IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1708 OF 2004

Hemant R. Mhatre and ors. ...Petitioners
Versus
Union of India and ors. ...Respondents

WITH
WRIT PETITION NO. 590 OF 2014

Hemant R. Mhatre and ors. ...Petitioners
Versus
Union of India and ors. ...Respondents

Appearances:
Mr. Ramesh Ramamurthy and Mr. Saikumar Ramamurthy for Petitioner Nos. 1 to 10 and 12 to 18 in WP No.1708/04 and for Petitioner Nos. 1 to 17 in WP No.590/14.

Mr. Suresh Kumar for Respondent No.3 in WP No.1708/04.

Ms Priyanka Mehndiratta for Respondent Nos.4 to 11 in WP No. 490/14.

WITH
WRIT PETITION NO. 6473 OF 2008
(APPELLATE SIDE)

Union of India and ors. ...Petitioners
Versus
Hemant R. Mhatre and ors. ...Respondents

WITH
WRIT PETITION NO. 285 OF 2009
(APPELLATE SIDE)

Smt. Reema R. Rele and ors. ...Petitioners
Versus
Hemant R. Mhatre and ors. ...Respondents

Appearances:
Mr. Suresh Kumar a/w. Ms Priyanka Tiwari for the Petitioners in WP No. 6473/08.

Mr. G.K. Masand i/b Mr. A.A. Manwani for the Petitioners in WP No.285/09.

Mr. Ramesh Ramamurthy and Mr. Saikumar Ramamurthy for Petitioner Nos. 1 to 22 in both the petitions.

CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.

DATE OF RESERVING THE JUDGMENT : 5th APRIL 2018.
DATE OF PRONOUNCING THE JUDGMENT : 16th APRIL 2018.

JUDGEMENT:

1] Heard learned counsel for the parties.

2] With the consent of and at the request of learned counsel for the parties, all these petitions are taken up for consideration together and disposed of by a common judgment and order. Even otherwise, the issues involved in all these petitions are interlinked and therefore, it is only appropriate that all these petitions are taken up and disposed of together by common judgment and order.

3] Writ Petition No. 1708 of 2004 has been instituted by Hemant R. Mhatre and 17 others, hereafter referred to as '*Tool Checkers*' to question the judgment and order dated 22nd October 2003 made by the Central Administrative Tribunal (CAT), Mumbai in O.A. No. 528 of 2001 instituted by them, to the extent, it directs the respondents in the said O.A. to take a decision on the issue of merger of cadres *only with prospective effect*.

4] The petitioners in Writ Petition No. 1708 of 2004 (Tool Checkers) contend that there ought to be merger of cadres, but with a retrospective effect, i.e., from 25th June 1985 and not merely with prospective effect. Therefore, the main issue involved in Writ Petition No. 1708 of 2004 is whether the merger of the cadre of Tool Checkers with that of ministerial cadre (Junior Clerks) should be with prospective effect or whether the same should be retrospective with effect from 25th June 1985.

5] In pursuance of the judgment and order dated 22nd October 2003 in O.A. No. 528 of 2001, the Union of India (Western Railway) issued order dated 26th May 2004, actually merging the cadres of Tool Checkers and Junior Clerks. This was subject to certain conditions, including, condition No.vii in the matter of determination of seniority in the merged cadre. This condition, *inter alia*, provided that on the merger of cadre of Tool Checkers with the cadre of Junior clerks, the seniority of Tool Checkers *vis-a-vis* Junior Clerks may be decided on the basis of entry into grade of Tool Checkers/Junior Clerks on regular basis.

6] However, it was the case of the Tool Checkers that despite the clear condition in clause vii of the order dated 26th May 2004, this principle of determination of seniority on the basis of entry into the respective grades on regular basis was ignored and promotions were sought to be made to the promotional post of senior clerks, based on a seniority list prepared in breach of clause vii. Therefore, the Tool Checkers instituted O.A. No. 466 of 2005 before the CAT to question promotion order dated 3rd February 2005 and seek consequential reliefs.

7] The CAT, by the judgment and order dated 22nd February 2008 upheld the contention of Tool Checkers, quashed and set aside promotion order dated 3rd February 2005 and directed the Union of India (Western Railway) to make promotions to the post of Senior Clerks on the basis of general seniority published on 25th January 2005 alongwith all consequential benefits.

8] Aggrieved by the judgment and order dated 22nd February 2008 in O.A. No. 466 of 2005, the Union of India (Western Railway) and Junior Clerks have instituted Writ Petition No.6473 of 2008 and Writ Petition No. 285 of 2009 seeking quashment of the same.

9] In Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009, both Union of India and Junior Clerks applied for, but did not succeed in obtaining any interim reliefs. In such circumstances, the Union of India was required to follow the directions issued by the CAT in the order dated 22nd February 2008. However, the Union of India issued seniority list/order dated 22nd January 2011, which, according to the Tool Checkers, dilutes the effect of judgment and order dated 22nd February 2008 issued by the CAT in O.A. No. 466 of 2005. Therefore, the Tool Checkers instituted O.A. No. 105 of 2011 before the CAT to question the seniority list/order dated 22nd January 2011.

10] However, the CAT, by order dated 29th November 2013, has dismissed O.A. No. 105 of 2011, not on merits, but by observing that since, the High Court is seized of connected issues in Writ Petition No.1708 of 2014, Writ Petition No.6473 of 2008 and Writ Petition No. 285 of 2009, it will not be appropriate for the CAT "*to tread on the toes of the Hon'ble High Court*" and entertain O.A. No. 105 of 2011. Aggrieved by the order dated 29th November 2013 in O.A. No. 105 of 2011, Tool Checkers have instituted Writ Petition No. 590 of 2014.

11] From the pleadings before the CAT as well as before this court, the following issues arise for determination in these petitions :

(a) Whether the Tool Checkers are entitled to merger of their cadre with the cadre of Junior Clerks with retrospective effect, i.e., from 25th June 1985 ? **(In Writ Petition No. 1708 of 2004)**

(b) Whether the Union of India (Western Railway) was right and justified in issuing promotion order dated 3rd February 2005 by ignoring the seniority list dated 25th January 2005 and relying upon a seniority list in variance with clause vii of the merger order dated 26th May 2004 ? **(In Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009)**

(c) Whether the Union of India (Western Railway) was right and justified in issuing seniority list /order dated 22nd January 2011 ? **(In Writ Petition No. 590 of 2014)**

12] Insofar as the first issue is concerned, Mr. Ramesh Ramamurthy, learned counsel for the Tool Checkers (Petitioners) in Writ Petition No. 1708 of 2004, submits that a policy decision was taken on 16th July 1985 to effect cadre review and restructuring of Group 'C' and Group 'D' staff in terms of Railway Board's letter dated 25th June 1985. He submits that in pursuance of the Railway Board's letter such restructuring, which includes merger of cadres of Tool Checkers and ministerial cadres like Junior Clerks were in fact effected in Eastern Railways as well as Central Railways. However, without any rhyme or reason, no such restructuring or merger was effected at the Western Railway to the utmost prejudice of the Tool Checkers at the Western Railway.

13] Mr. Ramamurthy submits that insofar as Central Railways are concerned, restructuring and merger was effected at a later date, but was given retrospective effect from 25th June 1985. He therefore, submits that the CAT though justified in directing the respondents to take a decision on the issue of merger, was not at all justified in directing the respondents to effect merger with prospective effect and not retrospective effect. Besides, he submits that the CAT has incorrectly proceeded on the basis that "*Tool Checkers*" was an ex-cadre post, which it was not. For all these reasons, Mr.Ramesh Ramamurthy submits that the impugned judgment and order dated 22nd October 2003 in O.A. No. 528 of 2001, to the extent, it directs prospectivity and closes option of retrospectivity warrants interference.

14] The CAT, in the impugned judgment and order dated 22nd October 2003 in O.A.No. 528 of 2001 instituted by the Tool Checkers, has given reasons as to why the scheme of merger, if at all adopted, ought to be prospective. Such reasons, are set out in paragraphs 11 and 12 of the CAT's order dated 22nd October 2003 and the same read as under:

> *"11. However, we have also considered the submission that an out right merger at this stage without involving and impleading the affected parties like the junior grade clerks, it may lead to endless litigation and counter litigation. Hence no action at this stage will be desirable which will generate counter litigation from the affected parties. It is a fact that the applicants have not impleaded all the parties who are likely to be affected by any merger at this stage. It is also a fact that this merger has taken place in other Railways as early as in 1982-83. The applicants slept over the issue for such a long time to wake up belatedly only in 2000-2001. Considering all aspects of the submissions by both the sides, we dispose of this application with the following directions.*
>
> *12. The Respondents are already seiged of the problem and we hope that they will be taking a decision on the matter within a reasonable period the outer limit being six months. But, they would be at liberty also to take such decision which does not generate further casual or germine frustration among others and the lead to endless litigation in the matter from the affected parties who have not been impleaded. We also direct that the decision to merger even if it is considered, should be only prospective as far as practicable and the Recruitment Rules should be suitably amended so that the status of the Tool Checkers grades is determined once for all whether by way of keeping them as ex-cadre or by merging them with the Ministerial Staff. As such action has already been taken in other Railways, no further morale need be spelt at this stage. The OA is disposed of with these observations. No orders as to costs."*

15] The CAT has basically indicated two reasons. The first reason is that the Tool Checkers instituted the O.A. only in the year 2001 and there is no explanation for not instituting the O.A., soon after issuance of Railway Board's letter dated 25th June 1985 or the actual restructuring in other sections ordered with effect from 16th July 1985 or 1987. The second reason is that the Tool Checkers in their O.A. No. 528 of 2001, had not impleaded, even in representative capacity, any members from the ministerial cadre or from the cadre of Junior clerks, who would naturally be affected, at least to some extent, if the merger were to be ordered with retrospective effect.

16] In our opinion, both these reasons are quite valid and warrant no interference. In the first place, there is hardly any explanation as to why the Tool Checkers, did not approach the CAT earlier with their grievances. Secondly, there is also no explanation as to why the members of the ministerial cadre/Junior Clerks were not impleaded in representative capacity to O.A. No. 528 of 2001. In such circumstances, there is nothing illegal or unreasonable about the direction issued by the CAT to consider the merger with prospective effect.

17] Apart from the two reasons given by the CAT, we are required to note that restructuring or merger is basically, a policy decision. Therefore, the issues as to whether such restructuring or merger, ought to be from a particular date, prospective or retrospective, are again, matters of policy. No doubt, merely because these are matters of policy, there can be no arbitrariness or unreasonableness. However, in the absence of any *mala fides*, unreasonableness or arbitrariness, the scope of judicial review in such matters, is extremely limited.

18] Any direction to merge cadres with retrospective effect from 25th June 1985 might have given rise to claims from employees, who were in service in the year 1985, but no longer in service when the actual merger decision was taken some time after 22nd October 2003. This might have resulted in very serious upheaval in the merged cadre or for that matter the cadres prior to their merger. Since, no members of any particular cadre can insist, as a matter of right, to have any restructuring or merger, it follows that there can be no bar to the Union of India (Western Railway) considering the issue of restructuring or merger in a phased manner, if the exigencies so demand. Again, as noted earlier, the scope of judicial review in such matters, which are basically matters of policy, is quite limited.

19] In ***S.P. Shivprasad Pipal vs. Union of India and ors. - (1998) 4 SCC 598,*** the Hon'ble Supreme Court has held that under Articles 309 of the Constitution of India, there is wide power to regulate recruitment and conditions of service and the same would include the power to constitute a new cadre by merging certain existing cadres. The decision to merge cadre is essentially a matter of policy and therefore, the scope of judicial review in such matters is extremely limited.

20] In ***Director, Lift Irrigation Corporation Ltd. and ors. Vs. Pravat Kiran Mohanty and ors. - (1991) 2 SCC 295,*** the Hon'ble Supreme Court has held that the decision to amalgamate existing cadres by reorganizing into two cadres was a policy decision taken on administrative exigencies. Such policy decision is not open to the judicial review unless it is *mala fide,* arbitrary or bereft of any discernible principles.

21] Taking into consideration the restrictive parameters of judicial review in such matters and also the reasons stated by the CAT and the Union of India (Western Railway) , we see no reason to interfere with the impugned judgment and order dated 22nd October 2003 in O.A. No. 528 of 2001. The first issue for determination stands answered accordingly. Therefore, Writ Petition No.1708 of 2004 fails and is liable to be dismissed.

22] The second issue concerns the promotion order dated 3rd February 2005, on basis of which, certain Junior Clerks were ordered to be promoted to the post of Senior Clerks on regular basis by ignoring the seniority list dated 25th January 2005.

23] In order to determine this issue, reference is necessary to the order dated 26th May 2004, by which, actual merger was effected between cadres of Tool Checkers and cadre of Junior Clerks/ministerial cadre. The order dated 26th May 2004 reads as follows:

"WESTERN RAILWAY

Head quarters office Church gate Mumbai --- 20.

No.EM834/8/5/5 Vol. II PL W/Shop Dt.26.05.2004

Sub: O.A. No. 528/2001 Shri P.B. Pancikar & others V/S. Western Railway & others - Regarding Merger of Tool checker with Ministerial staff.
Ref: CWM – PL's letter No. E 839/Merger Seniority/CW/TC Vol. I MC dt. 29.04.2004.

The following action may be taken to implement the CAT/Mumbai's decision on above CAT case keeping in view Railway Board's guidelines issued vide PCIII/2002/CTC-I/4 dt. 25.03.2004.

(i) The cadre of Tool checkers of parel and Mahalaxmi may be merged with Ministerial cadre with prospective effect. The relevant recruitment rules and regulations should be modified accordingly. As the existing ministerial staff are likely to be affected by the merger of the cadre of Tool checkers with ministerial cadre, this may be done taking into confidence both the recognized unions.

(ii) Unconditional option is to be obtained from the Tool checkers as to whether they intend to get merged with the ministerial cadre with prospective effect or to continue in ex-cadre posts to repatriate to their parent artisan cadre. No conditional option will be entertained. In case any employee gives a conditional option, it shall be deemed to be invalid and he shall be merged with the ministerial staff.

(iii) The employees who submit option for merger with ministerial cadre, their posts may be merged with the ministerial cadre.

(iv) The employees who want to continue to work in ex-cadre post/parent cadre, may be allowed to continue in the ex-cadre post/repatriated to their parent cadre as the case may be. The posts to the extent of employees intend to continue in the ex-cadre post of Tool checkers

should be continued to operate as ex-cadre post and on its vacation by the incumbent of the post; the same can be merged with the ministerial cadre. The post vacated by the employees who will be repatriated to their parent cadre as per option will be merged with the ministerial cadre. Further promotion will be as per existing AVC available to ministerial staff.

(v) Job being performed by Tool checkers will now be performed by ministerial staff or staff opting to work against ex-cadre posts.

(vi) *The tool checkers who have submitted option for merger with ministerial cadre are not entitled for the incentive as admissible to Tool checkers on merger of their cadre with the ministerial cadre. This has to be made clear while calling up option.*

(vii) On merger of the cadre of Tool checkers with the cadre of Junior clerk, Rs.3050-4590, the seniority of the Tool checkers viz-a-viz Junior Clerks may be decided on the basis of entry into the grade of Tool checkers/Junior Clerks on regular basis.

2. Application may be filed in CAT/Mumbai for extension of time limit if necessary.

3. It should be ensured that, the case is settled early as this is a court Judgement which has yet to be implemented and further delay may cause embarrassment.

This issues with the approval of Competent Authority i.e. CWE.

Sd/-
(K.K. Appu)
For General Manager (E)

Copy to.: DY.CPO ® with reference to his note No.EP830/0 Vol.IV (L) dt.5.4.2004."

(emphasis supplied)

24] On the basis of order dated 26th May 2004, options were invited, merger was effected and even a seniority list dated 25th January 2005, on provisional basis, was prepared consistent with clause vii of the order dated 26th May 2004. As noted earlier, clause vii of the order dated 26th May 2004 provides that on merger of cadre of Tool Checker with the cadre of Junior Clerk, in pay scale of Rs.3050-4590, the seniority of Tool Checkers *viz-a-viz* Junior Clerks may be decided "*on the basis of entry into the grade of Tool Checkers/Junior Clerks on regular basis.".*

25] By communication dated 25th January 2005, this provisional seniority list was circulated to the concerned staff members and the concerned staff members, who had any doubt about seniority so circulated, were permitted to represent within one month from the date of issue of the letter/communication dated 25th January 2005.

26] The provisional seniority list comprises in all 93 staff members in the merged cadre of Tool Checkers and Junior Clerks. The seniority is prepared on the basis of entry into the grade of Tool Checkers/Junior Clerks on regular basis. By way of illustration, reference can be usefully made to the seniority positions of Tool Checkers and Junior Clerks upto serial No.15 in the seniority list dated 25th January 2005.

MERGER OF SENIORTY OF TOOL CHECKER WITH MINISTERIAL STAFF ON

SR No	Name of Employees	SC/ ST	Design	T.No.	Date of entry in Jr. Clerk/Tool Checker	Remark
1	Shri. Hemant R.	–	Tool checker	6481	07.06.1984	
2	“ R.H. Shinde	–	**Junior clerk**		08.06.1987	Adhoc Sr. Clerk
3	“ Prassanna B.	–	Tool checker	8255	20.06.1987	--
4	“Sailesh Kumar B.	--	Tool checker	6770	26.09.1987	--
5	“ Ramesh Tanaji	--	Tool checker	6805	26.09.1987	--
6	“ Guatam C.	SC	Tool checker	8425	31.08.1988	--
7	“ Mahesh M.	--	Tool checker	6807	31.08.1988	--
8	“ Rajendra	--	Tool checker	6893	05.11.1988	--
9	“ Janardhan S.	--	Tool checker	6783	05.11.1988	--
10	“ Ramdhani C.	--	Tool checker	6051	07.08.1990	--
11	“ Lalchandra B.	--	Tool checker	6310	11.04.1991	--
12	“ K.K. Panikar	--	Junior clerk		11.04.1991	Adhoc Sr.Clerk
13	Smt. Snehal B. Mohite	--	Junior clerk		11.04.1991	Adhoc Sr.Clerk
14	Shri Pramod A.	--	Tool checker	798	09.11.1991	--
15	“ Dadoo B. Hatale	SC	**Junior clerk**		01.01.1992	Adhoc Sr.Clerk

27] By promotion order dated 3rd February 2005, however, only Junior Clerks were promoted to the position of Senior Clerks completely ignoring seniority list dated 25th January 2005. There is no material produced on record to indicate whether any objections were filed by any of the Junior

Clerks to the provisional seniority list dated 25th January 2005, further and whether, such objections were adjudicated upon, accepted and final seniority list issued, which was in variance with the provisional seniority list dated 25th January 2005. This means that as on the date of issuance of promotion order dated 3rd February 2005, the seniority list existing on record was the seniority list dated 25th January 2005. The respondents, i.e., Union of India (Western Railway) was not justified in proposing to effect promotions to the cadre of Senior Clerks by ignoring the seniority list dated 25th January 2005.

28] Mr. Suresh Kumar and Mr. Masand, learned counsel for Union of India and Junior Clerks, who have instituted Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009, however, submit that there was a flaw in clause vii of the order dated 26th May 2004, particularly, if such clause, were to be interpreted literally. They submit that the CAT in its order dated 22nd October 2003 in O.A. No. 528 of 2001 had recommended merger only with prospective effect. They submit that even the decision of the Railway Board as well as the other authorities, in pursuance of the directions in O.A. No. 528 of 2001 was to effect merger with prospective effect. They submit that clause vii of the order dated 26th May 2004, if literally interpreted would virtually amount to grant of retrospective effect to the decision of merger, which was neither the intention of the Railways nor would such retrospective merger be consistent with the directions of the CAT in O.A. No. 528 of 2001.

29] Mr. Suresh Kumar and Mr. Masand submit that if seniority is to be determined on the basis of entry of the employees into the grade of Tool Checkers on regular basis, then, this is nothing but ordering merger of the cadre of the Tool Checkers with the cadre of Junior Clerks with retrospective effect. They submit that since merger was intended and ordered to be only prospective, there was no question of treating any of the Tool Checkers as senior to junior Clerks, since, the Tool Checkers were born in the cadre of Junior Clerks only post merger in the year 2004 and not earlier. They submit that the seniority of Tool Checkers in the cadre of Junior Clerks, post merger, must count only from the date of merger in the year 2004 and not from the date of appointments of the Tool Checkers on regular basis.

30] Mr. Suresh Kumar and Mr. Masand submit that vacancies to the post of Senior Clerks had in fact arisen prior to the merger. They submit that at the time when the vacancies arose, the Tool Checkers were not even born into the cadre. Therefore, there was no question of considering any Tool Checkers for promotion to the post of Senior Clerks at least in respect of vacancies which arose prior to the merger.

31] Insofar as the first contention of Mr. Suresh Kumar and Mr. Masand is concerned, we agree with the CAT that there is no retrospectivity involved in clause vii of the order dated 26th May 2004 , by which, merger of the two cadres came to be effected. The merger, in this case, is prospective and continues to remain prospective. If the merger were to be retrospective, then, perhaps, all Tool Checkers who were in service from 1985, could have claimed the benefit of such merger. All that clause vii of the order dated 26th May 2004 provides is that the seniority in the merged cadre of Tool Checkers and Junior Clerks will be determined on the basis of entry into the grade of Tool Checkers/Junior Clerks on regular basis. There is no question of any retrospectivity as such involved in the decision of the merger. Clause vii merely provides the manner in which the seniority in the merged cadre is to be determined.

32] In the present case, though, we are not concerned with interpretation of a statute but only the interpretation of an executive instructions, it will not be out of place to refer to the settled position in law that the rule against retrospective construction is not applicable to a statute merely because a part of the requisites for its action is drawn from a time antecedent to its passing (***See: R. L. Marwaha vs. Union of India & Ors. (1987) 4 SCC 31; Dilip vs. Mohd. Azizul Haq & Anr. (2000) 3 SCC 607***). If that were not so, every statute will be presumed to apply only to persons born and things come into existence after its operation and the rule may well result in virtual nullification of most of the statutes. Besides, this is not a case where any vested rights of the junior clerks stand to be affected by determination of seniority in terms of clause (vii). The junior clerks, if at all, had a right to be considered for promotion to the post of senior clerks. This right or condition of service has not been taken away. Mere chances of promotions are never regarded as conditions of service. Therefore, on the ground that such chances might be affected, it cannot be said that there is any taking away of vested rights of junior clerks.

33] The concept of retrospectivity involves more senses than one and the real issue in each case is as to the scope of the particular instrument which falls for interpretation having regard to its own and the object discernible from the instrument, read as a whole. In ***State of Bombay vs. Vishnu Ramchandra AIR 1961 SC 307***, the question was whether a person convicted in 1949 for theft could be directed to remove himself outside a specified area under section 57 of the Bombay Police Act, 1951, which authorised removal of a person who has been convicted of certain offences including theft. The contention raised was that the conviction being prior to the Act of 1951, no removal could be founded on such a conviction. Rejecting such contention, the Hon'ble Supreme Court held that section 57 of the Bombay Police Act, 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from activities of undesirable persons who have been convicted of an offence of a particular kind. The second only enables the authorities to take note of their convictions and put them outside the area of their activities, so that the public may be protected against a repetition of such activities. The offender who has been punished, may be restrained in the acts and conduct by some legislation, which takes note of his antecedents; *but so long as the action taken against him is after the act comes into force, the statute cannot be said to be applied retrospectively*.

34] Just as the fact that a prospective disqualification under a statute results from anterior misconduct, is not always taken as sufficient to make the statute retrospective, so also the fact that a prospective benefit under a statutory provision is in certain cases be measured by or depends on antecedent facts does not necessarily make the provision retrospective. In ***Ramji Purshottam***

vs. Laxmanbhai Kurlawala (2004) 6 SCC 455 a provision in a Rent Control and Eviction Act, which was added by an amendment and which enabled a tenant to adjust water taxes and water charges paid by him towards rent due from him, was held to apply to pending suits which related to eviction on the ground of arrears of rent and the tenant was held entitled to adjust water tax and charges paid by him although the arrears of rent due and water taxes and charges paid related to period before coming into force of the amendment.

35] If the contention of Mr. Suresh Kumar and Mr. Masand is to be accepted, then, will perhaps, the entire service rendered by the Tool Checkers prior to merger will stand wiped out for all purposes. In fact, Mr. Masand, in the course of his submission asserted that this would be the position and therefore, the Tool Checkers, will not even be entitled to be considered for promotion to the post of Senior Clerks until then complete service of five years, which is prescribed as the qualifying service in the recruitment rules. This contention, which will result in inequity, cannot be accepted.

36] Besides, such contention, proceeds on the basis that the cadre of Junior Clerks prior to merger/integration continues and since, Tool Checkers, have been born in such cadre post the merger, their seniority will count only from the date of merger. This is not the correct position. Post the merger, we are really concerned with the merged cadre of Tool Checkers and Junior Clerks. This is quite clear from the order dated 26th May 2004. Clause vii only provides for the manner in which the seniority in this merged cadre has to be determined. When the matter is considered from this perspective, it is not possible for us to accept the contentions of Mr. Suresh Kumar and Mr. Masand.

37] Again, we are also unable to accept contention of Mr.Suresh Kumar and Mr. Masand that such interpretation of clause vii leads to any arbitrariness or unreasonableness. According to us, once merger takes effect, though prospectively, seniority in the merged cadre can always be determined by reference to the initial entry in the respective cadres prior to the merger. This is not a case where there exists any appreciable difference in the pay scales or nature of duties. There are several instances where seniority in the merged cadre is determined on the basis of entry in the respective cadres prior to the merger. This is in fact, quite an equitable manner of determining seniority, so that, members of either cadre do not forfeit their several years of service in their respective cadres.

38] In *Director,Lift Irrigation Corporation Ltd. (supra),* on account of the amalgamation and adjusting the composite Electrical-Mechanical cadre in either of the Electrical or Mechanical cadre as per the options given, the order of seniority of the employees working in Electrical or Mechanical cadres was likely to be reviewed. When the persons in the composite Electrical - Mechancial cadre opted to the Electrical cadre, they were entitled to be considered for their fitment to the cadre "*as per the seniority from the date of their initial appointment vis-a-vis their scale of pay".* This was the procedure adopted by the corporation in fixing the *inter se* seniority.

39] The Hon'ble Supreme Court, in the aforesaid context, held that the procedure adopted was just, fair and reasonable and beneficial to all the employees without affecting their scales of pay or losing the seniority from the date of initial appointment. The Hon'ble Supreme Court, further observed that undoubtedly, in this process the respondent/writ petitioners lost some place in seniority which is consequential to amalgamation. However, that does not mean that such persons have been deprived of their right to be considered for promotion, only, chances of promotion may have receded.

40] The Hon'ble Supreme Court held that there is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with the relevant rules. From this perspective, the Hon'ble Supreme Court held that the conclusion of the High Court that gradation list prepared by the corporation is in violation of the right of the respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same, is obviously unjustified.

41] In *S.P. Shivprasad Pipal (supra),* the Hon'ble Supreme Court was again concerned with the issue of merger/integration of the cadre. In terms of Rule 9 of he Central Labour Service Rules, 1987 under which the merger was effected, it was provided that *inter se* seniority of the officers appointed to the various grades mentioned in Schedule I at the initial constitutional stage of the service shall be determined according to the length of regular continuous service in the grade subject to maintenance in the respective grade of *inter se* seniority of officers recruited *“in their respective original cadres”*.

42] The Hon'ble Supreme Court, in the aforesaid context, repelled the challenge that such rule of determining seniority in the merged/integrated cadre was unreasonable or violative of Article 14 and 16 of the Constitution of India by holding that the seniority of rules have been carefully framed taking all relevant factors into consideration. The Hon'ble Supreme Court at paragraph 19 also noted that it is possible by reason of such a merger, the chances of promotion of some of the employees maybe adversely affected, or some others may benefit in consequence. But this cannot be a ground for setting aside the merger which is essentially a policy decision. The Hon'ble Supreme Court, relying upon ***Union of India vs. S.L. Dutta – (1991) 1 SCC 505*** **and State of Maharashtra vs. Chandrakant Anant Kulkarni – (1981) 4 SCC 130** held that mere chances of promotion are not conditions of services and a policy of merger and consequent rules for determination of seniority cannot be ordinarily challenged unless, any *mala fides* or patent/arbitrariness was involved.

43] There is also no clear material on record in support of the contention that vacancies to the post of Senior Clerks had arisen prior to the merger and therefore, there was no reason to consider the candidatures of the Tool Checkers. Mr. Suresh Kumar, learned counsel for the Union of India (Western Railway) repeatedly submitted that such vacancies had arisen on 1st November 2003. However, no clear material was produced in support of this assertion. Even if, we are to proceed on this basis, then, this contention has to be tested in the light of submission made by Mr.Masand, learned counsel who appears for the Junior Clerks that merger is deemed to have taken effect from 22nd October 2003 in terms of the letter of Chief Personnel Officer (IR) dated 29th December 2010.

44] Mr. Masand laid great emphasis upon the letter of Chief Personnel Officer (IR) dated 29th December 2010, in which, the Chief Personnel Officer has opined that the date of merger will be 22nd October 2003, i.e., the date of judgment and order made by the CAT in O.A. No. 528 of 2001. If this is the position taken by the Chief Personnel Officer (IR) of the Western Railway, then obviously the vacancies to the post of Senior Clerks have arisen post the merger. The contention of Mr. Suresh Kumar will therefore, have to be rejected.

45] There is no clarity as to when the vacancies have really arisen. There is no material on record to support the contention of Mr. Suresh Kumar that the vacancies have arisen prior to the merger and therefore, the Tool Checkers, need not be considered for promotion to such vacancies in the posts of Senior Clerks. In the absence of clear material, we see no reason to fault the view taken by the CAT. Even otherwise, we are of the opinion that it would grossly unjust to exclude the Tool Checkers altogether from consideration for promotion to the post of Senior Clerks. The effect of such exclusion would also amount to wiping out of the service of the Tool Checkers prior to merger for purposes of promotion. The CAT has considered the matter in the proper prospective and there is neither any jurisdictional error nor perversity in the impugned judgment and order dated 22nd February 2008 in O.A. No. 466 of 2005, so as to warrant interference.

46] Mr. Masand contended that the Union of India suppressed the letter dated 29th December 2010 issued by their own Chief Personnel Officer (IR), in which, the Chief Personnel Officer (IR) has suggested his interpretation as regards the term "*prospective*". Mr. Masand submits that were this letter produced before the CAT, the verdict in O.A. No. 466 of 2005 would be different. This submission was made by Mr. Masand despite the fact that Union of India and the Junior Clerks are on the same side and in unison attack the judgment and order dated 22nd February 2008 in O.A. No. 466 of 2005.

47] The contention as projected, is quite misconceived. In the first place, the letter dated 29th December 2010 was not even in existence when the CAT disposed of O.A. No.

466 of 2005, by judgment and order dated 22nd February 20089. Besides, the letter dated 29th December 2010, at the highest, is an opinion of the Chief Personnel Officer (IR). It is significant that this opinion comes at the stage when the Union of India and Junior Clerks instituted Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009 to question the judgment and order dated 22nd February 2008 in O.A. No. 466 of 2005 and failed to secure any interim relief therein. Further, opinions of officers cannot bind tribunals or courts in matters of interpretation.

48] Accordingly, upon due consideration of the matter in its totality, in our opinion, the CAT was quite justified in holding that the Union of India (Western Railway) was not at all justified in issuing promotion order dated 3rd February 2005 by ignoring the seniority list dated 25th January 2005 and by totally excluding the Tool Checkers from even being considered for promotion to the post of Senior Clerks. The second issue stands answered, accordingly. There is no good ground to interfere with the judgment and order dated 22nd February 2008 in O.A. No. 466 of 2005. Consequently, Writ Petition No. 6473 of 2008 and Writ

Petition No. 285 of 2009 fail and are liable to be dismissed.

49] Insofar as the third issue, i.e., whether Union of India (Western Railway) was right and justified in issuing seniority list/order dated 22nd January 2011 is concerned, this issue, was squarely raised by the Tool Checkers in O.A. No. 105 of 2011 before the CAT. However, on account of pendency of Writ Petition No. 1708 of 2004, Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009, the CAT declined to this issue and held that O.A. No. 105 of 2011 "*was not maintainable*".

50] The reasoning of the CAT, is to be found in paragraph 16 of the impugned judgment and order dated 29th November 2013, which is subject matter of the challenge in Writ Petition No. 590 of 2014 instituted by the Tool Checkers, reads as follows:

> *"16. We now have a scenario before us in which the Hon'ble Bombay High Court is seized of the matter concerning both the methods of fixation of inter se seniority as propounded by this Tribunal through its orders dated 22.10.2003, and 22.02.2008, and the Hon'ble High Court is fully seized of the matter of inter se seniority among the two groups, and the pleadings of all the three parties and the Writ Petitions independently filed by all the three parties before it.* ***Such being the case, it is apparent***

> ***that this Tribunal cannot tread on the toes of the Hon'ble High Court, and this O.A. is not maintainable in its present form, and is therefore dismissed."***
>
> *(emphasis supplied)*

51] Although, the CAT, has held that O.A. No. 105 of 2011 "*is not maintainable in its present form",* from the context, it is clear that the CAT, means that it would not like to entertain O.A. No. 105 of 2011 until the connected writ petitions pending before the High Court are disposed of. Otherwise, taking into consideration the provisions of Administrative Tribunals Act, 1985, there was no reason to hold that O.A. No. 105 of 2011 was not maintainable.

52] There is a distinction between maintainability of an original application and refusal to entertain the same for permissible reasons, even though, such O.A., may be maintainable. We are clear that in the present case, the CAT, deemed it appropriate not to entertain O.A. No. 105 of 2011, because connected issues were pending before the High Court in Writ Petition No. 1708 of 2004, Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009. The observations in the impugned judgment and order dated

29th November 2013 to the effect that O.A. No. 105 of 2011 "*was not maintainable*", if construed literally are obviously, not sustainable.

53] Mr. Ramamurthy, learned counsel for the Tool Checkers, submits that this is a case of failure to exercise jurisdiction by the CAT. He submits that since there was no interim relief granted by the High Court in any of the pending writ petitions, the CAT, ought to have gone into the issue of legality and validity of the seniority list/order dated 22nd January 2011 , which was challenged by the Tool Checkers in O.A. No. 105 of 2011. In the alternate, Mr.Ramamurthy submits that this court ought to go into such issue, as otherwise, the Tool Checkers cannot left without any remedy either before the CAT or this court.

54] Mr. Suresh Kumar and Mr. Masand submit that Writ Petition No. 1708 of 2004 instituted by the Tool Checker is required to be dismissed and Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009 are required to be allowed. They submit that once this is done there will remain no merit whatsoever in the Tool Checker's challenge to seniority list/order dated 22nd January 2011. They submit that even independent of outcome of Writ Petition No. 1708 of 2004, Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009, there is no merit in the Tool Checker's challenge to seniority list/order dated 22nd January 2011.

55] As noted earlier, the only ground on which the CAT has dismissed O.A. No. 105 of 2011 is the pendency of Writ Petition No. 1708 of 2004, Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009. Now that we propose to dismiss these three petitions, this sole ground discernible in the impugned judgment and order dated 29th November 2013 in O.A. No. 105 of 2011 does not survive. As noted earlier, the CAT has not at all examined the merits of the rival contentions in O.A. No. 105 of 2011.

56] In ***L.Chandra Kumar vs. Union of India and ors. - (1997) 3 SCC 261,*** the Hon'ble Supreme Court has cautioned against the High Courts directly entertaining the writ petitions in service matters, bypassing administrative tribunals constituted under the Administrative Tribunals Act, 1985. At paragraph 93, the Hon'ble Supreme Court has listed the circumstances and the cases in which High Courts concerned may be approached directly. In the same paragraph, however, it has been added that the tribunal's will, however, continue to act as the only courts of the first instance in respect of areas of law for which they have been constituted. By this, the Hon'ble Supreme Court has explained that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of the statutory legislations (except, as mentioned, where the legislation which creates the particular tribunal is challenged) by overlooking the jurisdiction of the tribunal concerned.

57] For the aforesaid reasons, we do not deem it appropriate to decide the third issue referred to in paragraph 11 of this judgment and order, ourselves, in the first instance. Rather, we are of the opinion that it would be appropriate if the impugned judgment and order dated 29th November 2013 in O.A. No. 105 of 2011 is set aside and the matter is remanded to the CAT for fresh adjudication of O.A. No. 105 of 2011 on its own merits and in accordance with law. Until, O.A. No. 105 of 2011 is disposed of by the

CAT, the interim order made by the CAT on 22nd February 2011, which, we are told, was continued by this court and is in operation till date, can as well continue.

58] Accordingly, we dispose of all these petitions with the following order:

(a) Writ Petition No. 1708 of 2004 is hereby dismissed and the Rule issued therein is hereby discharged;

(b) Writ Petition No. 6473 of 2008 and Writ Petition No. 285 of 2009 are also hereby dismissed and the Rule issued therein is hereby discharged;

(c) Writ Petition No. 590 of 2014 is partly allowed. Rule is made absolute in terms of prayer clause (a). The impugned judgment and order dated 29th November 2013 is quashed and set aside. However, O.A. No. 105 of 2011 is remanded and restored to the file of CAT for fresh adjudication in accordance with law and on its own merits.

(d) The interim order passed by the CAT in O.A. No. 105 of 2011 is directed to continue and operate during pendency of O.A. No. 105 of 2011;

(e) The CAT is requested to dispose of O.A. No. 105 of 2011 as expeditiously as possible and in any case within a period of one year from the date of production of authenticated copy of this order;

(f) The parties to O.A. No. 105 of 2011 to appear before the CAT on 4th June 2018 at 10.30 a.m. and produce an authenticated copy of this order;

(g) All concerned to act on the basis of authenticated copy of this order.

(M.S. SONAK, J.) **(ACTING CHIEF JUSTICE)**