

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) No. 6205/2014**

% **Reserved on : 13th February, 2017**
Date of decision: 26th May, 2017

PRAVEEN SRIVASTAVA & ORS. Petitioners
Through: Mr. V.K. Garg, Sr. Advocate with
Mr. Ajay Jain, Ms. Noopur Dubey and Ms. Astha
.Chopra, Advocates.

Versus

UNION PUBLIC SERVICE COMMISSION & ORS....Respondents
Through: Mr. Naresh Kaushik and Mr. Joymoti
Mize, Advocates for UPSC/ respondent no.1, Mr.
Maninder Singh, Additional Solicitor General, Mr.
Kirtiman Singh, Central Government Standing
Counsel, Mr. Waize Ali Noor, Mr. Prateek
Dhanda and Mr. Pranav Agarwal, Advocates for
respondents Nos.2 and 3.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

1. There is a plethora of case law relating to seniority disputes between direct recruits and promotees. The present litigation expositis another facet of conflict relating to the stage of induction, i.e., the appointment of direct recruits and promotion of in service officers.

2. The unusual feature of the present litigation is that the Union Public Services Commission; and the Ministry of Law and Justice and the Department of Personnel & Training (Ministry of Personnel, Public Grievances, and Pensions) have taken divergent positions. The Union Public Service Commission (for short 'Commission') though statedly neutral, to some extent supports the petitioners who had applied for selection and appointment to the post of Deputy Legal Advisor (DLA) in the open category, whereas the Ministry of Law and Justice (also referred to as the Ministry) and the Department of Personnel & Training (DoP&T) support the promotees and are opposing the petition.
3. The post of DLA is the second post in the hierarchy, above the post of Assistant Legal Advisor (ALA) in the Indian Legal Service. Recruitments and appointments to the Indian Legal Service are governed by the Indian Legal Service Rules 1957 (for short 'Rules') framed under the proviso to Article 309 of the Constitution of India. As per Rule 6(2) of the Rules, posts in the cadre of DLA have to be filled up alternatively by direct recruitment and by promotion from the cadre of ALA.
4. Pursuant to the advertisement published in the employment news and leading newspapers on 3rd September, 2011, the six petitioners had applied for selection and appointment to the post of DLA. The petitioners had appeared in the written examination conducted on 27th November, 2011. They were declared successful along with others in the results declared by the Commission on 3rd February, 2012. The

Commission had thereafter conducted interviews between 28th May, 2012 to 30th May, 2012. On 13th June, 2012, the Commission declared the final results and eleven candidates, including the six petitioners were declared successful. On 13th March, 2013, the Commission issued notice cancelling the entire recruitment for eleven vacancies. This prompted petitioner Nos. 1 to 3 before us to file OA No. 1925/2013 and petitioner Nos. 4 to 6 to file OA No. 1165/2013. The common impugned order dated 29th August, 2014 dismisses the aforesaid OAs along with OA Nos. 3602/2013, 1165/2013 and 3816/2013.

5. Earlier, on 14-20/7/2007, the Ministry of Law and Justice had initiated the process of filling up six posts of DLA, then known as Deputy Government Counsel, under 50% direct recruitment quota. This selection process was struck down by the Central Administrative Tribunal vide order dated 24th February, 2011 in OA No.86/2010, filed by O.P. Bagri and others and OA No 150/2010 filed by G.K. Chakraborty. The order dated 24th February, 2011 records that out of 516 applications received, 63 candidates were shortlisted at the first instance for interview. Thereafter, the Ministry of Law and Justice had sent names of six candidates who were working as ALAs to the Commission. These candidates were interviewed between 8th and 12th June, 2009. Another 280 candidates were added and interviewed between 11th to 15th January, 2010 by the Board that was different from the earlier Board, which had met in June 2009. The Tribunal observed that there was no justification to include six ALAs as suggested by the Ministry of Law and Justice especially when these

candidates did not meet the eligibility criteria, on the pretext that some ALAs, who were working in the said Ministry had represented that they were senior to the candidates, who were shortlisted earlier. Ultimately, none of the 63 first shortlisted candidates were declared successful. Setting aside the selection, it was directed that the whole selection process should be scrapped and the authorities, after issuing fresh advertisement, would make selections and appointments to the post of DLA.

6. Notwithstanding the aforesaid directions, Mahesh Tyagi, the fourth respondent before us, an ALA had filed OA No. 746/2012, which was dismissed by the Tribunal vide order dated 7th March, 2012 recording as under:-

“3. We have heard the learned counsel representing the applicant and with his assistance examined the records of the case. The applicant admittedly, as pleaded by him, has not chosen to compete for the posts advertised, which are to be filled by way of direct recruitment. Learned counsel representing him has not been able to show any embargo in the rules for the respondents to hold a written test and interview thereafter for making appointment on the post of DLA by way of direct recruitment. The plea that at this age when the applicant is 50, it would be difficult for him to compete in the examination, as the counsel has urged before us during the course of hearing, has no merit whatsoever. If the applicant wants to come on the post under contention by way of direct recruitment, he has to compete with others, and once there is no prohibition under the rules for making direct recruitment by way of selection through a written test and interview, we find nothing wrong in that. We could imagine if it was to be the case of the applicant that against the sanctioned strength when 50% posts are to be filled up by way of promotion, he should have been given regular promotion instead of giving the same on ad hoc basis, but such is not even the prayer

of the applicant. We may reproduce para 8 of the prayer clause, which reads as follows:

- “a. To declare the selection process initiated by the respondent No.1 on the basis of the advertisement issued in Sept., 2011 as null and void being illegal and arbitrary.
- b. Direct the respondents to abide by the rule 7 (1A) of ILS rules, in making appointments to the post of Deputy Legal Adviser.
- c. To allow the OA with cost of the litigation.
- d. To pass such other and further order, which this Hon’ble Court deem fit and proper in existing circumstances of the case.”

4. Even if one is not to go strictly by the prayers made by the applicant, as the pleadings are often found before the Tribunal to be inapt, but there is no proper material even in the body of the Application, which may show that direct recruitment on the 11 posts, would, in any way, impinge upon the rights of the applicant. What is pleaded is that the total sanctioned strength of the posts of DLA is 19, and that 50% posts have to be filled by way of promotion. If one is to go by the averment as mentioned above, surely, recruitment of 11 persons by way of direct recruitment would be in excess of their quota, but in the same very para wherein the applicant has mentioned that the sanctioned strength is 19, he has mentioned that 13 persons are working on ad hoc basis similarly as the applicant. If that be so, the total strength cannot be 19, and it has to be more. For lack of proper particulars, it is not possible to make out if the applicant may have grievance as regards recruitment of 11 persons by way of direct recruitment.

5. In totality of the facts and circumstances of this case, whereas we dismiss this Original Application insofar as the prayers of the applicant, as reproduced above, are concerned, we will still permit him to file a fresh Application as regards his

promotion on regular basis by giving correct and proper material on that behalf. Ordered accordingly.”

Mahesh Tyagi in the aforesaid OA had pleaded that he had been promoted to the post of DLA on *ad hoc* basis, but pursuant to the setting aside of the recruitment process the authorities, instead of issuing a fresh advertisement, had clubbed the 6 vacancies with 5 subsequent vacancies for the post of DLA and the same were to be filled on the basis of direct recruitment by holding oral and written examinations. Thirteen officers were working at the post of DLA on *ad hoc* basis against the sanctioned strength of nineteen. Mahesh Tyagi having completed more than ten years as ALA should be given a preferential right of appointment as DLA, being eligible for promotion to the said post as he had already worked for three years at the post of ALA. A written test would curtail his and other ALAs' chances for promotion. These contentions challenging the direct recruitment were substantially rejected, albeit giving liberty to file a fresh OA regarding promotion on regular basis.

7. Shortly, thereafter on 2nd April, 2012, the fourth respondent-Mahesh Tyagi filed OA No. 1110/2012 on somewhat similar grounds and pleas as were raised in OA No. 746/2012. The pretext was that Mahesh Tyagi and other ALAs had already completed more than 10 to 12 years of service at the said post. The Rules had been changed by introducing requirement of qualifying written examination. Direct recruitment was a brazen attempt to secure appointment of outsiders. There were 19 posts in the cadre of DLA and, therefore, the total

number of posts to be filled by direct recruits cannot be more than 10, whereas 11 posts had been advertised. By the order dated 3rd April, 2012, the Tribunal issued notice in OA No. 1110/2012 returnable on 21st May, 2012. In the meanwhile, it was directed that selection if made, shall be subject to the outcome of the OA.

8. On 16th May, 2012, a note was prepared by the Ministry of Law and Justice for filling up of vacancies in Indian Legal Service cadre stating that out of 121 sanctioned posts in different grades, only 62 incumbents were in position and there were 59 vacancies in different grades. These vacancies could not be filled up for a long time due to different administrative reasons. The Secretary (Law) convened a meeting in his Chamber on 13th May, 2012 to discuss the matter in which other officers were also present. It was observed and recorded that certain officers in the Law Commission and Central agency section in the grade of Joint Secretary, LO, and Senior Government Advocate were not selected/appointed to the post of Additional Secretary for last few years. It was felt that action should be taken to ensure that injustice was undone and the officers were accorded the higher post of Additional Secretary though on a personal basis. The note discussed filling up of 14 vacancies in the grade of DLA.
9. This note was approved by Joint Secretary and Legal Adviser on 16th May, 2012 with an observation “it is proposed to fill up vacancies, as far as possible, by promotion of officers in the feeder grades, if necy (sic. necessary) by seeking relaxation of the Rectt. (sic. Recruitment Rules). The vacancies resulting to promotions in various grades due

to proposed promotions will be filled in the lowest grades (ALA/ALO) to the extent possible by direct recruitment after promoting the eligible officers”.

10. On the basis of approval of this note, the Director of the Ministry of Law and Justice had sent a letter dated 21st May, 2012 to the Secretary of the Commission stating that on re-consideration of the matter, the said department had decided to withdraw the proposal for direct recruitment of the eleven DLA vacancies. It was requested that the proposal under reference be treated as withdrawn and no further action be taken.
11. The Commission, however, did not agree and vide their letter dated 25th May, 2012 informed the Ministry that their proposal for withdrawal of recruitment for 11 posts of DLA was not found feasible since recruitment process was at an advance stage and interviews were scheduled to be held from 28th May, 2012 to 30th May, 2012.
12. Relying upon the letter dated 21st May, 2012, Mahesh Tyagi, the fourth respondent before us, filed MA No. 1608/2012 in OA No. 1110/2012. The Tribunal, vide order dated 31st May, 2012, after referring to the letter dated 21st May, 2012 and 25th May, 2012, directed that declaration of the results would be stayed till 1st August, 2012. In the meanwhile, the matter could be sorted out by the Ministry of Law and Justice and the Commission.
13. The Commission, however, was not communicated this stay order and on 13th June, 2012 declared the results of direct recruits.

14. On 14th June, 2012, the Ministry of Law and Justice informed the Commission about the stay order and asked them to withdraw the said result. In view of the stay order, the Commission withdrew the result declared on 13th June, 2012, vide order dated 22nd June, 2012.
15. Simultaneously, on 20th June, 2012 a detailed note was prepared for filling up vacant posts in the grade of Deputy Law Officers, Additional Legal Advisors, Additional Law Officers and DLAs granting promotion by seeking one-time relaxation of the Recruitment Rules. The relevant portion of the note dated 20th June, 2012, reads as under:

“3. Deputy Legal Adviser (DLA):

3.1 At present, out of 19 sanctioned posts, there are 14 regular vacancies in the grade of DLA, out of which 13 are meant for DR and 1 for Promotion.

3.2 Rule 6(2) of RRs of ILS provides that **“the post of DLA shall be filled alternatively by direct recruitment and by promotion of a member of the Service in ALA.”**

3.3 Rule 8(1)(iii) of RRs of ILS provides that **“a person shall not be eligible for promotion to the grade of DLA unless he has held the duty post in ALA (Grade IV) for a total period of not less than 3 years”.**

3.4 Presently, there are 14 regular vacancies in the grade of DLA which could not be filled up for a long time. It may be pertinent to mention that 6 vacancies in the grade of DLA were reported to UPSC in 2005 for filling up through DR. In the meanwhile, the Government Advocate Cadre was merged into ILS w.e.f. 28.12.2005 which resulted in a number of court

cases. In pursuance to the Hon'ble CAT's order dated 17.4.2007 in this regard, the ILS cadre was de-merged into three different cadres i.e. Legal Advisers Service Cadre, Government Advocates Service Cadre and Law Officers Service Cadre w.e.f. 10.5.2008. Thereafter, 2 candidates were appointed as DLA on DR basis on recommendation of UPSC. However, Hon'ble CAT, vide their order dated 24.2.2011, quashed the said selection made for the post of DLA and directed to make the selection for the post of DLA by issuing fresh advertisement. In pursuance of this, the services of the appointed candidates were terminated vide notification dated 1.3.2011. Consequent thereupon, 11 vacancies meant for DR were reported to UPSC. Subsequently, 2 more vacancies were reported to UPSC for DR in the grade of DLA. **Now, this Department feels that being a senior level post the officers with experience in this Department will be more suitable for appointment to DLA posts to discharge the duties attached to the post. It has, therefore, been decided with the approval of Hon'ble MLJ, to fill up the vacant post of DLAs by promotion rather than by direct recruitment and to seek one-time relaxation from DOPT / UPSC regarding the mode of recruitment from DR to promotion as well as the nature of qualifying service. In view of this decision, we have requested the UPSC vide our letter dated 25.5.2012 that the proposal of direct recruitment to the post of DLA may be treated as withdrawn.**

3.5. In view of the above, under Rule 14A of RRs, we may send a proposal to DOPT as well as to UPSC for seeking one-time relaxation to the RRs for filling up the vacant posts of DLAs by promotion instead of by Direct Recruitment. Following is the list of officers in the grade of Assistant Legal Adviser, who have completed more than five years service in the grade as on 1.1.2012:

Sl. No.	Name & designation of the officers (S/Shri)	Date of appointment as ALA on regular basis	Total strength of service as ALA/ DLA (ad-hoc)
1	S.D.B. Chenji	02.08.2000	11 years
2	Dr.V.K. Singh	31.10.2000	11 years
3	G.K. Chakraborty	19.09.2001	10 years
4	R.K. Srivastava	31.08.2001	10 years
5	Mahesh Tyagi	28.08.2001	10 years
6	P.K. Behra	15.10.2001	10 years
7	Devkant	03.09.2001	10 years
8	R.J.R. Kasibhati	17.07.2002	10 years
9	O.P. Bagri	16.01.2003	09 years
10	Ramesh Chander	13.09.2002	09 years
11	O. Venkateswarlu	03.06.2002	10 years
12	Ms.Poonam Suri	04.06.2003	09 years
13	R.S. Verma	11.03.2004	08 years
14	T.K. Malik	13.12.2004	07 years
15	M.N. Singh	13.07.2005	07 years
16	D.K. Behra	23.02.2006	06 years
17	R. Jayalakshmi	04.10.2006	05 years
18	Dr.D.V. Rao	28.09.2006	05 years

3.6 Out of the above officers in the zone of consideration, the officers mentioned against Sl.No.1 to 7 (who are already working as DLAs on ad-hoc basis) are likely to be promoted as Addl. Las by promotion through DPC after relaxation of the RRs. Therefore, the officers mentioned against Sl.NO.8 to 18 may be considered for promotion as DLAs after one-time relaxation of RRs from DOPT and UPSC. The remaining vacancies in the grade may be filled as per normal provisions of RRs. Of ILS.

3.7. One time relaxation is required for changing the mode of recruitment from Direct Recruitment to promotion in the grade of DLA in respect of 11 posts. The concerned officers have been stagnating in the lower grade for a pretty long time and are feeling de-motivated and frustrated. This proposal will remove the causes of frustration and enthuse them to work with greater motivation and efficiency.”

(emphasis supplied)

Under the heading Additional Legal Adviser, it was mentioned that there were 12 vacancies in the said grade out of which 11 vacancies were meant for promotion and one by direct recruitment. As no eligible officers were available in the feeder cadre, the vacancies had been advertised twice. However, there response to the advertisement from the eligible officers was poor. It was proposed that vacancies in the cadre of Additional Legal Advisers would be filled by promotion, rather than by deputation or direct recruitment from amongst regular as well as *ad hoc* DLAs by counting their *ad hoc* service as DLA and as ALA also if required. With regard to the posts of Additional Law Officer, it was noticed that there was only one vacancy in the grade of Additional Law Officer, which was meant for promotion. Under the heading Deputy Law Officer, it was stated that there were three sanctioned posts and there were two regular vacancies and one vacancy was likely to occur. It was suggested/proposed that vacant post of Deputy Law Officer may be filled by promotion instead of direct recruitment. The note was approved at different stages, between 20th June, 2012 and 28th June, 2012.

16. However, when the note was sent to the DoP&T, the same was returned vide note dated 18th July, 2012 observing that the proposal submitted was unclear and the Ministry should bring out clearly the eligibility requirement for appointment to vacant posts in various grades, particulars of the officers in the feeder grade, the date of the appointment of the officers in the feeder grade (on *ad hoc* basis as well on regular basis separately) for consideration.
17. Thereafter another note was prepared in the month of August, 2012 and sent to DOP&T.
18. The DOP&T accorded their concurrence for relaxation vide the note dated 9th October, 2012. With reference to the post of DLA, it was observed:-

“(iii) Deputy Legal Advisors: The Rules prescribed that the post shall be filled alternatively by DR and the promotion of the member of the service (Grade-IV). All the 18 officers meet the requirement of 3 years in ALA. The relaxation to fill up 14 vacancies in the grade of DLA by promotion in relaxation of the provisions in the method of requirement prescribed in the Rules is accorded.”

19. It is pertinent to mention here that DOP&T vide OM dated 31st December, 2010 on the question of amendments and relaxation had issued the following guidelines:-

“AMENDMENTS AND RELAXATIONS

4.1 Amendment proposals should be sent to this Department and UPSC in the format as given in Annexure-III. The reasons for making amendments should be clearly indicated. A copy of

the Recruitment Rules in which amendments are made should always be enclosed, duly referenced and flagged.

4.2 All Recruitment Rules should contain a “Power to relax” clause in the covering notification or in the body itself (in the case of organised services).

4.3 Relaxation of Recruitment Rules is to be resorted to in respect of a class or category of persons. Relaxation should not be resorted to in respect of an individual except in cases where an individual can be treated as a Class or Category of persons.

4.4 Relaxation of rules is to be resorted to on rare occasions. Such a relaxation should not be a regular feature.

4.5 Before resorting to relaxation of Recruitment Rules, the Ministries/Departments should explore the feasibility of filling up a post by other methods of recruitment provided in the rules. In the case of deputation, the vacancies should have been circulated in the employment News before consideration of relaxation.

4.6 Relaxation proposals should be sent to this Department in Annexure-IV after obtaining the approval of at least Joint Secretary level officer in the Ministry/Department concerned.”

The aforesaid guidelines state that relaxation of Rules was to be resorted on rare occasions and should not be a regular feature. More importantly, it was stated before resorting to relaxation, the Ministry/Departments must explore the feasibility of filling up the posts by other methods of recruitment provided in the Rules. This aspect and the guidelines were ignored while according concurrence. Appositely, the selection process for direct recruitment for the vacant posts of DLA had commenced, the written examination and interviews had been held, and by mistake, even the final result had been declared. In spite of repeatedly being asked, counsel appearing

for the Union of India could not justify and explain how the conditions stipulated in paragraph 4.5 of the OM dated 31st December, 2010 were satisfied. Indeed, no such explanation is possible and can be given.

20. After obtaining concurrence of DOP&T, proposal dated 17th October, 2012 was sent by the Ministry to the Secretary of the Commission. The said letter reads as under:-

“Subject: One-time relaxation of the ILS Rules, 1957 in connection with filling up of vacancies in the grade of Additional Legal Adviser, Additional Law Officer, Deputy Legal Adviser and Deputy Law Officer.

Sir,

I am directed to state that, with the approval of Hon’ble Minister of Law and Justice, a proposal was sent to DoPT on the subject mentioned above. DoPT raised some queries stating that the said proposal is not clear. Accordingly, a clarification was furnished to DoPT and the DoPT conveyed the following approvals in filling up vacancies in the grade of Addl. L.A., Addl. L.O., DLA and DLO by promotion during 2012-13 with one-time relaxation of the ILS Rules, 1957. Copies of the correspondences (ID Notes) made with the DoPT are enclosed for ready reference:-

- (i) Additional Legal Adviser: The relaxation in residency period in respect of officers at S.No.1 to 5 [of para 3(I) of page 7/notes], who have been regularly appointed as DLA is approved. Officers at Sr. No. 6 to 18 are appointed as DLA on ad-hoc basis and therefore not eligible for promotion to the grade of Additional Legal Adviser as per extant Rules. Ministry of Law may in the first instance take action to regularize the services of these officers in the grade of DLA.
- (ii) Additional Law Officer: The relaxation in eligibility service in respect of Shri A.K. Upadhyay, DLO, to consider him for

promotion against the vacancy in the grade of Additional Law Officer is approved.

- (iii) Deputy Legal Adviser: The Rules prescribed that the post shall be filled alternatively by DR and by promotion of the member of the service (Grade-IV). All the 18 officers meet the requirement of 3 years in ALA. The relaxation to fill up 14 vacancies in the grade of DLA by promotion in relaxation of the provisions in the method of recruitment prescribed in the Rules is accorded.
- (iv) Deputy Law Officer: The proposal to consider the two officers in the grade of ALO to consider them for promotion to the two vacancies in the grade of DLO in relaxation of the provisions of the Rules is approved.

2. Rule 14-A of the RRs of ILS Rules, 1957 (Annexure-II) provides that “where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing and, in consultation with the Union Public Service Commission relax any of the provisions of these rules with respect to any class or category or persons or any posts.

3. Hence, UPSC is requested to convey their concurrence to the proposal for one-time relaxation of the ILS Rules, 1957 for filling up the vacancies in the grade of Addl.L.A., Addl. L.O., DLA and DLO, as agreed to by the DoPT vide their I.D. Note No. AB.14107/34/2010-Estt. (RR), dated the 9th October, 2012.”

21. The case was processed by the Commission and on the question of relaxation in the case of DLA, it was observed and recorded by the Commission as under:-

“3. Deputy Legal Adviser – PB-3-Rs.15600-39100 + Pay of Rs.7600/-

3.1 Rule 6(2) of the ILS Rules provides that the post of Deputy Legal Adviser shall be filled alternatively by direct recruitment and promotion of a member of the service. In terms of Rule 81(iii) of the ILS Rules, a person shall not be eligible for

consideration for promotion to the Grade of Deputy Legal Adviser unless he has held the duty post in the grade of Assistant Legal Adviser (Grade-IV) for a total period of not less than 3 years.

3.2 At present, out of 19 sanctioned posts, there are 14 regular vacancies in the grade of Deputy Legal Adviser out of which 13 are meant for direct recruitment and 01 for promotion. These vacancies could not be filled up for a long time. 06 vacancies were reported to UPSC in 2005 which resulted in a number of court cases. In pursuance of the Hon'ble CAT's order dated 17.4.2007, the ILS cadre was de-merged into different cadres i.e. Legal Advisers Service Cadre, Government Advocates Service cadre and Law Officers Service cadre w.e.f. 10.5.2008. Thereafter 6 candidates were appointed as DLA on DR basis on the recommendations of the UPSC. However, the Hon'ble CAT vide order dated 24.2.2011 quashed the said selection and directed to make the selection for the post of DLA by issuing a fresh advertisement. In pursuance of this, the services of the appointed candidates were terminated vide notification dated 1.3.2011. Consequent thereupon 11 vacancies meant for DR were reported to the UPSC. Subsequently 2 more vacancies were reported to UPSC for DR. Now, the department feels that being a senior level post, the officers with experience in the department will be most suitable for appointment to the post of DLA to discharge the duties attached to the post. It has, therefore, been decided with the approval of the Hon'ble Minister for Law & Justice to fill up the vacant posts of DLA by promotion rather than by direct recruitment and to seek one time relaxation from DOPT /UPSC regarding the mode of recruitment from DR to promotion as also the relaxation in the qualifying years of service. In view of this decision, the Commission was requested vide letter dated 25.05.2012 to treat the Ministry's proposal for direct recruitment of 13 vacancies in the grade of DLA as withdrawn. In the circumstances, the Ministry has requested for relaxation in the mode of recruitment from direct recruitment to promotion and has furnished the details of 18 officers who are to be considered for promotion to the grade of Deputy Legal Adviser. All these

officers have completed the qualifying years of service in the grade of Assistant Legal Adviser.”

In the summing up paragraph the Commission had stated with reference to the post of DLA as under:

"(iii) Division of 14 vacancies in the grade of Deputy Legal Adviser from direct recruitment quota to promotion quota in view of the fact that the feeder category officers in the grade of Assistant Legal Adviser have put in more than eight years of service against the three years qualifying service prescribed in the RRs and have been stagnating for quite some time and the Ministry has failed to fill the DR quota vacancies. The above is covered under items 3(a)(i) and (ii) of the Policy Guidelines decided upon by the Commission.”

22. Thereafter, the Commission issued a formal order dated 23rd November, 2012 granting one-time relaxation of the Rules for filling up vacancies in the grade of Additional Legal Advisor, Additional Law Officer, DLA and Deputy Law Officer.
23. By advertisement dated 13th March, 2013, the Commission informed the petitioner and other candidates that recruitment to 11 posts of DLA vide advertisement published in the employment newspaper and in the leading newspapers dated 3rd September, 2011 had been cancelled. The petitioners herein thereupon filed an OA Nos.1925/2013 and 1165/2013 praying for quashing of the cancellation notice dated 13th March, 2013 published by the Commission, and withdrawal of requisition dated 21st May, 2012 sent

by the Ministry of Law and Justice and issued by the Commission. They had also challenged the order dated 7th December, 2012 passed by the Commission granting one time relaxation and for direction that the vacant posts of the DLA under the direct recruitment quota should be filled as per the Rule position without granting one time relaxation.

24. The officers of the Commission, who had granted the permission or approval for grant of relaxation, were not aware of the fact that their recruitment unit had initiated process of direct recruitment for selection and appointment to the 11 vacant posts of DLA. When this factum came to their notice, they took up the said issue and had raised objections by writing to the Ministry. In the note dated 16th April, 2013 written by the Commission, it was stated as under:-

“1. This files(sic) relates to convening of a DPC to consider promotions to the post of Deputy Legal Adviser (Grade III of Indian Legal Services). Group A, PB-3, Rs.15600-39100+Grade Pay of Rs.7600.

2. In this case, Hon'ble Member, Shri A.P. Singh stands nominated to preside over the meeting of the DPC. The DPC was fixed on 14.3.2013 and has since been postponed in view of the order of the Hon'ble CAT Chandigarh Bench at Page 115/Cor. In this case, the Ministry has sought the approval of the Commission to the diversion of 14 direct recruitment vacancies to promotion quota. The Commission approval, inter alia, to the diversion of 14 direct recruitment vacancies to promotion quota in the Communicated(sic) to the Ministry Vide communicated (sic) letter No.11/4/(4)/2012-AP-4 dated 7th December, 2012.

3. It would be relevant to point out in this connection that the Ministry had withdrawn the direct recruitment requisition furnished by them at a very late stage i.e. after the interviews for the posts were held and recommendations were

communicated to the Ministry and the selected candidates. It is also pointed out that the Ministry at the time of seeking relaxation of RRs did not place the full facts of the case i.e. the fact of the Ministry withdrawing the direct recruitment proposal after the selection to the post was made. Had this fact been brought to the notice of the Commission, perhaps, the Commission may not have approved the relaxation to the diversion of vacancies from direct recruitment quota to promotion quota.

4. FR is a letter received from the Ministry in response to our letter dated 19th March, 2013 informing the Ministry about the postponement of the DPC meeting fixed for 14th March, 2013 in view of the court direction. The Ministry has stated that perusal of the Hon'ble CAT, Chandigarh Bench order dated 14th February, 2013 indicates that the Tribunal has observed that "the Respondents may consider the advisability of refraining from making any promotion in the meantime." This(sic), there is no stay order passed. The Ministry has, therefore, requested the Commission to convene a meeting of the DPC at any early date. A view will be taken whether to seek leave of the Tribunal for making promotions to the post of DLA subject to final outcome to the OA at the appropriate stage after recommendations of the commission are available.

The contention of the Ministry that there is no stay order in the case is not correct the Hon'ble Tribunal's Observation is a polished language directing the Respondent not to make any promotion in the meantime. If the DPC is held. The same may attract contempt of court and as such the DPC may not be convened till the OA is finally decided by the Hon'ble Tribunal. It would be worthwhile to note that the OA has been filed by one of the candidates recommended for appointment to the post on the basis direct recruitment proposal after the selection in the case had attained finality.

7. In light of the foregoing, it is suggested that was(sic) may inform the Ministry that the DPC cannot be held till the OA No.191/CH/2013 is finally decided by the Hon'ble Tribunal."

(emphasis supplied)

25. Thereafter, letter dated 7th May, 2013 was written by the Commission, which reads:-

“I, am directed to refer to your letter No. A-600011/23/2013-Admn.I(LA) dated 4th April, 2013 on the above subject and to state that in OA No. 1110/2012 filed before Hon’ble CAT, Principal Bench, New Delhi in the matter of recruitment to the post of Deputy Legal Adviser, the Ministry of Law and Justice had taken a stand before the Hon’ble Tribunal that the requisition for direct recruitment to the post of Deputy Legal Adviser had been withdrawn by the Ministry specifically when the Commission vide their letter dated 25.05.2012, had not agreed to such withdrawal of requisition by the Ministry. **The Commission’s displeasure in this regard has been conveyed to the Ministry vide D.O. letter No. 1/25(41)2012-Spl.II dated 26.02.2013.**

2. It is also brought out in this connection that at the time of seeking approval of the Commission to the relaxation of the Recruitment Rules for filing up various posts by promotion in the Indian Legal Service, the Ministry had not apprised the Commission of the full facts of the case i.e. the fact of having placed a requisition to the Commission’s office for direct recruitment to the post and the details of OA No. 1110/2012 filed before Hon’ble CAT Principal Bench.

3. The O.A. No. 191/CH/2013 has been filed by Shri Rajinder Singh Sra, one of the recommended candidates for appointment to the post of Deputy Legal Adviser by direct recruitment wherein he has challenged the diversion of vacancies from direct recruitment quota to promotion quota.

4. In the light of the foregoing, it has been decided by the Commission not to hold the DPC for considering promotion to the post of Deputy Legal Adviser pending final adjudication of OA No. 191/CH/2013 by the Hon’ble CAT, Chandigarh Bench.”

(emphasis supplied)

26. Earlier the Secretary of the Commission had written letter dated 26th February, 2013 to the Secretary Ministry of Law and Justice, which reads:-

“Please refer to the OA No. 1110/2012 filed in CAT, Principal Bench, New Delhi with respect to the recruitment of Deputy Legal Adviser.

2. I wish to draw your attention to Hon’ble CATs order dated 19.12.2012 wherein the Hon’ble Tribunal had observed as follows:

“4. In view of the above and also keeping in view that after the requisition being withdrawn by the second respondent, this application has lost its efficacy. The application, is, therefore, dismissed as withdrawn with the above order.”

3. The Commission, keeping in view the fact that the Ministry of Law & Justice was not interested in recruiting the Deputy Legal Advisers and because of the Hon’ble Tribunal’s above mentioned order, has decided to cancel the recruitment.

4. The Commission is of the view that the Ministry of Law & Justice should not have taken a stand before the Hon’ble Tribunal that the requisition for recruitment to DLA had been withdrawn by the Ministry especially when the Commission, vide letter dated 25.5.2012, had not agreed to such withdrawal of requisition by your Ministry. The Ministry also did not think it proper to refer back to the Commission your disagreement with the Commission’s view. I have accordingly been directed by the Commission to communicate to you their displeasure about the manner in which the Ministry of Law & Justice had dealt with the matter.”

(emphasis supplied)

27. This was answered by letter dated 6th March, 2013 written by the Joint Secretary and Legal Adviser of the Law Ministry to the

Commission stating that as per the Constitution, in case of disagreement with the recommendation of the Commission, Article 323(1) of the Constitution would be applicable. Once the Law Ministry had written the letter withdrawing their proposal for direct recruitment, nothing was required.

28. In these circumstances, the Commission in their reply to OA No. 1925/2013 filed by Praveen Srivastava had stated:-

“3. That in this connection, it is stated that UPSC was in the midst of selection process for recruitment to 11 posts of Deputy Legal Advisor Ministry of Law & Justice vide it's letter dated 21st May, 2012 (copy enclosed) conveyed the decision of the Government to withdraw the proposal and requested that the proposal under reference may be treated as withdrawn and no further action be taken on the requisition for filling up the aforesaid posts by Direct recruitment. It was further informed that this decision has been taken by the Government after due deliberations to fill up the vacancies of DLA falling for Direct Recruitment Quota by promotion in view of the acute stagnation in the grade of Assistant Legal Advisor. The matter was considered in the Commission and UPSC vide letter dated 25th May, 2012 (Copy enclosed) regretted to accede to the request for withdrawal of the requisition as the date of interview were fixed. The Commission also expressed displeasure about the manner in which the matter has been handled by Ministry of Law & Justice, Department of Legal Affairs. The result of the interview was declared by the Commission on 13th June, 2012. However, the Commission had to withdraw the result considering that no purpose would be served as the concerned Department withdrawn the proposal and requested that the proposal under reference may be treated as withdrawn and no further action be taken on the requisition for filling up the aforesaid posts by Direct recruitment.

4. That meanwhile the Ministry of Law & Justice, Department of Legal Affairs, had sought the approval of the Commission inter

alia for diversion of 14 DR vacancies to promotion quota in the Grade of Deputy Legal Adviser (Gr.III of the ILS) PB3-15600-39100-GP of 7600. After examination of the proposal approval of the Commission to the diversion of vacancies from DR quota to promotion quota was conveyed to the Ministry vide Commission's letter dated 7.12.2012 (Copy enclosed).

5. Subsequently, a proposal was received from Ministry of Law and Justice for convening a meeting of the DPC to consider promotion to the post of Deputy Legal Adviser against the diverted vacancies. The DPC in this case was fixed on 14.3.2013. However, on receipt of copy of the order dated 14.2.2013 of the Hon'ble CAT Chandigarh in OA No.191/CH/2012 filed by Shri Baljinder Sra staying the promotion till further orders, the meeting of the DPC has been postponed till further orders. The Ministry of Law and Justice have been provided a copy of the order of the Hon'ble Tribunal while intimating the postponement of the DPC. **It is pertinent to mention here that Ministry of Law and Justice did not make any reference to the requisition placed by them separately for making direct recruitment to the post nor did they intimate that they have withdrawn the direct recruitment requisition after the selection to the post by way of direct recruitment have been made."**

(emphasis supplied)

29. Realising the stand taken by the Commission, the Ministry of Law and Justice by their letter dated 30th September, 2013 had called upon the Secretary of the Commission to suitably modify their reply filed to OA No. 1925/2013 and 1165/2013. This did not happen and the Commission has stuck to their stand. Even before us, the Commission has filed an affidavit and written synopsis reiterating their position. It is stated that the Commission had expressed their displeasure and the manner in which the issue had been handled by the Ministry of Law and Justice.

30. We also have before us a copy of the joint minutes of meeting dated 9th December, 2015 in the chamber of the Joint Secretary of the Commission in compliance with the order dated 26th November, 2015 passed by the High Court in the present writ petition. The Commission in their stand has recorded in the said minutes that they should not be made a party to any arrangement or mechanism, which were contrary to and beyond the mandate of the Rules and procedure prescribed. It was restated that the Ministry at the time of asking for relaxation had not made any reference to the requisition placed by them separately for making direct recruitment to the posts nor did they intimate that they had withdrawn the direct recruitment requisition after the selection to the posts by way of direct recruitment had been made. The minutes finally record that no consensus could be reached in the matter as proposal to adjust six petitioners against direct recruitment vacancies by the Department, was not covered under the notified Recruitment Rules and was beyond the binding mandate and prescribed procedure adopted by the Commission.
31. It is in the light of the aforesaid that we have to determine and decide whether the petitioners are entitled to any relief, which they have prayed for in the OAs and which have been rejected.
32. The impugned order holds that the cancellation notice dated 13th March, 2013 issued by the Commission was valid as the Government had exercised the power of relaxation under Rule 14A of the Rules and the posts which were to be filled by way of direct recruitment were to be filled by way of promotion from those in the cadre of

ALAs. The power of relaxation under Rule 14-A having been exercised in view of the stagnation, amounts to relaxation of condition of service and relaxation of the relevant eligibility conditions. The said relaxation was based upon internal exercise leading to the decision that 14 vacant posts of DLAs need to be filled up by promotion. It was not for the tribunal to decide whether or not the decision to relax Rules, to enable promotion of internal candidates was justified or not. At the same time it was observed that relaxation was necessary due to stagnation, even if the select list of direct recruits was published. Once relaxation was granted in accordance with the Rules the same could not be challenged. The power of relaxation itself was not exercised arbitrarily and in violation of Articles 14 and 16 of the Constitution. The petitioners herein did not have any right to seek appointment but only right to consideration and once the requisition itself was withdrawn by the Ministry of Law and Justice, appointments could not have been made. The Commission had erred as declaration of results was stayed vide order dated 31st May, 2012 passed in MA No. 1608/2012 in OA No. 1110/2012 filed by the fourth respondent-Mahesh Tyagi. Such invalid declaration of result would not confer any rights on the petitioners to seek appointment.

33. It is not disputed and under challenge that many of the promotee ALAs in whose favour relaxation was granted had either not appeared in the open selection or having appeared did not qualify and get selected. As per Rule 6(2) of the Rules, the posts in the cadre of DLA have to be filled up alternatively by direct recruitment and by

promotion from the cadre of ALA. As per Rules, but for the relaxation granted under Rule 14A, the private respondents, i.e., promotee ALAs were not eligible and had not qualified and could not have been appointed as DLA. There is case law that quota prescribed in the Recruitment Rules must be strictly adhered to and followed. In ***V.B. Badami and Others versus State of Mysore and Others***, (1976) 2 SCC 901 referring to the quota rule, the Supreme Court had elucidated that where the Rules prescribe quota between direct recruits and promotees, confirmation or substantive appointments can only be in respect of clear vacancies in the permanent strength of the cadre. Further, direct recruitment is possible only by a competitive examination, which is a prescribed procedure and promotional vacancies can be filled either by selection or on the principle of seniority-cum-merit. Promotions in excess by promotional quota which may not be illegal but irregular, would not confer upon the promotees right to claim or hold the promotional post unless vacancies fall in their quota. Promotees, who occupy vacancies within the quota of direct recruits, either will be reverted or absorbed in the vacancies within their quota. The Constitution Bench in ***Direct Recruit Class-II Engineering Officers' Association and Others versus State of Maharashtra and Others***, AIR 1990 SC 1607, affirmed that when the Rules provide for appointment from more than one source, it is permissible to fix ratio of recruitment from different sources and ordinarily this must be strictly followed. If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the ends of situation. This

judgment also dealt with the situation where the quota rule breaks down with which we are not concerned in the present case.

34. This brings us to the core issue and the question relating to power of relaxation and exercise of the said power in the present case. Rule 14A reads as under:-

"14-A. POWER TO RELAX: Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing and, in consultation with the Union Public Service commission relax any of the provisions of these rules with respect to any class or category or persons or any posts."

The aforesaid Rule incorporates a relaxation clause, which is to be found in many a service rules. There are several decisions which draw a distinction between power to relax "conditions of service" and "rules of recruitment" holding that the former is permissible but attempts to relax "rules of recruitment" would fall foul for it would result in abrogation or amendment of the Rules. (See *Keshav Chandra Joshi and Others etc. versus Union of India and Others*, (1992) Supp. 1 SCC 272 and a decision of a Division Bench of this Court in *Om Prakash and Others versus Union of India and Others*, LPA No. 71/1973, decided on 26th August, 1980).

35. In *Suraj Prakash Gupta and Others etc. versus State of Jammu and Kashmir and Others*, AIR 2000 SC 2386, referring to the power of relaxation it was observed that some relaxation rules permit relaxation of "conditions of service" and others permit "relaxation of

Rules”. Relaxation when permissible in a particular case, does not refer to a particular person, but is meant to pertain to an event, situation or circumstances. Power of relaxation could be therefore exercised in favour of a group. This decision again emphasises that the courts would require strict conformity with the recruitment rules for both direct recruits and promotees. Relaxation is an exception and not the norm to be resorted to as a matter of routine.

36. The respondents, on the other hand, have referred to a Division Bench decision of this Court in ***Central Engineering Service Class-I(DR.) Association and Others versus Union of India and Others***, 156 (2009) DLT 300 (DB) wherein after referring to power of relaxation given under Rule 25 of the Central Engineering Service Group A Recruitment Rules, 1954, it was observed that the said power was extremely wide and enabled the Central Government to relax the provisions in respect of a category or class of persons, though only in consultation with UPSC. Albeit relaxation power must be distinguished from the right and power to amend. Whether relaxation of quota was possible by executive instructions without amendment of the recruitment rules, it was held, was difficult to answer in the absolute yes or no. The Division Bench observed that a middle path might be justified and power of relaxation as a one-time measure could be given in the exigencies of the given situation. The respondents have similarly made reference to judgments in ***Kuldeep Kumar Gupta and Others versus HPSEB and Others***, (2001) 1 SCC 475, ***Indian Railways Class-II Officers Federation and Another versus Anil Kumar Sanghi and Others***, (2002) 8 SCC 98, ***H.L.***

Bhasin and Others versus A.K. Das and Others, (1983) 4 DRJ 206 and *Dinesh Kant Srivastava versus State of U.P.*, (2006) 6 AWC 5865 All.

37. In the present factual matrix, we are not inclined to go into the question of amendment vis-à-vis relaxation, but would base our decision on the exercise of power of relaxation. The decisions quoted above highlight that power of relaxation cannot be used wantonly and arbitrarily. This power has to be exercised in a reasonable manner for just and good reasons and in accordance with law, i.e., by following and adhering to the prescribed procedure. Pertinently Rule 14A requires reasons to be recorded in writing and consultation with the Commission, i.e., Union Public Service Commission, before the decision is taken to relax any of the provisions of the Rules. Power of relaxation is granted to enable the Government to deal with difficult and egregious situations, and is not a power to be exercised to appease one class or group at the expense of the another. It is not a tool or enabling provision to placate those who can be heard and have the benefit of airing their grievance, to rob and deny appointments to those who are yet to enter the service, and are in that way outsiders and, therefore, unable to have equal access to voice their grievance and cause.
38. In *Keshav Chandra Joshi* (supra), the Supreme Court emphasised on two aspects. Firstly, consultation with the Commission when statelily required was mandatory by construing the word “may” to mean “shall”. This consultation must be before granting exemption or

relaxing operation of the Rule. Secondly, it must be shown that the relaxation was just and equitable and not exercised arbitrarily, whimsically, and capriciously. It should be shown that the operation of the Rules regarding "conditions of service" was causing undue hardship in particular cases. The courts, no doubt, cannot substitute their satisfaction for the satisfaction of the Government, but they would exercise the power of judicial review in case there is an error or fault in the decision making process, for all administrative decisions are amenable to judicial scrutiny.

39. Consultation has to be meaningful and should serve the intended purpose. Consultation involves process in which the material facts and points are referred to and considered to evolve and reach a satisfactory answer. If a power can be exercised only after consultation, then, the consultation should be informed, conscious, effective, and purposeful. The efficacy and mandate of consultation is negated and denied when the relevant and material facts for due deliberation are not disclosed by one party to the other. The consultee must express his opinion after due consideration of the matter on relevant facts and quintessence (see *State of Gujarat and Another versus Gujarat Revenue Tribunal Bar Association and Another*, (2012) 10 SCC 353 and other cases referred to in paragraph 34 of the said decision). The word "consult" means discussion and deliberation and when consultation is between two different authorities, there is an implied requirement which stipulates that necessary information must be given to the consultee to enable him to render advice. Correct and informed advice and opinion cannot be

expressed unless necessary facts relevant to the issue and question are disclosed. The Supreme Court in *Union of India versus Sankarchand Himmatlal Sheth and Anothe*, (1977) 4 SCC 193 referred to the judgment of the Madras High Court in *R. Pushpam and Another versus State of Madras*, AIR 1953 Madras 392 to observe that the word “consult” implies a conference of two or more persons and an impact of two or more minds in respect of a topic. It confers and produces a mutual impact, which is not possible unless upon consideration of full and informed facts for the said facts, constitute the source and the foundation of the final decision.

40. For the reasons, which are apparent from the facts and discussions above, the exercise of power of relaxation in the present case would falter and has to be struck down on the ground of error in the decision making process. The relaxation granted in the present case is arbitrary and whimsical. We would, at the risk of some repetition, like to elaborate. As noticed above, selection for six posts of DLA by direct recruitment was initiated in July, 2007. ALAs had then obstructed and intervened in the selection process though they were not eligible, when their names were recommended by the Ministry on the pretext that they were better qualified than the shortlisted candidates. This selection process was struck down by the Tribunal with the direction that a fresh advertisement be issued for selection to the post of DLA. On the basis of the requisition made by the Ministry, advertisement dated 3rd September, 2011 was published by the Commission for filling up 11 posts of DLA through direct recruitment. The Commission had conducted the written examination

on 27th November, 2011 and results were declared on 3rd February, 2012. Several ALAs had participated and were unsuccessful in the open competition.

41. Immediately on start of the process for direct recruitment, attempts were made to stall the said selection by filing of repeated OAs before the Tribunal. OA No. 746/2012 filed by Mahesh Tyagi, the fourth respondent before us, was substantially dismissed by the Tribunal vide order dated 7th March, 2012. Pursuant to liberty granted, the said respondent filed another OA No. 1110/2012 on similar grounds.
42. Simultaneously, after the open selection process had commenced and even the results of the written examination were declared on 3rd February, 2012, pursuant to a written note in May 2012 a cadre restructuring exercise was started by the Ministry of Law and Justice perceptively not only for the post of DLA, but for other posts like Additional Legal Adviser, Additional Law Officer and Deputy Law Officer. To restrict such exercise to the posts of DLA would have raised questions. Albeit, the objective was clear, for attempt was made to stop the selection process by writing letter dated 21st May, 2012 to the Commission, which was declined and rejected by the Commission on 25th May, 2012. The letter dated 21st May, 2012 was written even before relaxation under Rule 14A was approved and granted. Till then, the Commission had not been consulted or even sounded. Ministry wrote to the DoP&T for the first time for relaxation under the Rule 14A on 23rd June, 2012. The DoP&T did not agree and had asked the Ministry to clearly bring out the

eligibility requirement for appointment to vacant posts in various grades, particulars of officers in feeders grade, etc. Thereafter, another note was prepared in August, 2012. DoP&T gave their concurrence for relaxation vide note dated 9th October, 2012 observing that relaxation was granted to fill up 14 vacancies in the grade of DLA by promotion. What is missing from the said discussion and notes is reference to the DoP&T's OM dated 31st December, 2010, which has been quoted above and relates to the question of amendment and relaxation. In paragraphs 4.4 and 4.5, the O.M. stipulates that relaxation has to be resorted to on rare occasions and before resorting to relaxation, the Ministry/Departments should explore feasibility of filling up of the posts by other methods of recruitment provided in the Rules. OMs are executive instructions which ensure objectivity and fairness and strike at arbitrary decisions and actions, which favour one class and deprive or impinge on the rights of others. They ensure uniformity and curtail favouritism and nepotism.

43. It is apparent and clear that consideration for grant of relaxation under Rule 14A with the Commission in the present case did not take into account and consider the most important and relevant factor, i.e., the process for direct recruitment had reached its final stage after holding the written examination, interviews etc., and in fact the Commission had declared the final select list. The factum that the Commission by mistake had declared the said results for the Tribunal had issued a restraint order, would not make any difference for the issue is not whether the results were declared but whether the selection by way of

direct recruitment was possible and eminent and, therefore, this aspect and circumstance was required to be considered and given weightage before power of relaxation was exercised. The failure and absence of consideration of the said factual position would be an error in the decision making process, for a relevant and important factor which was germane and apposite for reaching the right decision in terms of the OM dated 31st December, 2010 was deliberately and intentionally ignored. It is in this context that we have referred to the correspondence exchanged between the Commission and the Ministry and the disbelief and angst expressed by the Commission. For the sake of clarity, we record that the Commission during consultation process while examining the question of relaxation was not told and informed about the process for direct recruitment which had commenced in 2011 and had reached the stage of declaration of results. This fact was concealed and withheld from the relevant unit/department of the Commission even though it had a vital and an significant bearing. The Commission may not have accepted the recommendation for relaxation made by the Ministry in the aforesaid circumstances especially in light of their letter dated 25th May, 2012 refusing to stop and rejecting the request of withdrawal of the recruitment process.

44. The contention of the respondents relying upon Article 315 to the effect that Commission is recommendatory body or their decisions are not binding and at best in case of disagreement, Article 323(1) of the Constitution would become applicable, is neither here nor there.

We are not concerned with these aspects, when we examine the

question of error in the decision making process. What is relevant and of significance is whether relevant factors were taken into consideration or were deliberately withheld and not informed for effective and an informed consultation and decision. Failure to reveal and state the relevant facts on record have deprived and denied a consultative decision, which takes into account relevant facts and thus renders the decision of relaxation vulnerable and bad in law. The Rule conferring the power of relaxation posits and requires consultation which is mandatory and not merely a formality.

45. The respondents have highlighted that there was stagnation in ALA cadre and, therefore, the official respondents were justified in exercising power of relaxation. This argument would not carry weight as we are not examining the aforesaid reason and indeed the Court would not substitute its own opinion, but are concerned with the question whether the procedure followed and the decision for grant of relaxation was in accordance with law. We have referred to the file notings in some detail to examine the issue of erroneous "decision making process". The noting in paragraph 14 above would indicate that ALAs who were working as DLAs on an *ad hoc* basis were likely to be promoted as Additional Law Officers after relaxation of Rules. The officers, i.e. the ALAs, mentioned at serial Nos. 8 to 18 were being granted direct benefit by withdrawing the process for direct recruitment and thereby encroaching upon the right of the petitioners for being considered for appointment. We would accept the argument that the stagnation of ALAs working as *ad hoc* DLAs and their promotion is connected with the relaxation which has

been granted. However, it would be wrong to ignore to refer to stagnation and the years or length of service of ALAs in isolation, without reference to the past history, including the litigation etc. stalling the recruitment process initiated in 2007 and 2011. The ALAs were involved and parties to the said litigation. These facts which were vital and relevant and should have been given due weightage and consideration were not mentioned and recorded in the consultative process of relaxation, which became a one-sided affair. Stagnation etc. was an aspect to be considered with the mandate and stipulations mentioned in the OM dated 31st December, 2010 and other facts, for a just and reasonable decision.

46. For the same reason, the contention of the respondents that the petitioners have no right or claim for appointment is misconceived for the petitioners do not claim any such right. The petitioners claim right to be considered for appointment, which cannot be denied by the State acting in an arbitrary manner. Constitution Bench in *Shankarsan Dash versus Union of India*, (1991) 3 SCC 47, has held that it is not necessary for the State to fill up the notified vacancies even when adequate number of candidates are found fit, for the candidates have no indefeasible right to appointment. The notification or advertisement is only an invitation to qualified candidates to apply for selection. However, this does not mean that the State has a licence to whimsically deny appointment by not filling up vacancies. The decision not to fill up a vacancy should be for appropriate and good reasons. It has to be taken bonafidely. We have followed and applied the aforesaid ratio and find that the case of the

respondents would falter and fail, as the power of relaxation has not been exercised in accordance with law. Thus, the foundation and basis for non-appointment collapses. The petitioners would be covered by the said ratio and are entitled to be considered for appointment as DLAs.

47. The said legal position cannot be doubted and is not in debate. In ***East Coast Railway and Another versus Mahadev Appa Rao and Others***, (2010) 7 SCC 678, the Supreme Court had observed:-

“13. A Constitution Bench of this Court in *Shankarsan Dash v. Union of India* [(1991) 3 SCC 47 : 1991 SCC (L&S) 800 : (1991) 17 ATC 95] had an occasion to examine whether a candidate seeking appointment to a civil post can be regarded to have acquired an indefeasible right to appointment against such post merely because his name appeared in the merit list of candidates for such post. Answering the question in the negative this Court observed: (SCC pp. 50-51, para 7)

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subash Chander Marwaha* [(1974) 3 SCC

220 : 1973 SCC (L&S) 488] , *Neelima Shangla v. State of Haryana* [(1986) 4 SCC 268 : 1986 SCC (L&S) 759] or *Jatinder Kumar v. State of Punjab* [(1985) 1 SCC 122 : 1985 SCC (L&S) 174] .”

14. It is evident from the above that while no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found a place in the select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the State's decision not to make an appointment is thus a matter which is not beyond judicial review before a competent writ court. If any such decision is indeed found to be arbitrary, appropriate directions can be issued in the matter.

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16. Applying these principles to the case at hand there is no gainsaying that while the candidates who appeared in the typewriting test had no indefeasible or absolute right to seek an appointment, yet the same did not give a licence to the competent authority to cancel the examination and the result thereof in an arbitrary manner. The least which the candidates who were otherwise eligible for appointment and who had appeared in the examination that constituted a step-in-aid of a possible appointment in their favour, were entitled to is to ensure that the selection process was not allowed to be scuttled for mala fide reasons or in an arbitrary manner.

17. It is trite that Article 14 of the Constitution strikes at arbitrariness which is an antithesis of the guarantee contained in Articles 14 and 16 of the Constitution. Whether or not the cancellation of the typing test was arbitrary is a question which the Court shall have to examine once a challenge is mounted to any such action, no matter the candidates do not have an indefeasible right to claim an appointment against the advertised posts.

18. What then is meant by arbitrary/arbitrariness and how far can the decision of the competent authority in the present case be described as arbitrary?

19. *Black's Law Dictionary* describes the term “arbitrary” in the following words:

“*Arbitrary*.—1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed *arbitrary and capricious*.”

20. To the same effect is the meaning given to the expression “arbitrary” by *Corpus Juris Secundum* which explains the term in the following words:

“*Arbitrary*.—Based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; capricious; exercised according to one's own will or caprice and therefore conveying a notion of a tendency to abuse possession of power; fixed or done capriciously or at pleasure, without adequate determining principle, non-rational, or not done or acting according to reason or judgment; not based upon actuality but beyond a reasonable extent; not founded in the nature of things; not governed by any fixed rules or standard; also, in a somewhat different sense, absolute in power, despotic, or tyrannical; harsh and unforbearing. When applied to acts, ‘arbitrary’ has been held to connote a disregard of evidence or of the proper weight thereof; to express an idea opposed to administrative, executive, judicial, or legislative discretion; and to imply at least an element of bad faith, and has been compared with ‘willful’.”

21. There is no precise statutory or other definition of the term “arbitrary”. In *Shrilekha Vidyarthi v. State of U.P.* [(1991) 1 SCC 212 : 1991 SCC (L&S) 742 : AIR 1991 SC 537] this Court explained that the true import of the expression “arbitrariness” is more easily visualised than precisely stated or defined and that whether or not an act is arbitrary would be determined on the

facts and circumstances of a given case. This Court observed: (SCC p. 243, para 36)

“36. The meaning and true import of arbitrariness is more easily visualised than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. The rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that ‘be you ever so high, the laws are above you’. This is what men in power must remember, always.”

22. Dealing with the principle governing exercise of official power Prof. De Smith, Woolf and Jowell in their celebrated book on *Judicial Review of Administrative Action* emphasised how the decision-maker invested with the wide discretion is expected to exercise that discretion in accordance with the general principles governing exercise of power in a constitutional democracy unless of course the statute under which such power is exercisable indicates otherwise. One of the most fundamental principles of the rule of law recognised in all democratic systems is that the power vested in any competent authority shall not be exercised arbitrarily and that the power is exercised that it does not lead to any unfair discrimination. The following passage from the above is in this regard apposite:

“We have seen in a number of situations how the scope of an official power cannot be interpreted in isolation from general principles governing the exercise of power in a constitutional democracy. The courts presume that these principles apply to the

exercise of all powers and that even where the decision-maker is invested with wide discretion, that discretion is to be exercised in accordance with those principles unless Parliament clearly indicates otherwise. One such principle, the rule of law, contains within it a number of requirements such as the right of the individual to access to the law and that power should not be arbitrarily exercised. The rule of law above all rests upon the principle of legal certainty, which will be considered here, along with a principle which is partly but not wholly contained within the rule of law, namely, the principle of equality, or equal treatment without unfair discrimination.”

23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.”

The *East Coast Railway* (supra) was a case wherein the selection process had been cancelled because of some complaints received from unsuccessful candidates. The factual similar matrix is not identical. But the legal position, which has been elucidated and referred to is appropriate and befitting.

48. In view of the aforesaid discussion, we would allow the present writ petition and set aside the impugned order dated 29th August, 2014 in the case of the six petitioners, who have challenged the said order.

They alone would be entitled to benefit of this judgment. It is stated that one of the petitioners may not be interested in joining the post of DLA. If that be the case, he would not be appointed.

49. Accordingly, the OAs filed by the six petitioners would be treated as allowed with a direction that their results would be declared by the Commission, and on being considered eligible and fit for appointment, appointment letters will be issued to them for the post of DLAs. They would not be entitled to back wages. For the purpose of seniority and pay fixation, they would be treated as notionally appointed on the date they would have been appointed in the normal course on declaration of result in June, 2012. *Inter se* seniority between the petitioners-DLAs and promotee ALAs appointed as DLAs as per the Recruitment Rules would be fixed in accordance with the Rules and applicable OMs.
50. The present litigation has remained pending in the Tribunal/Court for the last 5-6 years. We have struck down the relaxation granted in the case of appointments to the post of DLA. In view of the above circumstances and the lapse of time, we would observe that the Ministry, in consultation with the Commission, would examine the question of relaxation and appointment of ALAs to the remaining vacant posts of DLAs in the direct recruitment quota and accordingly fill up the same from those who were in the cadre of ALAs. However, ALAs so appointed as DLAs in the direct recruitment quota would be junior in seniority to the appointed petitioners.

51. The writ petition is accordingly disposed of. In the facts of the case, there would be no order as to costs.

**SANJIV KHANNA
(JUDGE)**

**CHANDER SHEKHAR
(JUDGE)**

**MAY 26, 2017
VKR/SSN**