who were selected as Private Secretary by order dated 28th

July 2006 be asked to tender technical resignation from their post which they previously held in the department. We further recommend that the technical resignation, if tendered by them, be accepted, they be treated as direct recruits and their pay be fixed accordingly.”

35. The above recommendations of the Committee were accepted by the Chief Justice on 28th July 2009. By a letter dated 18th August 2009, the departmental candidates were asked to tender ‘technical resignations’ from the post of SPAs which they held prior to their selection as PSs. Under the orders dated 7th October 2009 the technical resignations were accepted by the Chief Justice. Thereafter, by an Office Order dated 12th October 2009, the departmental candidates were treated as fresh recruits as PSs under the 75% DR quota.

36. A separate counter affidavit has been filed on behalf of Respondents 2 to 14. The Petitioners have filed a rejoinder. An additional affidavit was filed by the High Court on 23rd March 2013.

Submissions of the Petitioners

37. It is submitted by Mr. C. Hari Shankar, learned Senior counsel for the Petitioners, that once the Selection Committee of the High Court had recommended in its meeting held on 21st February 2007 the conversion of the temporary posts of PSs into permanent posts and that upon such conversion, “the incumbents holding the same may be confirmed” it cannot be in question that the intention behind this was to confirm the Petitioners as promotee PSs from the date of such conversion of those posts. He pointed out that if there was any doubt in that regard, it was removed by the decision taken subsequently in the meeting held on 19th July 2007, in which the Selection Committee reiterated its earlier

recommendation to convert the temporary posts of PSs into permanent ones and “to appoint the incumbents holding the said post against the same on permanent basis by declaring their probation to be completed successfully.” The fact that the Petitioners successfully completed their probation was clarified by the letters addressed individually to each of the Petitioners by the Deputy Registrar.

38. Referring to the notings on file, Mr. Hari Shankar submitted that the note put up on 25th March 2008 by the AOJ (Estt.) that promotee PSs should be informed that they had successfully completed their probation on 17th February 2007 and that “they will be confirmed as Private Secretary on their turn” was mischievous inasmuch as once the recommendations of the Committee had been accepted by the Chief Justice (on 28th February 2007 and 25th July 2007 respectively) there was no occasion to delay the confirmation of the Petitioners as PSs with effect from the date on which they had successfully completed their probation. Referring to the decisions in *Mir Mohd. Khasim v. Union of India* (2004) 10 SCC 721, *Kazia Mohd Muzzammil v. State of Karnataka* (2010) 8 SCC 155 and *Commissioner of Police v. R.S. More* (2003) 2 SCC 408 Mr. Hari Shankar submitted that once a probation period was 'successfully' or 'satisfactorily' completed, it had to necessarily result in an *ipso facto* automatic confirmation. He submitted that once the Chief Justice had approved the recommendations of the Committee of Judges "to appoint the incumbents holding that said post against the same on permanent basis by declaring their probation to be completed successfully", it would be a contradiction in terms to say that despite their successful completion of probation, the Petitioners continued on probation thereafter. Referring to the decision in *Ashok V David v. Union of India*

(1996) 9 SCC 67, he submitted that an unreasonable delay in issuing a confirmation order, after declaration of successful completion of probation, was not permissible in law.

39. Mr. Hari Shankar further submitted that Rule 3 of the Seniority Rules was specific to fixing inter-se seniority among 'confirmed employees' and not Rule 5A which did not speak of confirmed employees at all. The Petitioners successfully completed their probation on 17th February 2007 and the posts were made permanent on 25th July 2007, whereas Respondents 2 to 14 completed their probation on 27th July 2007. Therefore, the Petitioners should be held to be confirmed earlier to the Respondents 2 to 14, and therefore senior to the latter.

40. Mr. Hari Shankar pointed out that the Petitioners had been continuously representing against Rule 5A of the Seniority Rules and had been seeking its deletion relying on the decision in **B S Mathur** (*supra*). These representations were accepted by the Selection Committee on 17th February 2009 and Rule 5A was recommended to be deleted "for determining the inter se seniority of DRs vis-a-vis promotees". Therefore, Rule 5A had to be first deleted and then the inter se seniority had to be fixed. He submitted that these minutes ought to have been immediately placed for approval before the Chief Justice. Instead, the case of confirmation of the PSs was placed before the Selection Committee on 3rd March 2009, without referring to the earlier minutes of 21st February and 19th July 2007 or even the minutes of the meeting of 17th February 2009. Thereafter both minutes of 17th February and 3rd March 2009 were placed before the Chief Justice on the same day i.e. 20th March 2009 and the order of confirmation got issued first and the order deleting Rule 5A issued later on 8th April 2009. He submitted that once Rule 5A was

directed to be deleted, the delay by the Registry in placing that decision before the Chief Justice for approval cannot defeat the rights of the Petitioners to have the inter se seniority determined, de hors Rule 5A, under Rule 3 of the Seniority Rules.

41. Mr. Hari Shankar submitted that the seniority list circulated was only a provisional one and the mere fact that the Petitioners may not have sent in their objections to it would not preclude them from questioning the applicability of Rule 5A of the Seniority Rules. As regards the obtaining of 'technical resignations' from the DRs, he submitted that this could not have been from a retrospective date as that was not the recommendation of the Selection Committee. Therefore, the order dated issued to that effect was bad in law.

Submissions on behalf of the High Court

42. In response to the above submissions, it is pointed out by Mr. Sandeep Sethi, learned Senior counsel appearing for the High Court, that under the 1972 Rules, until a formal order of confirmation was issued there was no concept of a 'deemed confirmation' merely on the completion of probation. Rule 8 of the 1972 Rules postulated that probation would ordinarily be for a year and "expiry of the probation period would not result in automatic confirmation". He pointed out that there was a consistent practice of the High Court to issue specific orders of confirmation and in the present case that happened in the case of both the Petitioners and Respondents 2 to 14 when the impugned order dated 28th March 2009 was issued. He pointed out that the letters of appointment of the Petitioners as PSs made it clear that they "shall be placed on probation initially for a period of one year and that expiry of the period of probation shall not result in their automatic confirmation." Thus the letter issued by

the Deputy Registrar (Estt.) that the Petitioners had successfully completed their probation could not be read as a letter of confirmation. He sought to explain and distinguish the decisions relied upon by Mr. Hari Shankar and referred to the decision in *Shiv Kumar Sharma v. Haryana SEB 1988 Supp SCC 669*.

43. Mr. Sethi further pointed out that in the present case there was no breakdown of the rota-quota rule. Therefore, the reliance on the decision in *B S Mathur (supra)* was misplaced. Here, it was made clear to the Petitioners even at the time of appointment as PSs that their inter se seniority with the DRs would be in accordance with Rule 5A. Although the Committee had recommended its deletion on 17th February 2009 this was approved by the Chief Justice only on 20th March 2009 simultaneous with the approval of the confirmation order with effect from that date. Rule 5A was deleted prospectively from 8th April 2009 onwards. Therefore, as regards the inter se seniority, the rota of 1:3 applied, even if the DRs had completed their probation and were confirmed later than the promotees. Reliance was placed on the decision in *C K Anthony v. B Muraleedharan (1998) 6 SCC 630*. Mr. Sethi pointed out that the decision in *M Subba Reddy v. APSRTC (2004) 6 SCC 729* and *M S Sandhu v. State of Punjab (2014) 6 SCC 514* highlighted the problems that would arise if the rota rule was not adhered to while confirming appointees of the same batch.

44. Referring to an additional affidavit filed by the High Court on 23rd March 2013, he pointed out that a provisional seniority list of PSs as on 1st January 2007 had been circulated requiring them to point out discrepancies within a fortnight. None of the Petitioners raised any grievance qua the said list. Their only plea was for repeal of Rule 5A and

that too not retrospectively. As of that date i.e. 1st January 2007 even the PSs appointed earlier with effect from 7th December 2004 were yet to be confirmed. The question of confirming the Petitioners earlier to those PSs did not arise.

Submissions on behalf of the Respondents 2 to 14

45. Ms. Jyoti Singh, learned Senior counsel for Respondent Nos. 2 to 14, submitted that the question of 'deemed confirmation' did not arise till such time a specific order of confirmation was issued. This was made clear in the letters appointing the Petitioners. She submitted that when at the stage when the Committee was on 21st February 2007 considering the Petitioners' representation regarding their confirmation, its attention was not specifically drawn to the question of *inter se* seniority between the promotee PSs and the DR PSs. It had therefore, no occasion to consider Rule 5A of the Seniority Rules and the impact an earlier confirmation of the Petitioners would have on the applicability of the said Rule. Therefore, although the Committee may have recommended that the temporary posts of PSs should be converted into permanent ones and that the incumbents must be appointed as against the same on a permanent basis by declaring their probation to be completed successfully, and the said recommendations may have accepted by the Chief Justice on 25th July 2007, the Committee or the Chief Justice did not intend that Rule 5 A would not apply. By that time most of the DR PSs had virtually completed their probations successfully as well. Therefore, even if the completion of probation of the DR PSs took place slightly after the promotee PSs, there had to be a specific order of confirmation and thereafter Rule 5A of the Seniority Rules had to be followed as far as determination of their *inter se* seniority was concerned.

46. Ms. Jyoti Singh place extensive reliance on the decisions in *M S Sandhu* (*supra*) and *Union of India v. N R Parmar* (2012) 13 SCC 340 and submitted that where it was a recruitment of the same batch and where the delay in the DRs joining their posts was purely fortuitous, it could not be said that there was a breakdown of the quota-rota rule. She too submitted that Rule 5A applied to the determination of inter se seniority of the Petitioners and Respondents 2 to 14. It was repealed only prospectively from 8th April 2009.

47. Ms. Singh further pointed out that nowhere in the writ petition or even the rejoinder had the Petitioners pleaded for the application of Rule 3 of the Seniority Rules. This was being urged for the first time during the oral arguments. In the writ petition their case was on the basis of Rule 6 and they pleaded for application of the principle of continuous officiation in terms of Rule 6. She further submitted that, in any event, where there were two sources of recruitment for a cadre, neither Rule 3 nor Rule 6 would apply.

Rejoinder submissions of the Petitioners

48. In rejoinder, Mr. Hari Shankar submitted that the confirmation of promotees could not be delayed awaiting the confirmation of DRs, or expiry of the period of probation of DRs or vice versa. He placed reliance on the decisions in *B S Yadav v. State of Haryana* 1980 Supp SCC 524, *A. N. Pathak v. Secretary* 1987 Supp SCC 763 and *Suraj Prakash Gupta v. State of J & K* (2000) 7 SCC 561. He submitted that quota and rota are to be applied at the stage of recruitment and not at the stage of confirmation. He sought to distinguish the decision in *Paramjit Singh v. Rama Rakha* (1979) 3 SCC 478 and instead relied on the decision of the

Full Bench of the High Court of Punjab and Haryana in **Narender Singh Rao v. State of Haryana** MANU/PH/0126/1978 which was approved by the Supreme Court in **B S Yadav** (*supra*).

49. Mr. Hari Shankar submitted that **M S Sandhu** (*supra*) was a case where later DRs were confirmed without confirming the earlier promotees. Therefore the said decision was not an authority for the proposition that confirmation of earlier promotees should be held up awaiting the acquiring of eligibility of later DRs. Further, he submitted that a judgment was an authority only for what it decided and not what may logically flow from it. Reliance is placed for this proposition on the decisions in **Bharat Petroleum Corporation v. N R Vairamani** (2004) 8 SCC 579 and **Ambica Quarry Works v. State of Gujarat** (1987) 1 SCC 213.

50. While not disputing that the prayer in the writ petition was for fixation of seniority of the Petitioners, vis-a-vis the private Respondents, on the basis of continuous officiation, it is sought to be explained that was only because of the specific recommendation to that effect by the Selection Committee, while deleting Rule 5A. It is contended that in any event since the writ petition challenges the belated confirmation of the Petitioners from 20th March 2009 instead of 17th February 2007, or at the latest 25th July 2007, the seniority was in effect being asked to be fixed by applying Rule 3 of the Seniority Rules.

Deemed confirmation

51. The first issue that arises is whether it could be said that there was a deemed confirmation of the Petitioners with effect from 17th February 2007, the date on which they 'successfully' completed their probation or

25th July 2007 on which date, according to them, the temporary posts of PSs stood converted into permanent ones.

52. Rule 8 of the 1972 Rules deals with 'Nature of Appointment'. Rule 8 (a) reads thus:

"Appointment to post specified in Schedule II other than the post of Registrar-cum-Secretary to Hon'ble the Chief Justice may be substantive or on probation or on officiating, temporary or adhoc basis. Any appointment other than substantive appointment may be terminated at any time without assigning reasons. Probation shall ordinarily be of one year's duration. Expiry of the period of probation shall not result in automatic confirmation."

53. In addition Rule 11 of the 1972 Rules provides as under:

"Application of Central Government Servants Service Rules:

In respect of all such matters regarding the conditions of service of Court servants for which no provision or insufficient provision has been made in these rules, the rules and orders for the time being in force and applicable to Central Governments Servants shall regulate the conditions of service of the Court servants subject to such modifications, variations or exception, if any, in the said rules, as the Chief Justice may, from time to time, specify."

54. As far as the Seniority Rules are concerned, apart from Rule 5A which has been set out hereinbefore, the two provisions that have been invoked by the Petitioners are Rules 3 and 6 which read thus:

"3. Inter se seniority of confirmed employees in any category of the High Court Staff shall be determined on the basis of the date of confirmation.

6. Inter se seniority of unconfirmed employees in different categories of the staff of the High Court shall be determined on the basis of continuous length of service rendered by them in the category concerned both in the parent organization as well as in the High Court.

Explanation: The continuous length of service in the category concerned shall include any service rendered by the employees on an equated post or in an equal status post or in an officiating or temporary capacity, on a post in a higher category in the High Court."

55. What emerges from a reading of the 1972 Rules is that

- (a) although the period of probation is normally one year there is no maximum period of probation provided; and
- (b) the mere completion of a period of probation does not result in an automatic confirmation.

56. As far as the Seniority Rules are concerned, the position is that both Rules 3 and 6 talk of confirming employees appointed to a cadre from the same source and not two different streams like promotees and DRs. As far the inter se seniority of the Petitioners vis-a-vis the contesting Respondents i.e., DRs, is concerned, it would be governed by Rule 5A and in the absence of any specific rule, by the rules applicable to central government servants subject to such modifications as the Chief Justice may specify.

57. In the present case the question is one of determining the inter se seniority between the two streams of PSs viz., the promotees and the DRs, both of who have 'successfully' completed their respective periods of probation. At this stage when both sets of PSs stand confirmed, the question of applying Rule 6 to determine their inter se seniority on the basis of continuous officiation or length of service does not arise. As far as application of Rule 3 is concerned, that question would arise only if the Petitioners succeed in showing that, notwithstanding their appointment letters specifically stating to that effect, Rule 5A of the Seniority Rules will not apply for determining their inter se seniority vis-avis the

Respondent DRs.

58. In order to substantiate the above plea, the Petitioners have sought to first make out a case that they should be deemed to have been confirmed as PSs either from 17th February 2007 when they 'successfully' completed their probation or latest 25th July 2007 when the temporary posts of PSs were converted into permanent ones. It is their case that under the 1972 Rules a separate order of confirmation was not necessary. Their next submission, based on the first one, is that they stood confirmed earlier to the DRs and therefore should rank senior to them as PSs in terms of Rule 3. This of course is subject to their succeeding in their other major contention that Rule 5A is bad in law as it seeks to apply the rule of rota at the stage of confirmation and unfairly places the earlier confirmed promotees junior to the later confirmed DRs.

59. It is necessary in first instance to examine the legal position concerning 'deemed confirmation'. There have been a long line of cases cleaving along two broad lines: (a) if an employee completes the maximum period of probation in terms of the applicable rules, he is 'deemed' to be confirmed and treated on par with other confirmed employees (b) there has to be specific order of confirmation since the rules may require an authority to form an opinion about satisfactory completion of probation. In such cases there can be no 'deemed confirmation'. The question has always to be answered in the context of the relevant rules.

60. No two cases are based on identical facts. In each case a separate and distinct set of rules have come under scrutiny. Not surprisingly, in addition to the two broad categories mentioned, there have been further

sub-categories. In *Wasim Beg v. State of U.P. (1998) 3 SCC 321* three possible types of cases were identified and it was observed:

“15. Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant service rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless rules provide to the contrary. This is the line of cases starting with *State of Punjab v. Dharam Singh AIR 1968 SC 1210*, *M.K. Agarwal v. Gurgaon Gramin Bank 1987 Supp SCC 643*, *Om Prakash Maurya v. U.P. Coop. Sugar Factories Federation 1986 Supp SCC 95*, *State of Gujarat v. Akhilesh C. Bhargav (1987) 4 SCC 482*.

16. However, even when the rules prescribe a maximum period of probation, if there is a further provision in the rules for continuation of such probation beyond the maximum period, the courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In this category of cases we can place *Samsher Singh v. State of Punjab (1974) 2 SCC 831* which was the decision of a Bench of seven Judges where the principle of probation not going beyond the maximum period fixed was reiterated but on the basis of the Rules which were before the Court, this Court said that the probation was deemed to have been extended. A similar view was taken in the case of *Municipal Corpn. v. Ashok Kumar Misra (1991) 3 SCC 325*. In *Satya Narayan Athya v. High Court of M.P. (1996) 1 SCC 560* although the Rules prescribed that the probationary period should not exceed two years, and an order of confirmation was also necessary, the termination order was issued within the extended period of probation. Hence the termination was upheld.

17. The other line of cases deals with rules where there is no maximum period prescribed for probation and either there is a rule providing for extension of probation or there is a rule which

requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. In this line of cases one can put *Sukhbans Singh v. State of Punjab* AIR 1962 SC 1711, *State of U.P. v. Akbar Ali Khan* AIR 1966 SC 1842, *Kedar Nath Bahl v. State of Punjab* (1974) 3 SCC 21, *Dhanjibhai Ramjibhai v. State of Gujarat* (1985) 2 SCC 5 and *Tarsem Lal Verma v. Union of India* (1997) 9 SCC 243, *Municipal Corpn. v. Ashok Kumar Misra* (1991) 3 SCC 325 and *State of Punjab v. Baldev Singh Khosla* (1996) 9 SCC 190. In the recent case of *Dayaram Dayal v. State of M.P.* (1997) 7 SCC 443 (to which one of us was a party) all these cases have been analysed and it has been held that where the rules provide that the period of probation cannot be extended beyond the maximum period there will be a deemed confirmation at the end of the maximum probationary period unless there is anything to the contrary in the rules.”

61. In *Karnataka SRTC v. S. Manjunath* (2000) 5 SCC 250 the Supreme Court examined the whole line of cases on the subject and observed:

“9. The law on the subject has been varying, depending upon the peculiar pattern of the service rules/regulations concerned and the scheme underlying the same in spite of more than one Constitution Bench judgment of this Court declaring the general and basic principles governing the rights of a probationer. There was always a keen tussle between the employer and employee in the application of those principles to individual or class or category of cases.

10. This Court had an occasion to review, analyse critically and clarify the principles on an exhaustive consideration of the entire case-law in two recent decisions reported in *Dayaram Dayal v. State of M.P.* (1997) 7 SCC 443 and *Wasim Beg v. State of U.P.* (1998) 3 SCC 321. One line of cases has held that if in the rule or order of appointment, a period of probation is specified and a power to extend probation is also conferred and the officer is allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed and there is no bar on the power of termination of the officer after the expiry of the initial or

extended period of probation. This is because at the end of probation he becomes merely qualified or eligible for substantive permanent appointment. The other line of cases are those where even though there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The Constitution Bench which dealt with the case reported in *State of Punjab v. Dharam Singh* AIR 1968 SC 1210 while distinguishing the other line of cases held that the presumption about continuation, beyond the period of probation, as a probationer stood negated by the fixation of a maximum time-limit for the extension of probation. Consequently, in such cases the termination after expiry of the maximum period up to which probation could be extended was held to be invalid, inasmuch as the officer concerned must be deemed to have been confirmed.

11. The principles laid down in *Dharam Singh* case though were accepted in another Constitution Bench of a larger composition in the case reported in *Samsher Singh v. State of Punjab* (1974) 2 SCC 831 the special provisions contained in the relevant Rules taken up for consideration therein were held to indicate an intention not to treat the officer as deemed to have been confirmed, in the light of the specific stipulation that the period of probation shall be deemed to be extended if the officer concerned was not confirmed on the expiry of his period of probation. Despite the indication of a maximum period of probation, the implied extension was held to render the maximum period of probation a directory one and not mandatory. Hence, it was held that a probationer in such class of cases is not to be considered confirmed, till an order of confirmation is actually made. The further question for consideration in such category of cases where the maximum period of probation has been fixed would be, as to whether there are anything else in the rules which had the effect of whittling down the right to deemed confirmation on account of the prescription of a maximum period of probation beyond which there is an embargo upon further extension being made, and such stipulation was found wanting in *Dayaram Dayal* case."

62. Thereafter In *High Court of M.P. v. Satya Narayan Jhavar* (2001) 7 SCC 161 the Supreme Court surveyed the legal position and identified three categories of cases as under:

"11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."

63. It is the above legal position that has been reiterated in a number of later cases including the three relied upon by the Petitioners including ***Commissioner of Police v. R. S. More*** (*supra*) ***Mir Mohd. Kasim v. Union of India*** (*supra*) and ***Kazia Mohd Muzzammil v. State of Karnataka*** (*supra*). In each there was a different set of Rules, and facts, not comparable with the case on hand. In ***R.S. More***, for e.g., the question was whether in the absence of a specific order of the competent authority confirming the Respondent, his continuation on the post beyond the extended period of probation entitled him to claim a 'deemed

confirmation'? That question was answered in the negative in view of the relevant rules. Again in *Mir Mohd. Kasim* it was noticed that a relaxation was provided to the employee therein both in terms of the period for clearing an exam as well as the extended period of probation. Additionally, the competent authority had issued an order to the effect that he had satisfactorily completed the period of probation. It was in those circumstances that it was held that there was no need for a separate order of confirmation. The decision in *Kazia Mohd Muzzammil* summarises the settled legal position and notes that:

"47. There can be cases where the rules require a definite act on the part of the employer before an officer on probation can be confirmed. In other words, there may be a rule or regulation requiring the competent authority to examine the suitability of the probationer and then upon recording its satisfaction issue an order of confirmation. Where the rules are of this nature the question of automatic confirmation would not even arise. Of course, every authority is expected to act properly and expeditiously. It cannot and ought not to keep issuance of such order in abeyance without any reason or justification. While there could be some other cases where the rules do not contemplate issuance of such a specific order in writing but merely require that there will not be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties, even in those cases it is difficult to attract the application of this doctrine.

48. However, there will be cases where not only such specific rules, as noticed above, are absent but the rules specifically prohibit extension of the period of probation or even specifically provide that upon expiry of that period he shall attain the status of a temporary or a confirmed employee. In such cases, again, two situations would arise: one, that he would attain the status of an employee being eligible for confirmation and second, that actually he will attain the status of a confirmed employee. The courts have repeatedly held that it may not be possible to prescribe a straitjacket formula of universal implementation for all cases involving such questions. It will always depend upon the facts of a case and the relevant rules applicable to that service."

64. The legal position on 'deemed confirmation' can be summarised as under:

(a) If in the rule or order of appointment, a period of probation is specified and a power to extend probation is also conferred and the officer is allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed. At the end of such probation he becomes merely qualified or eligible for substantive permanent appointment.

(b) There is the other line of cases where even though there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The presumption about continuation, beyond the period of probation, as a probationer stands negated by the fixation of a maximum time-limit for the extension of probation. In such cases the officer concerned must be deemed to have been confirmed.

(c) A third line of cases is where though under the rules maximum period of probation is prescribed, it requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired, and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

(d) While there could be some other cases where the rules do not

contemplate issuance of such a specific order in writing but merely require that there will not be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties. Even in those cases, there would be no 'deemed confirmation'.

65. In the present case Rule 8 (a) of the 1972 Rules makes it evident that confirmation is not automatic. Also, there being no maximum period of probation, the mere completion of the initial period of probation would not automatically lead to a confirmation. However, since the Petitioners have placed considerable reliance on the minutes of the Selection Committee and the letters written to them by the Deputy Registrar (Estt) about their successful completion of probation, it requires examination whether those documents do bear out a 'deemed confirmation' of the Petitioners.

66. Since the entire case of the Petitioners hinges upon the two decisions of the Selection Committee at the meetings held on 21st February 2007 and 19th July 2007, the said decisions will have to be carefully analysed. The first meeting considered the representations of the Petitioners. It was stated that since the work load had increased, the temporary posts of PSs that were created by the notification dated 16th December 2005 should be made permanent. The further recommendation was that “the incumbents holding the same may be confirmed.” As far as the latter recommendation pertaining to the confirmation is concerned, it was not perhaps brought to the notice of the Selection Committee by the Registry that there were also DR PSs appointed against the 75% quota on those very temporary posts and that the question of their confirmation against such post upon conversion would also have to be considered. The Selection Committee was also not called upon to consider at that stage what effect such a

decision only in respect of promotee PSs would have on the question of arranging their inter se seniority vis a vis DRs in terms of Rule 5A of the Seniority Rules.

67. Now turning to the Minutes dated 19th July 2007 it is correct that the Selection Committee reiterated its recommendations about converting the temporary posts of PSs into permanent posts but it also recommended that the incumbents holding the temporary posts should be appointed “by declaring their probation to be completed successfully.” On carefully analysing the said Minutes, it cannot be said that the Selection Committee was considering only the case of promotee PSs and was referring to their substantive appointments to the exclusion of those appointed in the 75% DR quota against those very posts. There is nothing in the Minutes to infer that this issue was consciously present in the minds of the members of the Selection Committee. Therefore, the mere fact that the said recommendation was accepted by the Chief Justice on 25th July 2007 did not *ipso facto* mean that a decision had been taken to confirm the promotee PSs from either 17th February 2007 or 25th July 2007.

68. One important fact requires to be noticed at this stage. The conversion of the 25 temporary posts of PS to permanent ones took place in fact on 7th August 2007 and not 25th July 2007. By that date, the DR PSs had also 'successfully' completed their probation. Thus if one were to accept the Petitioners' contention that the letter of a Deputy Registrar communicating the completion of probation was sufficient for inferring confirmation, then there were as on the date of conversion of the posts of PSs into permanent ones, two sets of confirmed PSs. However, the correct legal position would be that under the 1972 Rules, there had to be separate decision

taken and a separate order of confirmation issued by the competent authority i.e. the Chief Justice. This is also the reason why this was placed as a separate agenda item for the decision of the Selection Committee on 3rd March 2009. The Court is informed by the learned Senior counsel for the High Court that this has been the practice in the High Court and there is no reason to view it differently as far as the PSs are concerned. This order of confirmation i.e. appointing them 'substantively' as PSs took place only by the order dated 28th March 2009 effective 20th March 2009.

69. It was not incumbent on the Chief Justice to have issued the orders of confirmation only because the recommendation of the Selection Committee in respect of the promotee PSs had been accepted. The completion of probation is one aspect but confirmation on the post is another. If for taking a conscious decision as to the latter aspect, the Chief Justice was required to keep in view the possible competing claims of the DRs who had also by then 'successfully' completed their probation, it cannot be said that the Chief Justice was acting arbitrarily. One important aspect to be borne in mind at this stage was the effect this would have on the arranging of their inter se seniority in the cadre of PSs. At this stage i.e. 7th August 2007, Rule 5A had not been recommended by the Selection Committee to be repealed. That happened later on 17th February 2009. All this happened at the instance of only the promotee PSs and without any notice to the DR PSs whose interest were being adversely affected by such a decision. This was what prompted the case of confirmation of the entire lot of PSs to be placed before the Selection Committee on 3rd March 2009. This also reinforces the position that there was no deemed confirmation of either set of PSs only upon completion of their probation and that it required a separate decision and a consequential order of the

Chief Justice in that regard.

70. While there is no explanation as to why the minutes of both the meetings of the Selection Committee were placed together before the Chief Justice only on 20th March 2009, the Court is satisfied that, in the circumstances outlined above, it would not have been fair to the DRs to have asked the Chief Justice to take a decision on repealing Rule 5A only on the representation of the Petitioners. It is only on the collective considering of both the decisions of the Selection Committee i.e. of 17th February and 3rd March 2009 that an objective view could be taken by the Chief Justice as regards the confirmation of PSs and the repeal of Rule 5A. The Court, therefore, does not find that the placing of the minutes of both the meetings of the Selection Committee held on 17th February 2009 and 3rd March 2009 together for consideration by the Chief Justice on 20th March 2009 to be either unfair or unwarranted and to constitute a reason for interference.

71. The upshot of the above discussion is that the contention of the Petitioners that they should be held to have been deemed to be confirmed as PSs on 17th February 2007 or at the latest and 25th July 2007 is hereby rejected.

Effect and validity of Rule 5 A

72. The Court next considers the challenge by the Petitioners to Rule 5A of the seniority Rules and in any event its applicability to deciding their inter se seniority vis a vis the DR PSs.

73. At the outset it must be noticed that the High Court has repealed Rule 5A with effect from 8th April 2009. This was on the basis of the

recommendation of the Selection Committee at its meeting on 17th February 2009 which in turn was based on the decision of the Supreme Court in ***B.S. Mathur's case*** (*supra*). The repeal was accepted with prospective effect from 8th April 2009.

74. In the above circumstances, the question of the validity of a Rule that has already been repealed, is academic. Also, there can be no quarrel with proposition that the repeal of Rule 5A was prospective. In other words Rule 5A remained in force till 8th April 2009. It was therefore in force as on the date of confirmation of both the Petitioners and Respondents 2 to 14 as PSs. The only possible question that requires to be considered is whether any prejudice was caused to the Petitioners by applying Rule 5A as far determining their *inter se* seniority with Respondent Nos. 2 to 14 was concerned and whether this was contrary to the settled position of law. This is in the context of the submission of the Petitioners that Rule 5A sought to apply the rota rule at the stage of confirmation and that this was legally impermissible.

75. Extensively reliance has been placed by the Petitioners on a series of judgments beginning with the decision in ***Paramjit Singh v. Ram Rakha*** (*supra*) where it was held that while determining the validity of Rule 10A of the Punjab Police Service Rules, 1959, the quota rule should be applied, not only at the stage of recruitment, but at the stage of confirmation as well and that confirmation was to be done on the basis of vacancies. The matter did not end at that stage but resurfaced in the form of an application for clarification.

76. In ***Paramjit Singh Sandhu v. Ram Rakha Mal*** (1982) 3 SCC 191 the Supreme Court clarified that what it meant was that:

“[Q]uota should be co-related to the vacancies which are to be filled in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule. A roster had to be introduced which was to continue while giving confirmation. Introduction of roster only postulates ascertainment of available number of vacancies and proceeding to make recruitment keeping in view of the quota. If recruitment is strictly made according to quota there will be no difficulty in applying the very rule of quota even while giving confirmation.”

77. This was followed by the decision of a Constitution Bench in **B.S. Yadav v. State of Haryana 1980 Supp SCC 524**. It was observed in **B.S. Yadav (supra)** that the application of rota system at the stage of confirmation is beset with practical difficulties, where the quota and rota system had broken down. The Supreme Court in **B.S. Yadav (supra)** gave the following examples:

“For example, if vacancies in the quota of direct recruits cannot be filled for 2 or 3 years for the not uncommon reason that direct recruits are not available, and during that period several vacancies occur in the quota of promotees who have been officiating continuously for two or three years, can the postponement of the confirmation of such promotees against vacant posts in their quota, until the direct recruits are appointed and become eligible for confirmation on completing the prescribed period of probation, be justified on any reasonable ground? Is it proper and fair to defer the confirmation of the promotees merely because direct recruits are not available at the point of time so as to enable the High Court to make confirmations from both the sources by rotation?

78. Therefore, the observations in **B.S. Yadav (supra)** that rota rule should not be applied at the time of confirmation was in the context of a breakdown of quota-rota. In para 73 the Supreme Court further clarified as under:

“73. We would like to say at the cost of repetition that we are not dealing with the abstract question as to whether the rule of quota necessarily excludes the rule of rotation. We are only concerned to point out that it is not correct to say that the rule of rota must necessarily be read into the rule of quota. We have to decide in these cases the narrow question as to whether, on a true interpretation of Rules 8 and 12 of the Superior Judicial Service Rules of Punjab and Haryana, the quota rule prescribed by Rule 8 justifies, without more, its extension at the time of confirmation so that, after every two promotees are confirmed one direct recruit has to be confirmed and until that is done, promotees cannot be confirmed even if vacancies are available within their quota in which they can be confirmed. We are of the opinion, on a proper interpretation of the rules, that promotees are entitled to be confirmed in the vacancies which are available within their quota of 2/3rd, whether or not 1/3rd of the vacancies are occupied by confirmed direct recruits. And similarly, direct recruits are entitled to be confirmed in vacancies which are available within their quota of 1/3rd, whether or not 2/3rd of the vacancies are occupied by confirmed promotees. What we find lacking in justification is the refusal of the High Court to confirm the promotees even if vacancies are available in their quota in which they can be confirmed merely because, by doing so, more than two promotees may have to be confirmed at one time, without the confirmation of a proportionate number of direct recruits. The fairness which Articles 14 and 16 postulate is that if a promotee is otherwise fit for confirmation and a vacancy falling within the quota of promotees is available in which he can be confirmed, his confirmation ought not to be postponed until a direct recruit, whether yet appointed or not, completes his period of probation and thereupon becomes eligible for confirmation. The adoption of this principle in the matter of confirmation, will not, in practice, give any undue advantage to the promotees. The facts and figures supplied by the High Court in Annexure 'R-4' to its counter-affidavit in Writ Petition No. 266 of 1979 show that vacancies in the quota of promotees do not generally become available before the promotees have put in two to five years' service as officiating District and Sessions Judges.”

79. The Court next examines the decision in *M S Sandhu (supra)*. This was in effect an aftermath of the earlier round of decisions in *Paramjit Singh (supra)* and *B S Yadav (supra)*. In *M.S. Sandhu (supra)* the Supreme Court was categorical that the decision in *B.S. Yadav (supra)* did not overrule the decision in *Paramjit Singh (supra)*. In paras 28 and 36 it was observed as under:

“28. We have carefully considered the submissions of the learned Counsel for the parties on this aspect. As pointed out above, shorn off any niceties and nuances which have been projected before us, the core issue is as to whether judgment of this Court in *Paramjit Singh's* case was rightly followed by the High Court. The case of *Paramjit Singh* was concerned with same 1959 Rules pertaining to the officers of this very cadre, namely DSP Cadre. It was interpreting the rule in the context which had arisen before it. The Court was of the opinion that to save Rule 10 from the vice of the arbitrariness and to avert the situation of striking down the same, it would be appropriate to interpret the said Rule 10 to mean that rule of quota shall apply not only at the time of appointment but at the time of confirmation also and confirmation was to be done on the basis of vacancies. This was achieved in the manner stated in para 14 of the said judgment which reads that: (*Paramjit Singh case, SCC pp. 486-87*)

'14. It may be pointed out that where recruitment is from two sources and the seniority in the cadre is determined according to the date of confirmation, to accord utmost fair treatment a rotational system has to be followed while giving confirmation. The quota rule would apply to vacancies and recruitment has to be made keeping in view the vacancies available to the two sources according to the quota. If the quota rule is strictly adhered to there will be no difficulty in giving confirmation keeping in view the quota rule even at the time of confirmation. A roster is introduced while giving confirmation ascertaining every time which post has fallen vacant and the recruit from that source has to be confirmed in the post available to the source. This system would break down the moment recruitment from either source in excess of the quota is made. In fact a strict adherence to the quota rule

at the time of recruitment would introduce no difficulty in applying the Rule at the time of confirmation because vacancies would be available for confirmation to persons belonging to different sources of recruitment. The difficulty arises when recruitment in excess of the quota is made and it is further (I) accentuated when recruits from one source, to wit, in this case direct recruits get automatic confirmation on completion of the probationary period while the promotees hang out for years together before being confirmed. In *Mervyn Coutinho* case this Court in terms said that rotational system of fixing seniority meaning thereby confirmation followed by seniority does not offend equality of opportunity in Government service and recruitment not following the fixed quota rule need not be a ground for doing away with rotational system.

.....

36. Significantly, *Paramjit Singh's* case has been specifically taken note of and commented upon by the Constitution bench (in *B S Yadav's* case). Therefore, we are not faced with a situation where *Paramjit Singh* judgment has gone unnoticed. This judgment has been discussed by the Constitution Bench in para 71, as under:

‘71. In *Paramjit Singh Sandhu v. Ram Rakha* it was held by this Court on a harmonious reading of Rules 3, 4, 6, 8, and 10 of the Punjab Police Rules, 1959 that the quota rule was operative both at the time of initial recruitment and at the time of confirmation. We would like to clarify that this case is not an authority for the proposition that whenever service rules provide for quota, the rule of rota must be read into the rule of quota. We are not laying down that the rules of quota and rota cannot coexist. Service rules may so provide or they may yield to such an interpretation. In that event, their validity may have to be tested in the total setting of facts. Therefore, whether the quota system has to be observed not only at the stage of initial recruitment but also at the stage of confirmation is not a matter of abstract law but will depend on the wording of the rules and the scheme of the rules under consideration. Any dogmatic assertion, one way or the other, is wrong to make. On a review of these authorities, all that we would like to say is that on a proper interpretation of the rules governing the Punjab and Haryana Superior Judicial

Service, the rule of rota cannot be read into the rule of quota. In other words, the ratio of 2 : 1 shall have to be applied at the stage of recruitment but cannot, on the language of the relevant rules, be applied at the stage of confirmation.'

From the reading of the aforesaid extracted portion, it follows that the Court made it clear that it was not laying down that rule of quota and rota cannot go exist. Service rules, in a particular case may specifically provide the co-existence of quota and rota. There may also be a situation where service rules be interpreted as such. That is a very important comment made by the Constitution Bench after taking note of the ratio in ***Paramjit Singh's*** case. It is specifically noted how the Court on harmonious reading of Rules 3, 4, 6, 8 and 10 of these 1959 Rules had come to the conclusion that quota rule was operative both at the time of initial appointment and at the time of confirmation. After taking note of this ratio on the harmonious interpretation of the Rules in question, rather than stating that such an interpretation was impermissible or wrongly given, the Constitution Bench clarifies that there may be circumstances where such an interpretation would be permissible and validity of the rules would be tested in the total setting of facts. That was precisely done by the Bench in ***Paramjit Singh's*** case. Only conclusion which can be drawn from the reading of para 71 of the judgment is that the harmonious reading of the 1959 Rules done in that case was in fact approved, and by no stretch of reasoning, can it be inferred that it was overruled."

80. In ***M.S. Sandhu*** (*supra*) after analysing the legal position it was observed that the operation of the Rules may result in harsh consequences but "on the vagaries of such outcomes, the Court cannot keep on interpreting a rule differently."

81. The other decision relevant for the purpose of the present case is ***Union of India v. N.R. Parmar*** (2012) 13 SCC 340. Here the Supreme Court acknowledged the difficulties in applying the rota rule at the stage of confirmation but that there can be delays in filling up by way of direct recruitment and such delay cannot be a basis for depriving those

appointed by way of direct recruitment of their right to application of the rota rule. It was pertinently observed in para 31.2 as under:

“31.2 It is not necessary, that the direct recruits for vacancies of a particular recruitment year, should join within the recruitment year (during which the vacancies had arisen) itself. As such, the date of joining would not be a relevant factor for determining seniority of direct recruits. It would suffice if action has been initiated for direct recruit vacancies, within the recruitment year in which the vacancies had become available. This is so, because delay in administrative action, it was felt, could not deprive an individual of his due seniority. As such, initiation of action for recruitment within the recruitment year would be sufficient to assign seniority to the concerned appointees in terms of the "rotation of quotas" principle, so as to arrange them with other appointees (from the alternative source), for vacancies of the same recruitment year.”

82. What is evident from all the decisions is that departure from rule requiring application of rota at the stage of confirmation would be justified only when there is a demonstrable break down in the quota rule. In the cases cited by the Petitioners including the decision in **B.S. Mathur** (*supra*) recruitment of the DR to fill up posts took place infrequently leading to the breakdown of the quota rule. Invariably when it is not possible to have a set of appointments both by way of promotion as well as DR in close proximity, delaying the confirmation of the either promotees or the DR on the basis of the existing rule of seniority rules would produce inequitable consequences. The decision in **B.S. Mathur** (*supra*) was in the context of one such inequitable consequence. It was for that reason that the Supreme Court chose to apply the principle of continuous officiation so as to mitigate the inequitable consequences.

83. However, as far as the present case is concerned, there is just a six-month gap, and that too in the same year i.e. 2006, in the initial

appointment of the promotees and the DRs to the temporary posts of PSs subject to successful completion of probation. The initiation of the process for the selection of candidates to fill up the 75% DR quota took place almost simultaneously with the appointment of the promotee PSs. Their respective completion of probation was also separated by only six months in the same year i.e. 2007. The Petitioners and Respondents 2 to 14 are virtually appointees of the 'same batch' and in the 'same year'. The Respondents are right in pointing out that the Petitioners have not been able to show any breakdown of the quota rule.

84. The second factor that weighs with the Court is that the Petitioners were fully aware, even at the stage of their appointments to the posts of PSs on probation, of the fact that their confirmation would be governed by Rule 5A of the Seniority Rules. Although they made representations against retaining Rule 5A, it remained as of the date of completion of probation by both the promotee and the DR PSs. There is also merit in the contention that having been appointed in the full knowledge that their seniority vis a vis the DRs would be governed by the said Rule 5A, it was not open to the Petitioners to question its applicability as long as it did not produce any inequitable consequence arising out of a breakdown of the quota rule. Thirdly, the DRs were not in any way responsible for the marginal delay in their recruitment to fill up the 75% quota. They were expecting to be confirmed and later fitted in their appropriate seniority in terms of the 1972 Rules and the Seniority Rules. It is important to recollect at this stage that when the 25 temporary posts of PSs were converted into permanent ones on 7th August 2007, both the promotee and the DR PSs had completed their respective periods of probation and were required to confirmed upon such conversion of the posts. Rule 5A had

not been recommended by the Selection Committee to be repealed. That happened later on 17th February 2009. A unilateral decision to repeal Rule 5A could not have been taken behind the backs of the DRs and particularly when there was no apparent justification for not applying it to determine their seniority vis-a-vis the promotee PSs. The question of applying Rule 3 of the Seniority Rules did not, in the circumstances, arise. That would have been contrary to the express terms of the appointment of the promotee PSs.

85. The Court is, therefore, not persuaded to hold that the operation of Rule 5A of the Seniority Rules would have caused undue prejudice to the promotee PSs and that it should not have been applied for determining their seniority vis-a-vis Respondent Nos. 2 to 14.

Acceptance of technical resignations

86. As regards the acceptance of the technical resignations of the DR PSs from the posts of SPAs held by them earlier, the minutes of the meeting of the Selection Committee held on 23rd July 2009, as extracted hereinbefore, is self-explanatory. The Court is not persuaded that the said decision of the Chief Justice suffers from any invalidity as contended by the Petitioners.

Summary of conclusions

87. To summarise the conclusions:

- (a) The fact that the recommendations made on 21st February 2007 by the Selection Committee on the representation of the Petitioners was accepted by the Chief Justice on 28th February 2007 and the subsequent recommendation at the meeting on 19th July 2007 was accepted on 25th July 2007 did not *ipso facto* mean that a decision

by the Chief Justice had been taken to confirm the promotee PSs from either 17th February 2007 or 25th July 2007.

(b) Under the 1972 Rules, there had to be a separate decision taken and a separate order of confirmation issued by the competent authority i.e. the Chief Justice. This has been the practice in the High Court and there is no reason to view it differently as far as the PSs are concerned. This order of confirmation i.e. appointing the Petitioners and the Respondents 2 to 14 'substantively' as PSs took place only by the order dated 28th March 2009 effective 20th March 2009.

(c) It would not have been fair to the DRs to have asked the Chief Justice to take a decision on repealing Rule 5A only on the representation of the Petitioners. It is only on the collective considering of both the decisions of the Selection Committee i.e. of 17th February and 3rd March 2009 that an objective view could be taken by the Chief Justice as regards confirmation of PSs and the repeal of Rule 5A. Therefore, the placing of the minutes of both the meetings of the Selection Committee held on 17th February 2009 and 3rd March 2009 together for consideration on 20th March 2009 before the Chief Justice cannot be said to have been unfair or unwarranted.

(d) Under the 1972 Rules there is no scope for a 'deemed confirmation' of the Petitioners as PSs. Their contention that they should be held to have been deemed to be confirmed as PSs on 17th February 2007 or at the latest 25th July 2007 is rejected.

(e) Departure from rule requiring application of rota at the stage of confirmation would be justified only when there is a demonstrable break down in the quota rule. In the present case, the Petitioners have not been able to show any breakdown of the quota rule.

(f) The Court is, therefore, not persuaded to hold that the operation of Rule 5A of the Seniority Rules would have caused undue prejudice to the promotee PSs and that it should not have been applied for determining their seniority vis-a-vis Respondent Nos. 2 to 14.

88. Accordingly, the Court holds:

(i) With the repeal of Rule 5A of the Seniority Rules, with prospective effect from 8th April 2009, the question of its validity has at this stage been rendered academic.

(ii) No prejudice was caused to the Petitioners by applying Rule 5A as far determining their *inter se* seniority with Respondent Nos. 2 to 14 was concerned and this was not contrary to the settled position in law.

(iii) the notification dated 28th March 2009 confirming the Petitioners as well as Respondents 2 to 14 to the substantive posts of PSs only with effect from 20th March 2009 did not suffer from any legal infirmity.

(iv) The notification dated and 12th October 2009 accepting the technical resignations of Respondents 2 to 14 retrospectively and treating them as fresh recruits under 75% quota DR quota in the post of PSs also suffers from no legal infirmity.

89. The writ petition is dismissed but, in the facts and circumstances of the case, with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

JANUARY 21, 2016
Rk

